The Organisation of Working Time Act 1997 – An Overview of the Act and Case Law

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The Organisation of Working Time Act

When you read the blurb in various Government publications it would appear to be a relatively simple piece of legislation. Nothing could be further from the truth. In dealing with the legislation those of you who regularly represent in employment cases will know that you are not only dealing with the Act. You also have a number of Statutory Instruments. On top of that you have decisions of the Labour Court and to a lesser extent the High Court. Added onto this are EU Directives and Regulations and decisions of the European Court of Justice.

We have an Act which has to be read in line with EU Directives and Regulations. This often involves an Adjudicator or the Labour Court having to perform at best a form of legal gymnastics to be able to read the legislation to be in line with the Directive. At other times Adjudicators and the Labour Court will have a situation where the European Court of Justice has held that a particular provision of the Directive is sufficiently precise to have direct effect. In other cases, an Adjudicator or Labour Court will be left in a situation that because of the differences between the Act and a Directive and a subsequent ECJ decision the potential for a Frankevic case against the State can often be a real possibility.

The Working Time Legislation is far from simple in its application.

I hope that you will find my notes and comments on the legislation useful and relevant.

Excessive Working

Normally, this is seen as cases which are taken by employees against employers. However, employers are starting to see the potential exposure which employers have if they fail to address excessive working.

A link between workplace stress and serious illness is becoming increasingly evident. Saying this, the potentially dangerous nature of overwork is not being fully recognised.

Some employers will have very conscientious and ambitious employees. Sometimes these employees may work themselves way over any reasonable number of hours.

10 to 11 hours a day is not unusual for some professional firms. A case recently was reported in Japan where an employee died of heart failure. His death was attributed to "karoshi" which effectively means "death by overwork". Of course, this is going to be rare but the stress, anxiety disorders, depression, chronic fatigue and heart conditions, it would appear, are becoming more prevalent. Excessive working could have a negative impact on a person's physical and mental health. Very little has been done in Ireland in relation to ascertaining the effect of this. However, in the UK a UK Government review of mental health and employers called "Thriving at Work" found that 15% of people at work have symptoms of an existing mental health condition. Therefore, employees can suffer illnesses through work. In some cases, they may never fully recover. The UK report indicates that some 300,000 people with long term mental health conditions leave employment each year. Let us put this in context. This is the entire population of Belfast.

So why should employers be concerned?

There are a number of reasons. The first is that an employee is at risk of losing talent within the workforce. In professional firms this may be talent which has been nurtured over years. There may be a significant cost in replacing that individual. On top of that there is also the issue of disability claims and personal injury claims.

Of course, employers will have very useful policies such as occupational health advice, confidential help lines, stress management courses etc. These can be helpful. However, employers will be met with individuals who are ambitious and insist on working themselves consistently and are simply told that they are too busy or not available to take holidays and breaks on a particular time.

Prevention is always better than a cure. An employer is entitled to direct an employee to take holidays. In fact, we will be of the view that there is a real question mark over any employee who will not take holidays. What are they afraid of? Are there issues there within the organisation that they are trying to hide? Saying this, an employer is entitled to insist that the employee takes holidays and rest periods as prescribed by the Organisation of Working Time Act. This is Health and Safety Legislation. It is mandatory for all employees other than those who are managers. Managers are individuals who are entitled to set their own hours but that also means that they are entitled to effectively decide when they go on holidays. There are very few associates in law firms, accountancy firms or in many organisations who can decide "I do not want to come in today". Unless the employee is in that position they are not a manager.

The real danger with over work is potentially mental health issues. Employers need to seriously look at having support for these employees, to develop mental health awareness, to encourage open conversations about mental health and support available when employees are struggling, provide the employee with good working conditions so that there is a good work - life balance and promote effective people management who ensure all employees have regular conversations about their health and wellbeing with line managers. Of course, line managers, supervisors and leaders in organisations must be trained in effective management practices in this area.

Employers can take some practical steps. These include monitoring working hours, which there is a legal obligation to do to ensure that they do not reach dangerous levels and to take appropriate action to stop employees working excessive hours. It is important to train staff to spot warning signs of stress and mental illness such as becoming withdrawn, skipping meals and breaks or spending excessive time in the office. The report in the UK has indicated that less than a quarter of managers have received training in mental health. It is probably no better here.

It is important to review staff absences to identify stress related absences. Senior management must support Human Resource Departments so that they can step in where employees are prepared to work themselves to the bone or are being taken advantage of by line managers.

A claim under the Organisation of Working Time Act by an employee who is being worked to the bone, particularly if they are senior managers, can be extremely embarrassing for employers if the case goes public and can result in a litany of actions including enforcement affecting all the workers. That is a cost. A personal injury claim by such a worker can be an extremely expensive claim against the employer.

How a company or organisation is viewed by employees inside and outside where there is a culture of excessive hours is one that employers need to consider. The issue is whether the new employees coming through now are going to be prepared to work the excessive hours which many up to now have been prepared to do who are that little bit older.

The issue of work - life balances is now becoming a real issue. Attracting and retaining the best people may be down to having good work - life balances. If an employee cannot get work done within a reasonable number of hours in a week then there are some questions that have to be asked. If that employee is effective? Are they being given too much work? And if it is as in some organisations hitting particular targets, is the employee being sent to chase unproductive targets or unrealistic targets?

We would expect to see considerably more claims by senior individuals within organisations over the coming years relating to excessive hours of work and these will not just be employment law claims under the Organisation of Working Time Act, but serious personal injury claims for work related stress caused by cultures within organisations. Employers have a role to play in having a safe workplace and one of those is that excessive hours of work are not undertaken by employees. It is the employers' obligation to ensure that the maximum hours of work, which an employee can work, are not breached.

Von Colson and Kamann

The case of C-14/83 Von Colson and Kamann -v- Land Nordrhein - Westfahlen is the often-quoted case relating to the issue of the level of compensation which should be awarded.

In that case the CJEU stated:

"*Although Directive 76/2007/EEC, for the purposes of imposing a sanction for the breach of the prohibition on discrimination, leaves the Member State free to chose between the different solutions suitable for achieving its objective, it nevertheless requires that if a Member State chose to penalises breaches of that prohibition by the award of compensation, then in order to ensure that it is effective and it has a deterrent effect, that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation…"*

In case DWT15125 C&F Tooling Limited and Cunniffe the Labour Court stated that like every case the decision in Von Colson is authority only for what it decided. The Labour Court stated that they do not have the power to apply a sanction in the nature of punishment for a contravention of the law. They stated, quite correctly, that any compensation redress awarded by the Labour Court must remain within the bounds of what is capable of being redressed by compensation. The Court stated:

"That includes any present or future loss suffered by the Claimant as well as any loss, damage, inconvenience, or, expense which flows from the wrong which he or she suffered."

The Court in that case correctly set out that this case only applied to those Sections of legislation which applied provisions of the Directive.

In the case of HSE South and Kerry General Hospital and Lukco DWT1560, this is a case where the Rights Commissioner as it was then awarded €3,000 which the Labour Court increased to €20,000.

In that case, Eilas Barry BL pointed out that the CJEU had consistently pointed out that redress must be effective in attaining the objectives. He pointed out that hence the sanction must have a real deterrent effect since it could never be accepted for the advantage which accrues from any Act in breach to outweigh the cost of the redress which might be awarded. In the case of a large and financially strong enterprise, such as the Respondents in that case, Counsel submitted that only a significantly large award of compensation will act as a real and effective deterrent. The case of Adeneler and others -v- Ellinikos Case C-2012/04 is one where the CJEU stated:

"… It is, however to be remembered that the margin of appreciation thereby left for the Member State is not unlimited, because it cannot in any event go so far as to compromise the objective or the practical effect of the Framework Agreement … In particular this discretion must not be exercised by national authority in such a way as to lead to a situation liable to give rise to abuse and thus thwart that objective."

In addition, the case of Connaughton and Sons Landscaping Limited -v- Stolarczyk DWT12107 is a case where the Labour Court held that a significant award over and above the economic value of an entitlement was appropriate where there had been a deliberate and conscious breach of an employee's rights.

In case DWT1560 the Labour Court stated:

"In the well-known Von Colson case … the CJEU made it clear that where a right which has derived from the law of the communities is infringed the sanction for breaches must be effective, proportionate and dissuasive and must provide a real deterrent against future infractions."

However, the Court also pointed out that the redress must be proportionate and appropriate.

Application of EU law and its interaction with the Act

Following the case of Minister for Justice, Equality and Law Reform and another - Applicants, the Workplace Relations Commission - Respondents

and Ronald Boyle and others - Notice Party [2017] IESC 43 is a case which dealt with the issue as to whether the WRC (or by implication the Labour Court) as Tribunals of limited jurisdiction can disapply national law. In that judgment it was held that they did not at paragraph 8.10 where it is stated:

"The Tribunal does not have jurisdiction to embark in a process which required the disapplication of secondary legislation …"

This might mean a Frankevic claim against the State. Maybe "yes" and maybe "no". The recent CJEU case C-684/16, C-569/16 and C-570/16 published on 6th November 2018 have potentially in the area of Working Time cases introduced a possibility, if not probability, that cases can now be taken in the High Court to disapply national legislation not only against the State but also against employers directly who are not emanations of the State. In that case the CJEU stated:

"In the event that it is impossible to interpret national legislation such as that in issue in the main proceedings in a manner consistent with Article 7 of Directive 2003/88 and Article 31 (2) of the Charter of Fundamental Rights, it follows from the latter provisions that a National Court having a dispute between a worker and his former employer who is a private individual must disapply the national legislation and ensure that … the worker cannot be deprived of his acquired rights … which must be paid, in that case, directly by the employer concerned."

This is quite frankly for any Employment Law Solicitor, whether acting for employers or employees, mind-blowing. It means cases will have to go to the High Court. Applying to disapply national legislation is effectively a full team of Senior Counsel, Junior Counsel and Solicitor. The costs to the unsuccessful party will be staggering.

Unfortunately, our Act is defective in many respects and as the Charter in Article 31 (2) refers to working hours, rest, breaks and holidays, the whole gambit of Sections 11, 12, 13, 15 and 19 now come immediately into focus. The decision in case C-684/16 has also importantly held that the employee will be successful:

"… should the employer not be able to show that is has exercised all <u>due diligence</u> in enabling the worker actually to take the paid annual leave to which he was entitled under EU law …"

This decision clearly follows on from the case of C-484/04 Commission -v- United Kingdom where Advocate General Kokott in her opinion at paragraph 69 stated:

"It is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by community law are effectively observed, there is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. In addition, it must, however, be a matter of course within a business, in practice as well, that the worker's rights to rest periods not only exist on paper but can be effectively observed."

A further area which opens up the potential for claims having to be brought in the High Court is the case of Conley King and the Sash Window Workshop Limited Case C-214/16. Mr King worked for the company as a self-employed commission only contract. When he retired he sought payment of his annual leave from June 1999 until he retired on the 6th October 2012. The UK EAT held that he was a worker within the meaning of the Directive and he was entitled to holiday pay. As in Ireland the UK legislation limited the carry over of annual leave. This is a further case where there the CJEU referred to the Charter.

The CJEU held that Article 7 of Directive 2003/88/EEC the rights to an effective remedy in Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning in the case of a dispute between a worker and his employer as to whether the worker is entitled to paid annual leave they preclude the worker having to take his leave first before establishing whether he has a right to be paid in respect of that leave. Further, they held that the Directive must be interpreted as precluding national provisions or practices that prevent the worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave.

The effect of this case, in my opinion, is that employees have been inappropriately categorised as self-employed effectively having an unlimited right to bring claim. Our legislation does not provide for that. Therefore accordingly, a claim would have to be brought in the High Court.

Daily Rest Period – Section 11

The provisions of Section 11 are clear and precise. In each period of 24 hours an employee is entitled to a rest period of not less than 11 hours.

There are two main exceptions. The first is Section 4 (1) relating to shift workers. The second is employments covered by S.I. No. 21 and 52 of 1998 together with S.I. 817/2004.

The provisions of S.I. 817/2004 appear effectively revoked by S.I. 36/2012. S.I. 52/1998 applies to civil protection services. In practice S.I. 21 of 1998 may be the only one colleagues will usually deal with or encounter. They include services such as agriculture, tourism, security and residential institutions.

As was pointed out by the Labour Court in Flexsource Ltd and Saulius Karaliunas DWT1318.

"The requirement for daily rest is a health and safety imperative and is an important social right derived from the law of the European Union. Section 4 (1) of the Act provide a derogation from that right. It is well settled in the law of the European Union that a derogation must be interpreted strictly see Case C-222/84 Johnson –v- Chief Constable of the RUC [1986] IRLR 263 Par 36 C447/09 Prigge –v- Deutsche Lufthansa AG, Par 72".

Therefore, the Labour Court has confirmed if an employer is claiming an exemption the first matter an employer must show is that the derogation actually applies.

It is for the person seeking to rely on the exemption to show it applies. Michael O' Neill Mushrooms Limited –v- Giedra Tiatova DWT12103. In addition, as was held in that case;

"This requires a positive demonstration that an equivalent rest period to the statutory 11-hour consecutive break has been made available to and availed of by the worker concerned in addition to any other breaks to which they were entitled".

That case DWT12103 is also interesting in that the Labour Court held;

"They must also demonstrate that the equivalent break has been provided to the employee at the first available opportunity to do so".

An employer seeking to rely on an exemption has the burden of proof. A detailed overview can be seen in the case of Harbour House Limited and Jurska DWT0811 of 2008. Equally following HSE National Ambulance Services –and- David O' Connor DWT71484 23 September 2014;

"Objective reasons must be assessed in the context of each individual *circumstance which arises".*

In that case there were standing rules which the Court held could not be sufficient.

Shift Work

At times when there is a change of shift an employee may not receive the full 11 hours. In Marchford Ltd –v- Olejarz DWT1180 the Court held that the failure of the employee to receive the 11-hour rest period arose as a result of a change of shift.

The Court held;

"*Section 6 stipulates that where these exemptions are allowed compensatory rest must be provided*".

The Court pointed out that S.I. 44 of 1998 provided guidance. Regulation 3.2 states that;

"*Equivalent compensatory rest should be provided as soon as possible after the statutory rest has been missed*". Word underlined by the writer.

The word is "possible" not "practicable" which requires a proactive approach by an employer.

The validity of a complaint under section 11 will often depend on whether the exemption provided for in Section 4 (1) applies. The Act does not define "shift work". However, Article 2.6 of Directive 2003/88/EC does as follows;

"*Shift work means any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern including a rotating pattern and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks*".

By virtue of Section 2 (2) of the Act where a word or expression is also used in the Directive it has the same meaning in the Act as it has in the Directive.

It therefore would appear there must be a pattern of work by the employee. It should be noted it is a pattern of work by the employee, not by the employer. In Flexsource –v- Karaliunas DWT1318 the Labour Court stated;

"*An essential feature of shift work, as so defined is that the workers attend to work according to a certain pattern over a given period of days or weeks. In this case the respondent had a pattern of work involving morning work and afternoon / evening work. However, the claimant did not work according to any particular pattern*".

In this case the Labour Court held the employee worked "as and when he was required".

The Labour Court held the exemption did not apply.

The fact that an employee accepts a period of work is not relevant. The employer is obliged to;

"Ensure that his employees obtain the requisite rest period".

<u>Claiming an exemption.</u>

The most usual exemption is under S.I. 21 of 1998 being the Organisation of Working Time (General Exemptions) Regulations 1998. The Schedule to the Regulations sets out the industries which are subject to the exemption. It is not however absolute. There are conditions which must be complied with to avail of the exemption. See Tifco Limited –v- Smietana DWT11124 and Monkland Oysters Hotels Limited –v- Smith DWT1074. The Court held in Tifco;

"However, the exemption provided in S.I. 21/1998 in not absolute. It only applies if the employer complies with the provisions of Regulations 5 of the Statutory Instrument".

That statement of the Court reflects Regulation 3 of S.I. 21 of 1998 specifically Regulation 3(1) and 3(3);

"(1) without prejudice Regulations 4 and 5 of these Regulations are subject to the subsequent provisions of this Regulation, each of the activities specified in the Schedule of these Regulations is hereby exempted from the application of Sections 11, 12,13 and 16 of the Act"

"(3) The exemption shall not apply, as respects a particular employee, if and for so long as the employer does not comply with Regulation 5 of these Regulations in relation to him or her"

Regulation 4 provides as regards to the exemption from Sections 11, 12 and 13 the employer must ensure the employee receives a rest period which is "equivalent". In Tesco Ireland Limited and Kazilas DWT15139 the Court specifically held Regulation No 4 placed an onus on the employer to satisfy itself that it is complying.

Regulation 5 provides that where the exemption applies the employer where the work period exceeds 6 hours that the employer must provide a rest period/break of;

"Such duration as the employer determines"

In making a determination the employer must have "due regard to the need to protect and secure the health, safety and comfort of the employee" Regulation 5 (2).

This would appear to require a positive determination of a break or rest period and it must be "equivalent" the burden of proof appears to be on the employer. In Durban House Bed and Breakfast -and- Serika DWT1233 the Court stated;

"The respondent made no submission to the Court to the effect that he "ensured" that the employee had available to him a rest period that, in all the circumstances, could reasonably be regarded as equivalent to the first mentioned period".

In Marchford Ltd –v-Olejarz DTW1180 the Court stated;

"S.I. No 44 of 1998, the Code of Practice on Compensatory Rest, provides guidance as to what may be an appropriate rest period"

The Court in that case went on to state;

"Regulation 3.2 of S.I. 44 of 1998 said the equivalent compensatory rest should be given as soon as possible after the statutory rest has been missed"

The exception requires;

"…a positive demonstration that the equivalent rest period to the statutory 11-hour consecutive break has been made available to the employee and availed of by the employee concerned in addition to any other break to which they were entitled" Michael O'Neill Mushrooms Ltd –v- Giedra Tiatova DWT12103.

In the case of Noonan Services Group Ltd –v- Saygina DWT1052013 a similar view was taken by the Court.

For the purpose of an employer being able to rely on the exemption the Court must determine if the employer was compliant with the provisions of Regulations 4 and 5 of S.I. 21 of 1998 before determining the extent of which the employer can rely on the exemptions. Compliance with Regulation 5 is a condition precedent on relying on the exemption Trinity Lodge ltd –and- Mirela Catarama DWT1474.

<u>Exceptional circumstances</u>

In exceptional circumstances or in an emergency an employer by virtue of Section 5 of the Act is exempted from Sections 11, 12, 13, 16 and 17.

In Nurendale Ltd trading as Panda Waste –v- Suvac DWT19/2014 the employer contended that as a result of a fire they had a complete defence. The Court rejected the argument indicating there must be;

"A close temporal nexus between the accident and the work in question"

The Court importantly rejected the argument of "the exigencies of the business" and "the broader social implications of the plant's operation", as coming within the exemption of Section 5. A similar view taken in HSE National Ambulance Service –and- David O'Connor DWT 1484 in which the Labour Court stated;

"Inconvenience or losses or costs to the service do not amount to objective justifications".

The Labour Court comments on Section 11.

The case of Kepak Convenience Foods Limited and O'Hara DWT1820 where there was no claim under Section 11 is a clear warning to employers of the dangers of an employee accessing emails late at night.

The Court in Masterville Ltd –v- Ketis DWT12134 held that the legislation is in place to protect the health and safety of workers. The Court in that case held;

"…that where driving vehicles in a public place is concerned there is an additional requirement on an employer to ensure that workers in charge of such vehicles are properly rested and fit to drive".

The Court went on to say;

"Access to daily rest breaks is an important element of this obligation to workers and the general public and is viewed in that context by the Court"

In Primark Ltd –v- Preciado DTW1084 the Court determined that despite been aware of the possibilities of the employee not been able to take her breaks the employer failed to;

"Make any arrangements to adjust the finish and start times to accommodate this reality"

Clearly the law requires the employer to take a positive action to ensure compliance with the provisions of Section 11.

There are certain difficulties for an employer seeking to rely on an exemption. If an employer seeks to rely on an exemption and is not successful then the employer runs the risk that the employee can counter in any claim that the employer was aware that the employee was not receiving their entitlement. The employee can argue that the employer cannot plead ignorance of the law as the employer would have been aware of the breach but was seeking to rely on an exemption which did not actually apply.

The employee can therefore argue that the breach was not an omission but rather a commission by the employer and that therefore the level of compensation should take into account that the employer made a determination not to provide the relevant rest period.

Rest Intervals at Work – Section 12

This Section covers what is commonly referred to as "breaks". The Section purports to implement Article 4 of the Directive. This Section uses the words "shall not require". Unlike other Sections which are prescriptive. The issue here is whether Section 12 has in fact been properly transposed.

Organisation of Working Time – What is Working Time and Rest Periods

Case C-518/15 being a case of Ville De Nivelles and Matzak is a judgement of the European Court of Justice which issued on 21st February 2018.

The case dealt with the issue of fire personnel. They were required to reside in a place so as not to exceed a maximum of 8 minutes to reach the appropriate fire station. They were required to remain at all times within a distance of the fire station so that the period necessary to reach it when traffic is running normally does not exceed a maximum of 8 minutes.

The issue in this case was what was working time and what was a rest period. The Court helpfully pointed out the issue as to who is a worker. The Court pointed out the case of Union Syndicale Solidaires Isere being case C-428-09 and in particular paragraph 8 that in accordance with settled case law on the matter any person who pursues real genuine activities with the exception of activities on such a small scale as to be regarded as purely marginal or ancillary must be regarded as a worker. The Court pointed out that the defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he/she receives remuneration. The Court referred to Case C-316/13.

Importantly the Court pointed out that the legal nature of an employment relationship under national law cannot have any consequence in regard to whether or not the person is a worker for the purposes of EU law and referred to cases C-116-06.

The Court pointed out that while the relevant employee did not have the status of a professional fire fighter but was that of a voluntary fire fighter this was irrelevant for his classification as a worker within the meaning of Directive 2003/88.

The Court pointed out that the first issue was whether under Article 17 of Directive 2003/88 it was whether it was possible for a Member State to

derogate with regard to certain categories of fire fighters recruited by the public fire service.

The Court pointed out that a Member State may derogate from Articles 3-6 and 8-16 of the Directive but the wording of Article 17 of the Directive does not allow derogation from Article 2 which defines the main concepts contained in the Directive. The Court pointed out that any derogations under national law must be strictly limited to what is strictly necessary to safeguard the interests which those derogations enable to be protected.

The Court pointed out that in relation to the definition of working time within the meaning of Article 2 of Directive 2003/88 national legislation provisions may provide for more favourable treatment to workers than those laid down in the Directive but cannot amend the definition of working time to be less favourable and cannot apply legislation which is more restrictive.

In relation to the issue of rest periods the Court in their decision set out a considerable amount of case law but effectively held that under Article 2 of the Directive it must be interpreted as meaning that stand by time which a worker spends at home with a duty to respond to calls from his employer within 8 minutes very significantly restricts the opportunity for other activities and must be regarded as working time.

This case dealt with a situation where the employee had to be in a particular place and had to be able to get to the fire station within 8 minutes. The case is interesting in that as part of the decision the Court held that the situation is different where a worker performs a stand by duty according to a standby system which requires that that the worker be permanently accessible without being required to be present at the place of work. The Court pointed out that even if an employee is at the disposal of an employer since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances only, time linked to the actual provision of services would be regarded as working time. This case therefore effectively determines that where you have a simple on call provision then that will not be working time. However, if the employee has to be available to get to the place of employment or as directed by the employer within a certain period of time then the issue becomes more difficult. Certainly, if it is within 8 minutes it is clearly working time all the time that the employee is on standby. The issue is whether it is 10, 15 or 30 minutes what is the cut off time. That is going to be an issue which will

probably have to be addressed in later decisions. It would however in our opinion be hard to limit the application of this case to only situations where the employee had to get there within 8 minutes.

There are some important issues which come out which favour employers in this case and that is that the issue of working time has no relevance to the issue of payment. Therefore, the fact that an employee is on standby does not under this particular Directive require that the employee is paid. Under Irish law if however, the time is treated as working time then the employee may well be able to claim under the National Minimum Wage Act.

This case is extremely important.

When this case is looked at in association with the TYCO Case C-266/14 case it indicates how the European Court of Justice is interpreting the relevant Directive. In the TYCO case the Court held that time spent travelling from home to a place designated by the employer was working time.

These decisions have significant impact on some employers.

We can see it particularly as regards those in the security industry that this decision is going to be extremely important. There will be some businesses which because of the way they operate various employees will have to be on call and again these are cases which may well have a significant impact for certain businesses.

A very helpful decision from the UK Employment Appeals Tribunal under appeal number UKEAT/0316/16/BA is the case of Crawford and Network Rail Infrastructure Limited.

The case is useful in that His Honour Judge Shanks sitting alone dealt with the issue of a rest break under Regulation 12 of the UK Working Time Regulations 1998 and the issue of compensatory rest under their Regulation 24 (a). The employee was a railway signalman working on signalman boxes on 8-hour shifts. He had no rostered breaks but was expected to take breaks when they were naturally occurring breaks in work by remaining “on call”. The employee won on the basis that he claimed an equivalent rest period of compensatory rest must comprise one period lasting 20 minutes. The employee’s appeal succeeded in light of the case of Hughes -v- Corps of Commissioners Management Limited [2011] EWCA Civ1061 in particular the judgment of Lord Justice Elias.

The case is interesting in relation to the issue of compensatory rest period but also actually in relation to the issue of rest periods where the right to a compensatory rest period is not the alternative.

His Honour in that case set out the EU Directive 2003/ADA/EC and referred to the Recitals being Recital 5, Article 2 and Article 4. Under the UK Regulations rest period is 20 minutes. What is interesting is His Honour in this case set out the five issues which are relevant to what could be classified as a normal rest period which would be the 15 or 30-minute break here in Ireland. Namely:

1. That the worker is away from his work stations;
2. That the period is at least 20 (in Ireland 15 or 30) continuous minutes;
3. That during that period he is not on call;
4. That the period is uninterrupted (which goes with not being on call); and
5. It is implicit that the break takes place during a shift where the workers would otherwise be working.

In this case, being the rail worker, there was an exemption which would apply in relation then to compensatory rest periods.

There was an argument that the employee at various stages would have got various rest periods at 5 or 10 minutes each. This was rejected on the basis that the period must be minimum of 20 minutes.

While the employee was entitled to take rest periods where matters where not busy the UK Employment Tribunal found in practice while the employee could take short breaks from his work station which could be more than 5 minutes. However, at least during day time shift in a week it was not possible to have continues 20-minute break.

His Honour found that the Claimant had not requested and had therefore had not been refused any different arrangements from the ones which had been set out, namely that he could take breaks when it was possible. However, he did subsequently raise a grievance. In the Hughes -v- Corps of Commissioners Management Limited His Honour pointed out that in that case if a break was interrupted as it frequently was the Claimant was able to deal with the problem raised by the interruption and then be allowed to go back and start his break being a further 20-minute uninterrupted break. The Court of appeal held that this was sufficient to comply with the UK Regulations.

His Honour pointed out, following that case, that the fact that the employee would be on call throughout any break would not be sufficient to say that he was not getting a break because of the very basis that this was a

compensatory rest period and the type of work being undertaken. However, His Honour held that he should get a full 20 minutes uninterrupted break. His Honour held that it would be possible to provide a break by providing a relief signaller.

This is a very important point. Effectively, the UK Employment Appeals Tribunal has held that if necessary additional staff have effectively to be taken on or assigned to undertake work so that an individual can get an uninterrupted rest period, even in the case of a compensatory rest period.

The application of Section 12 in practice

In Tesco Ireland Limited and Kazilas DWT15139 the Labour Court stated:

"The Court notes that the provision of adequate breaks is an important safety and health matter that is protected by law for good reason. It ensures that workers are not excessively fatigued at work and have adequate opportunity to recover during a shift. Accordingly, the Court takes a serious view of infringements of the Act...".

The Section provides that a worker shall be entitled to a rest period of at least 15 minutes after 4.5 hours of work or 30 minutes after 6 hours work. The 30-minute break may include the 15-minute break.

This sometimes leads to confusion.

Example

Employee A starts work at 8 am and finished at 4 pm. The employer has a choice.

A Provide a 15-minute break at 12.30 pm and a further 30-minute break at 2.15, or;

B Provide a 30-minute break at 12.30 pm.

The counter argument is two 15-minute breaks at 12.30 pm and 2.15 pm. This issue as yet to be clarified fully. However, in HSE South and Ruth Power DWT1623, the Labour Court held for an employee where she was required to work more than 4.5 hours without a break in a 12-hour shift. The Labour Court has yet to actually clarify the issue as to whether after 4.5 hours, where the employee is going to work more than 6 hours, whether that is a 15-minute

break and possibly a second 15-minute break or whether it is a 30-minute after 4.5 hours. Our view is that it is a 30-minute break after 4,5 hours.

A rest interval at the end of a working day will not satisfy the requirements.

Section 12 (4)

The Minister may set out longer rest intervals not to exceed one hour. This the Minister has done in S.I. 57/1998 where a shop worker's hours include the hours between 11.30am and 2.30pm the worker is entitled to a 1-hour rest interval. In addition, the rest interval must be between those hours.

Regulation 3

The Regulations do not apply to so much of a premises as is used as a hotel for the preparation of food or catering in respect of food or drink to "any person" or to a premises with a liquor licence. A barber or hairdresser or department store worker has the rights to the one-hour rest interval.

A person working in the restaurant serving or preparing food would not have this right. Certain workers covered by the General Exemption Regulations are not entitled to these breaks but are entitled to compensatory breaks. This will be dealt with later in this section.

An issue which regularly arises in cases under Section 12 is that the employee had the opportunity to take a rest interval at work and this complies with the employer's obligations.

The question of whether the Working Time Directive from which the Act of 1997 is derived, imposes an obligation to provide workers with the opportunity to take rest and break periods or places a positive obligation on an employer to ensure that the breaks are actually taken was considered in the ECJ case of Commission –v- United Kingdom C-484/04. In that case Advocate General Kokott stated;

"It is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community Law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. In addition, it must, however, be a matter of course within a business, in practice as well, that the workers' rights to rest periods not only

exist on paper but can effectively be observed. In particular no de facto pressure should arise which may deter workers from actually taking their rest periods".

In the full ECJ Decision was stated;

"Workers must actually benefit from the daily and weekly rest periods provided for by Articles 3 and 5 of the Directive. These provisions impose clear and precise obligations on the Members States as to the results to be achieved by such entitlements. A Member State which, in the national measures implementing the Directive provides that the workers are entitled to certain rights to rest but which, in the guidelines for employers and workers, on the implementation of those rights, indicate that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with the minimum requirements laid down by Article 3 and 5 or the essential objectives of the Directive which is to secure effective protection of the safety and health of employee's by allowing them to enjoy the minimum periods of rest to which they are entitled".

The European decision is emphatic. The reasoning of the European Court was approved in many cases. One of these was the case of Nolan Transport and Antanas DWT1117 where it was stated;

"It is to be assumed that the State intended to fulfil its obligations under Community Law in line with that assumption the Act must be interpreted as imposing a positive duty on employers to ensure that not only are opportunities available to take appropriate rest but that the minimum rest periods are actually observed".

The reason for quoting so extensively from the European Court Decisions and from the Labour Court on this point is that the defence that the employee had the opportunity to take a rest interval is trotted out with such regularity that some believe that if it is stated often enough somebody might actually believe it. The second alternative is that it is a defence run out by those who believe the ECJ was wrong. As the ECJ is the highest Court that argument needs to be debunked.

It is therefore probably worth giving other cases where the Court dealt with this issue. In the case of The Tribune Printing & Publishing Group –v- Geographical Print & Media Union [2004] ELR 222 the Labour Court held that the employer was under a positive duty to ensure the employees receive their breaks when it stated;

"Merely stating that employees could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee received those breaks thus protecting his health and safety, does not discharge that duty".

In Tifco Limited –and- Smietana DTW11124 the Labour Court stated;

"The Court is satisfied that it is the duty of the employer to ensure breaks are taken and there are systems in place to ensure that scheduled breaks can be, and in fact are, availed of by the workers".

The obligation on employers is not only to ensure a system is in place where breaks are actually scheduled, the employer must make sure that those breaks are availed of by the workers. In addition, the employer must maintain records of same.

In Nurendale Trading as Panda Waste –and- Suvac DWT19/2014 the Labour Court held there was an obligation on an employer to maintain records of working time and breaks. The Labour Court held that the obligation could not be transferred by contract or otherwise to an employee to relieve the employer from maintaining those records. A similar approach was taken in Monkland Oyster Hotels Limited Trading as Athlone Spring Hotel Limited – and- Michelle Smith. In that case he worker contended she did take short smoke breaks on most days but did not receive breaks or compensatory breaks. In that case there was no system in place for staff to take or record breaks. The employee contended she had been told generally she should take breaks but was never told to go on a break or advised of the time at which to do so. The employer contended that it *"ensured the provision of breaks were available for the employee".*

They contended that an onus on the employee to take her daily breaks – as evidenced in the employee's contract of employment.

The employer also contended that there was a meeting between the HR Manager and the Head Chef whereby he confirms that the employee at all times received her daily breaks and what is more on occasions left her post to take additional breaks.

The Labour Court held that there had been a breach and awarded €5000. The case is interesting in that the employer was a hotel and could therefore avail of the exemption in S.I. 21/1998.

Some employers will attempt to shift the obligation to the employee. One method is to use the NERA OWT1 Form. The second is to put some statement at the end of a weekly time sheet requiring an employee to notify the employer if they have not received their breaks.

In Eupreida Trading as Dingle Skellig Hotels and Peninsula –and- Martin O Connor DWT13146 the employer contended that a message written at the bottom of each weekly roster outlining the statutory break entitlements and stating that if the worker had not received their breaks each day he/she should contact their manager was rejected by the Labour Court as;

"*The Court is satisfied that in the main such breaks were taken by the complainant, however, this was not a satisfactory method of recording due to discrepancies identified*".

A sum of €1500 was awarded.

It would appear therefore that where the employer provides for breaks in a contract but does not specifically ensure breaks are taken the employer has not discharged the onus of compliance. There is a positive duty on employers to ensure the breaks are in fact taken. Even getting the employee to sign each week confirming they received their entitlements may not be enough. Saying this, the Labour Court has appeared to take cognisance that during a period prior to the complaint the employee had raised no complaint and has taken this into account. This is evidenced in the case of Noonan Services Group Limited –and- Andrius Stasaitis DWT13121. This was upheld by the High Court 2014 ILR 173. In that case the employee worked alone and took his breaks at slack times. Following the case of C-684/16 that reasoning may be open to further interpretation unless the employer exercises "due diligence" to see such breaks were taken. However, following the High Court decision in Stobart (Ireland) Driver Services Limited and Keith Carroll [2013] IHC581 which while dealing with the Safety Health and Welfare at Work Act 2005 held that it is "not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made". There is in addition nothing in the legislation which requires an employee to raise a grievance before bringing a claim.

In dealing with such cases the Labour Court will consistently hold that the period to which the complaint relates is a period of six months. What breach may have occurred prior to that period of six months will not be looked at by the Court. It is now becoming common that employers will contend that prior to the complaint being made that no grievance had been raised by an

employee. This will invariably mean going back further than six months. It is one thing for the employer to contend that no grievance was raised in the 6-month period prior to the complaint being raised. If however, the employer wishes to go back outside of the six month period that there is an argument that the employee should be allowed also to go back and look at the actions of the employer in the preceding period. It must be noted that in the majority of cases where this argument arises that no complaint had been made or grievance raised by the employee there will invariable not be documentation in place advising the employee of their entitlements under Section 11, 12 and 13 of the Organisation of Working Time Act as required by Statutory Instrument 49 /1998 nor records. The argument in relation to no grievance having been made, which had been taken account of by the Labour Court is in my view an incorrect reading of the legislation. There is no requirement to raise a grievance as the law places the obligation on the employer to ensure compliance in practice. Case C-684/16 now confirms, I believe, my opinion.

The argument which is often raised in tandem is that the employee did not raise the complaint at the first available opportunity. An interesting case on this issue is the High Court decision of Mr. Justice Hogan in the case of Michael Browne and Iarnrod Eireann / Irish Rail (No. 2) delivered on 5th March 2014 reference [2014] IHC117.

That case related to a breach of contract. His Honour stated;

"In these circumstances, in can hardly be a surprise that Mr. Browne elected to carry on working despite his most profound misgivings. This may thus be regarded as another example where, in the words of Lord Reid, in White and Carter, by refusing cooperation… the party in breach, "can compel the innocent party to restrict his claim to damages".

The employer is invariably in the dominant position. The issue has to be asked is whether there was a robust system in place for grievances to be dealt with properly and independently. In my view, the issue of whether a complaint or grievance was raised with an employer at any time during the employment is an irrelevant factor particularly where the breach complained of is one covered by the Directive.

<u>What is a Rest Period?</u>

It may sound, at first sight, unusual that this question is asked. However, the issue of what is or is not a rest period is often raised. The first issue which is often raised is that the employee received "smoke breaks" of 5-10

minutes. It could be claimed that there was a number of these during the day. This argument regularly arises. A rest interval of less than 15 minutes is not a rest interval and must be disregarded for the purposes of the Act. The determination of what is a rest period means it is necessary for it to be distinguished with working time.

Section 2 (1) of the Act contains the following definition

"rest period" means any time that is not working time.

"Working Time" means any time that the employee is

(a) At his or her place of work or at his or her employer's disposal and
(b) Carrying on or performing the activities or duties of his or her work and shall be construed accordingly.

Article 2 of the Directive contains the following definition.

1. Working Time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national law and/ or practice.

2. Rest period shall mean any period which is not working time;

In ISS Ireland Limited and Vyara Gfencheva DWT1157 the Labour Court had to consider a situation where employees moved between locations. The employees had sufficient time to get to the next location but no longer. The employer contended that the period travelling between locations was a rest period.

The Labour Court in this case reviewed a number of ECJ Decision including Case C-300-98 SIMPA Case. In this case Doctors were required to be at a medical centre and available to perform work if required. The ECJ held that this was working time. Similarly, in Case C-151-02 Jaeger the Doctors were provided with a room in which they could sleep. Again, the ECJ held that this was working Time as the ECJ at paragraph 95 stated;

"In order to be able to rest effectively the worker must be able to remove himself from his working environment…".

The Labour Court held;

1. The time during which a person is working, at the employer's disposal and carrying out his or her duties is working time.

2. Time during which a person is at a place designed by his/her employer, and is required to undertake his/her activities or duties if directed to do so by the employer, is working time.

3. The notion of working time and that of rest periods are mutually exclusive.

4. A period of rest is a period which is not working time during which a worker can relax and dispel the fatigue caused by the performance of his/her duties.

The ECJ has in Case C-14/04 Dellas ruled that there is no "intermediary category" between "working time" and "rest periods".

The issue then arises is whether a person is at "rest" if that person can be interrupted. The answer would appear to be an emphatic "No". The issue arose in a number of cases involving Stobart (Ireland) Driver Services Limited DWT1438, 1437 and 1464. The drivers had to make one or more phone calls during a break and there was a contractual obligation to do so. The Labour Court held that the time was not "absolutely at the employee's disposal" and the requirement to make the call meant the employee was at the employer's disposal. While the case concerned Section 13 a similar approach would apply to section 12. Therefore, if the employee has to be "available" it is not a rest period. The common issue which currently arises is that an employee must be available to return to work. That mere availability would undermine the argument that it is a "rest period". An argument which often arises is that the rest period exceeded the Statutory period but with the employee arguing the employee could not know when it would end.

In JP Gallagher –v- Alpha Catering Services Limited [2004] EWCA CIV 1557 the UK Court of Appeal held that the employee must know at the start of a rest period that it is such and which "the worker can use as he pleases". It would therefore appear that an employee may not know when a rest interval may start but must know when it will finish. Sending a worker on a rest period and not telling them what length of time that rest period is will not be a rest period. If an employer says to an employee to go on a rest period and

to take 30 minutes but after that the employee does not need to come back to the office or the workplace until they are called then that is a 30-minute rest period.

Anything after 30 minutes is time that the employee is at the employer's control as the employee can be called back at any stage and is therefore "working time".

If an employer tells an employee go on your break now and I will call you when you are to come back that is not a break at all even if it exceeds 30 minutes as the employee is not free to dispose of the time as they wish.

There are exemptions from the requirements to provide rest intervals. S.I.21 of 1998 exempts certain workers from the requirements of Sections 11, 12, 13 and 16. Where an employee is not entitled by reason of the exemption to the rest period and break referred to in Sections 11. 12 and 13 of the Act equivalent rest or break periods must be provided.

The exemption in Regulation 3 is conditional on Regulation 5 being complied with. Regulation 5 provides that the employer shall not require a worker to whom the exemption applies to work for a period of more than 6 hours without allowing him or her a break of such duration as the employer determines. In doing so, the employer should have regard to the Organisation of Working Time (Code of Practice on Compensatory Rest and Related Matters) (Declaration Order) 1998 S.I. 44/1988.

The Labour Court appears to have taken a contradictory view of such exemptions. In Michael O Neill Mushrooms Limited –v- Tiatova DWT103/2012. The Labour Court held that this required a positive demonstration that an equivalent rest period to the statutory rest period had been made available to and availed of by the worker concerned. However, in Noonan Services Group Limited and Stasaitis DWT13121 the employer argued that the respondent did not specifically determine any period to be regarded as a break. The respondent argued that the complainant was provided with kitchen facilities in the Security Hut in which he worked and there were substantial periods of inactivity during which breaks could be taken. The Labour Court held that as a matter of probability the claimant was told he could take breaks during periods of inactivity during his shift. The decision of the Labour Court was upheld by Kearns P [2014] IEHC199. The Labour Court decision referred to disputes being avoided by a suitably worded notice advising security guards of the obligation to take a break. This would be in line with the case of Hughes –v- The Corps of Commissionaires

Management Limited UK EAT / 0173/10/SM where the complainant was a security guard who worked a 12-hour shift on his own. The Tribunal came to the conclusion that, on the facts, the employer had afforded the claimant with appropriate protection in order to safeguard his health and safety. They took account in particular of the fact that he was afforded breaks and that although he was on call during them and could be called he was allowed to start his break again.

The Tribunal held the employee was afforded rest but it did not have the features of a "Gallagher" rest period. The EAT on appeal however held that while the employee might have the break interrupted he was allowed to decide when to start his break and if interrupted to start his break again. The decision of the UK EAT appears to make perfect sense. Where the employer has clear and precise rules relating to compensatory rest. In the case of Noonan Services Group Limited and Staitis the Labour Court held that it was "probable" such rules applied even though there were no actual rules of the employer stating this. The recent CJEU case C-684/16 probably has now decided the point that the "probable" test will no longer be applied.

Saying this, following the advice set out by the Labour Court and the rationale in Michael O Neill Mushrooms Limited and Tiatova, referred to previously, it is far more advisable for employers to be able to demonstrate equivalent rest periods being available.

Section 12 claims by employees are almost invariably ones which will be the subject of disputes because of the lack of records of such breaks. In addition, they usually arise because of a lack of clear and precise rules in the employment related to breaks. Section 12 claims relate to fairly minimal rest periods. An employee who commences work at 7am and receives a rest period of 30 minutes at 11:30 am or 15 minutes and then 30 minutes at 1 pm and then works on until 6pm and received a 15-minute break can then work on until 7.30pm. That employee will have received their full entitlements. Effectively in any period of less than 12 hours working the full entitlement of the employee is to a 45-minute rest interval.

There are special rules for some categories of workers such as drivers and they will be dealt with separately.

<u>The Burden of Proof in Section 12 Cases</u>

Section 25 of the Act sets out the requirement that in the absence of records the Burden of Proof rests on the employer. The issue was dealt with at length

as to the proof and the burden of proof as it applies in the case of ISS Ireland Limited and Vyara Gfencheva where the Court stated;

"The normal rule in civil proceedings is that the person bringing proceedings bears the burden of proving every element of the wrong on which their claim is founded. It is also the normal rule that the person who bears the legal burden of proof also bears the evidential burden. The effect of S.25(4) of the Act is to shift the burden to the Respondent in cases where records in the statutory form were not maintained. Thus, a form of rebuttable presumption of non-compliance arises in such cases.

The burden of proof must be applied in a way that confirms to the requirements of natural justice and the right of the respondent to mount a defence. This suggests, at a minimum, the respondent must know, with reasonability clarity, what it is expected to rebut.

The burden on the respondent of proving compliance with the Act arises in proceedings in which a complaint of non-compliance is made. It is clear from S.27 (2) of the Act that the jurisdiction of the Adjudicator is invoked by an aggrieved worker or his/her Trade Union by presenting a complaint to an Adjudicator that his/her employer has contravened a relevant provision of the Act in relation to him/her. The subsection goes on to provide that where a complaint was made the Adjudicator shall give the parties an opportunity to be heard and to present to the Adjudicator any evidence relevant to the complaint. This suggests that the evidential burden is on the claimant to produce such evidence as it available to support a stateable case of non-compliance with a relevant provision of the Act. It seems to the Court, that, as a matter of basic fairness, the claimant should be required to do so with sufficient particularity and to allow the respondent to know, in broad terms, the nature of the complaint and the case that they are expected to meet.

As was pointed out by Lord Devlin in Bratty –v- Attorney General for Northern Ireland [1963] A.C. 386 an evidential burden is satisfied where the evidence adduced is sufficient to suggest "a reasonable possibility".

The respondent should then be called upon to put the records required by S.25 (1) of the Act in evidence showing compliance with the relevance provision in issue. If records in the prescribed form are produced, and show compliance on their face, the legal burden will be on the claimant to satisfy the Adjudicator, or the Court on appeal, that the records are not to be accepted as evidence of compliance. Thus, the claimant will bear both the evidential and legal burden of proving on the balance of probabilities under

the Act were contravened in the manner alleged. If the claimant fails to discharge that burden he or she cannot succeed. Where records in the prescribed form are not produced and the claimant has satisfied the evidential burden which he or she bears it will be for the Respondent to establish on credible evidence that the relevant provisions were complied with in relation to the claimant. The Respondent will thus be required to carry the full legal burden of proving on the balance of probabilities, that the Act was not contravened in the manner alleged by the claimant. If the respondent fails to discharge that burden the claimant will succeed".

A very similar approach was taken by the Labour Court in Nolan Transport and Antanas referred to previously. However, in Blue Thunder Fast Food Limited and Oleniacz DWT15124 the Court stated

"*It is accepted that the respondent failed to maintain records in the statutory form. Consequently, in accordance with S. 25 (4) of the Act, the onus is on the respondent to prove that the Act was complied with in respect of matters put in issue by the claimant. The standard of proof is that of the balance of probabilities. That is that the respondent must show, on cogent evidence, that it is more probable than not that it complied with its statutory duty in relation to these matters. It also means that if the probabilities are equal the burden of proof borne by the respondent will not be discharged (see Miller –v- Minister for Pensions [1947] 2 ALL E.R. 372) see also ERAC Ireland Limited and Eddie Murphy DWT1583 where a sum of €8000 was awarded.*"

It is now common for representatives of employers to raise the argument that the employee must be in a position to provide dates on which the employee did not receive their entitlement. This argument goes far further than the test set out by the Labour Court and the Act. For that argument to succeed it would first presuppose that the employer had notified the employee of all entitlements and that the employee was effectively walking around with a clocking system themselves. The employee need only set out the claim in the broadest terms. The issue of how far the employee has to go in setting out their claim has yet to be fully determined by the Court. It would appear to me to be sufficient if the employee is able to say that they did not get their 30-minute break within 6 hours of starting work on a regular or irregular basis or that they did not get 15-minute or 30-minute breaks at any time during most days or on occasions. Giving particulars of the claim does not mean the employee is required to give times and dates. A counter view was expressed by the Court in Petrogas Group Limited and Paulauskas DWT1676. However, in that case the employee declined to give any evidence at all on the issue. Saying this, the issue of Section 25 is yet to be fully trashed out and is

possibly an issue which will go to the High Court and maybe the CJEU. There is an unwritten determination by the High Court which would indicate that evidence need only to be very broad, such as "I did not always get breaks".

The approach of the Labour Court can be seen in such cases as DWT1570, 1540, 1523, 1583.

An issue which has been the matter of some debate, from our firm at least, has been the issue of Section 25 of the Act. Section 25 (4) sets out that where an employer fails to keep records in accordance with the Organisation of Working Time Records (Prescribed Form and Exemptions) Regulations, 2001 SI 473 of 2001 the onus of "… *proving, in proceedings before an Adjudication Officer or the Labour Court, that the said provision was complied with in relation to the employee shall lay on the employer."*

In IBM -v- Svoboda DWT0818 the Labour Court held the effect of subsection (4) was to shift the evidential burden of proof to the employer in cases where the records in the statutory form were not maintained.

In Kepak Convenience Foods Unlimited Company and O'Hara DWT1820 the Labour Court did hold that:

"… Through her operation of its software and through the emails she sent aware of the hours the Claimant was working and took no steps to curtail the times she spent working."

When you look at the case of Jakonis Antanas and Nolan Transport DWT11/17 and ISS Ireland Limited -and- Jfencheva DWT11/57 where the Court held "*rebuttable presumption of non-compliance arises."*

The Labour Court went on to hold that natural justice required that the Complainant must adjust such evidence as was available to support a stateable case of non-compliance.

In my opinion, the Labour Court may be straining from the literal interpretation of the Section.

Where an employer maintains records in accordance with the Regulation then the legal and evidential burden falls to the employee. That is accepted.

Where records in the statutory form are not provided then in my opinion, once the employee sets out with sufficient particularity the claim being made

then the legal and evidential burden is on the employer. The employee may produce such evidence as they have but there is no need to. The employer then needs to go first.

Where an employee has elected to put in a request under the Data Protection Act and it has been held by the European Court of Justice that working time records are data then if those records are furnished clearly the employee will have to go further than simply making broad statements. Where the employee makes broad statements then it is a matter for the employer to put the records into evidence if they have not already been provided or requested. Where those records are put in place and they are not in the prescribed form, or there are no records, then the legal and evidential burden will pass to the employer.

The form of records which must be maintained

S.I. No. 473/2001 in Regulation 3 sets out the form of records which must be maintained under Section 25 of the Act. These records must set out;

(a) The name and address of each employee and their PPS number.

(b) A copy of their statement under the Terms of Employment (Information) Act 1994 and S.I. 49/1998.

(c) The days and total hours worked in each week by each employee, any days and hours of leave in each week granted by way of annual leave or as a public holiday and any additional days pay referred to in Section 21 in each week to each employee concerned.

(d) A copy of the written record of notifications issued under Section 17.

This is quite an extensive list but those Regulations have now been in place for 13 years.

Where there is no clocking in facilities in place then an OWT1 Form or a form similar to it should be used.

There are exemptions from Section 25. The exemption applies where the employer has electronic record keeping facilities. This would include flexitime or clocking in facilities.

Employers who have a manual record and have agreed with the employee that the employee will complete the OWT1 Form and will present the completed form to the employer for counter signature and retention. This exemption only applies to an employer if he or she complies with three conditions namely;

1. The employer notifies the employee of Sections 11, 12 and 13 of the Act. Exemptions also apply where there is a collective agreement, an Employment Regulation Order or a Collective Agreement registered.

2. The employer notifies in writing each employee of the procedures which the employee may notify the employer of in respect of any rest or break period referred to in Sections 11, 12 and 13 of the Act to which the employee is entitled and was not able to avail himself or herself of, and

3. The employer keeps a record of having notified each employee of the matter set out at 1 above, a record of matters 1, 2 and 3.

What happens where there are no records?

Where there are no records the evidential burden and the legal burden rests on the employer. In the case of a factory where there is a production line it is usual that a production line will cease on regular occasions for rest and break periods. That will be a form of evidence. In the case of an office it would be that there is a procedure in place that individuals take a break at lunch time when an office will be closed for a period of time.

Because of the way businesses now work, which is effectively the 24/7/365 that form of evidence is becoming less available. The normal evidence which is given is that the employer will contend that everybody took breaks or will bring in a work colleague to say that they saw the employee take breaks. That is never going to be sufficient. Where the employer bears the evidential and legal burden then there is an entitlement to the employee to request the employer to produce evidence of the exact start and finishing time of each break. It is highly advisable that employers have in place procedures for recording individuals signing in and signing out for their rest periods. It is advisable that the procedures are in place with scheduled rest periods and that managers and those responsible for the workplace are advised to ensure that those reporting to them obtain their proper rest intervals.

As a matter of practice claims under Section 12 are probably one of the most difficult for both employers and employees and ones where the greatest length of time is taken up in examining whether an individual received their entitlements. These problems invariably arise where there are incomplete or improper recording procedures in place in the workplace coupled with failure to notify employees of their entitlements.

The importance of keeping records can be seen in the case of Rocatil Limited and Hourican DWT1817. Equally, the employer cannot seek to place the obligation to be compliant with the Act on the employee Merchants Arch Restaurant Company Limited and Guerrero DWT188.

On –call time maybe working time

In a UK EAT case of Truslove and Another –v- Scottish Ambulance Service UK EAT /0053/13/JW the claimants were ambulance paramedics. The claimant sometimes worked on-call night shift duties away from their home base station. On such occasion they were required to take accommodation within a three mile radius of the ambulance station. This is where they were to park the ambulance.

They were required to meet a target time of three minutes within which to respond to a call. The claimants claimed that time spent on call counted as working time and so they were entitled to rest periods according to the Working Time Regulations.

The Employment Tribunal in the UK dismissed their claim. The UK Employment Tribunal decided that the claimants in this case were not confined to unspecific location and therefore were at rest during the periods they spent on call. The case was appealed to the UK EAT. The UK EAT allowed the appeal. The UK EAT held that it was clear that the time of the claimants was not their own while on duty. They held that the central question was whether the employees were on the facts required to be present at a place determined by their employer. They held that they had to be where they were within narrow limits. They could not be at home.

Therefore, they could not enjoy the quality of rest that they were entitled to under the UK Working Time Regulations which are similar to ours. In Particular the UK EAT looked at the case of Landeshaupsadet Kiel –v- Jaever [2004] ICR 1528.

This case may well be interesting for the principles which it sets out.

The reasoning is a reasonable approach to the issue of rest periods.

Shop Workers

There is an anomaly for shop workers in SI 57/1998. A shop worker works in a shop doing shop work. Where a shop worker works hours that "include periods between 11:30 am and 2:30 pm, the break period for him or her is 1 hour between those hours unless it would cause Section 12 (4) not to be complied with" i.e. if the break would be after working 4.5 hours.

Shop working does exclude working in areas where food is served or intoxicating liquor is served.

Conclusion

The issue of rest intervals at work is for some reason the most contentious of all claims and disputes. The disputes arise because of lack of records. There is a legal requirement to maintain such records. In the UK employers invariably do because of the actions of the regulatory authorities. In Ireland even when the Labour Court determines records have not been kept NERA are less than proactive in pursuing compliance.

Section 13 – Weekly Rest Period's

Section 13 implements Article 5 of the Directive

The Section requires an employee to receive, in each period of seven days, a rest period of 24 hours. The rest period of 24 hours must be preceded by a daily rest period of 11 hours.

For example, an employee who finishes work on Saturday at 1pm should not recommence work until midnight on Sunday.

An employer by virtue of Section 13 (2) instead of providing the rest period in a 7-day period may provide two rest periods of 24 hours each. However, this does not mean it should be preceded by two periods of 11 hours, if granted as a 48-hour period. If, however, it is two non-consecutive 24-hour periods the daily rest period must be granted.

There are exemptions in Section 13 (4). The 24-hour period preceded by the 11-hour period does not apply in cases were due to the technical nature and how the work is organised or an objective reason would justify the exemption applying. It is difficult to envisage circumstances where this exemption would apply. Saying this there are exceptions for activities covered in S.I. 21 and 52 of 1998 and S.I. 817 of 2004 under Section 13 (6).

The Act in Section 13 (5) provided that the rest day period of 24 hours shall be a Sunday. This Sunday rest does not apply where the employee's contract of employment provides for Sunday work.

In Laois County Council –and- Paul Delaney DWT1383 the contract for the employee provided, that as a water and sewerage caretaker, he should attend at work 7 days a week. The employee made a complaint. The Adjudicator accepted the employee could claim the benefit S.I. 21 of 1998. The relevant Regulation is Regulation 4. However, the Adjudicator held that the employer had failed to provide compensatory rest and required the employer to pay €5000. The award was paid but still went on appeal. The employee's hours of work had been altered. The matter went on appeal with the employer contending that they had complied with the decision of the Adjudicator. The issue on appeal was whether the Respondent had complied with the decision of the Adjudicator. This in turn raised the question of whether the Claimants revised attendance patterns complied with Regulation 4 S.I. 21/1998.

The Court found that the claimant finished work at 2.30pm on Friday. He recommenced work at 8am on the following Saturday. The Court held that he had a rest period of 17.5 hours. He finished work at 11am on Saturday and recommenced work at 11 am on Sunday. The Court held that he therefore had a rest period of 24 hours.

The employee had contended that the rest period of 24 hours should be preceded by rest period of 11 hours as is required by Section 13 (2) of the Act. It was accepted by the Court that the employer was exempted from the requirements of Section 13. The question was whether he was provided with a rest period and breaks that in all the circumstances can reasonably be regarded as equivalent as a rest period and breaks to which he would otherwise be entitled. The Court held;

"In this context, all of the circumstances include the exigencies of the job that the claimant is employed to perform. He obtains a rest period of 17.5 hours between finishing work on Friday and recommencing work on Sunday. He

works for 3 hours and then has a rest period of 24 hours. In the Court's view this pattern can, in all the circumstances, reasonably be regarded as equivalent to the rest period normally required by Section 13 (2) of the Act".

This case is interesting in that the Labour Court not only looked at the exemption but also looked at the exigencies of the job which the employee was employed to do to ascertain whether the employer had complied with the requirement of providing compensatory rest. The decision would appear to place a high bar on employers to show that compensatory rest had been provided.

The provisions relating to the 24-hour rest period are covered by the Directive in Article 5. There is an obligation on employers to ensure the employee takes this rest Case C – 484/04 Commission –v- United Kingdom.

Two very interesting decisions of the Labour Court on the issue are Stobart (Ireland) Driver Services Ltd –and- Seven Workers DWT1437/2014 and Stobart (Ireland) Driver Services Ltd –and- David Burke and Others DTW1464/2014.

In both these cases there was no argument that the employees did not receive the period of 35 hours. However, the employees, in both cases, were required to phone during the second "rest period" to get their shift starting times. In DTW1437/12 there is a very extensive determination of the law on this issue.

The Labour Court in that case held that the purpose of the Act in the relevant parts was to provide for the implementation of Directive 1993/104/ECC of the 23 of November 1983. The Court referred to Section 2 of the Act which defined the rest period in the following terms;

"Rest period's means any time that is not working time"

The Court pointed out that the definition of working time is;

"Working time means any time the employee is

(a) At his or her place of work or at his or her employer's disposal; and,

(b) Carrying on or performing the activities or duties of his or her work and,

"Work shall be construed accordingly"

The Court in that case set out the provisions of Section 13 and Article 5 of the Directive.

The Court pointed out;

"Words or phrases in the Act have the same meaning as words or phrases in the Directive unless the contrary is indicated"

The Court stated that there was no question but that the individuals received 35 hours between the shifts. However, the Court held;

"The question maybe more precisely rephrased in the following terms: "Does a requirement to telephone the employer during a rest period bring the employee within the definition of "working times" and/or does it amount to an interruption of the weekly rest period"

The Court held that in order to bring an employee within the definition of working time the employee must "be at his or her place of work or at his or her employer's disposal and be carrying out or performing the activities or duties of his or her works.

The Court held;

"It is common case that the claimants are under an obligation to make the phone call to the employer while on a weekly rest period"

The Court went on to state;

"It is clear therefore that the claimants were performing the activities or duties of his or her work…"

The Court went on to find therefore that the statutory requirements to qualify as working time were met.

The second question which the Court had to raise was whether the employees;

"Are at their place of work. The answer to this question is more difficult as their place of work is not easily identified. It maybe the company, the depot or

the truck to which they are assigned or any place they are required to deliver or to collect from by their employer in the course of their employment"

The Court however went on to state;

"However, the requirement is to be at one's place of work is one of two alternative requirements in the Statue. It appears from a plain reading of the Section that it is sufficient that one be either at one's place of work or at one's employer's disposal. It appears as a Court that these must be read as alternatives either of which meets the statutory of requirements to comply with the test of working time".

The Court went on to hold the mandatory requirement to make the phone call brought the employees into the category of working time.

In DWT1464 the Court restated this view.

It would therefore appear that any interruption of the rest period in effect causes a break in the rest period entitling the employee to issue a claim.

Because of the way that work is currently organised now particularly for those working on shifts, and, those paid on an hourly rate it is becoming common for an employer to require an employee to phone in to get their shift time starts. This leaves the employer open to a claim under Section 13. There may also be subsequent claims also under Sections 11 and 17 as regards notification of start times. It is sufficient to state that employer's need to be extremely careful in requiring employees to phone in to get shift times. The writer is not aware of any situation where an employee has to check their mobile whereby they will be notified by text or their start times.

It would appear to the writer that if such a procedure occurs while an employee is on a rest period under Section 13 and has to check their mobile phone for a text from their employer this may equally come within the reasoning of the Court in the Stobart cases referred to previously.

<u>Drafting a contract to include Sunday work</u>

Where an employer requires an employee to work on Sunday it is important to ensure that the contract specifically provides for Sunday working. It must be self-evident from the contract.

The clause which states;

"Your hours of work shall be X hours per week rostered over Monday to Sunday"

Equally a statement that says;

"The company works on a 7 day a week basis and you maybe rostered to work on any day"

This may also be sufficient but it would be more advisable to add in the words "which may include a Sunday".

Where Sunday work is not specified and the employment is not covered by one of the exemptions then it would appear that the employee is entitled to refuse to work on a Sunday. If an employee is disciplined or dismissed in certain circumstances the employee may well have a claim for penalisation under the provisions of Section 26 of the Act.

How this is applied, however, in practise is sometimes difficult to follow.

In the case of The Fleet Street in Dublin Ltd –and- Burtan DWT12/23 the employer contended the employee was employed to act as a doorman on Saturday evening and Sunday morning. The employer prepared a contract for the employee. The employer could not confirm it was ever given to the employee. The employer submitted that the employee always knew that he had to work on Sunday. The Labour Court held that the employee was "employed for the express purposes of providing door security services…at the weekend". The Labour Court held that the contract for the employee contained a provision that required him to work on Sunday. In Brinks Ireland Ltd and Protsenko DWT 1515 the Court implied a term into the contract that the employee would work on Sunday. However, that case covered a worker previously employed under a contract covered an ERO.

The writer has a difficulty with the reasoning of the Labour Court on this point. The Labour Court does not appear to have had regard to Section 13 (5) which provides that there such a clause must be provided in the contract. A contract cannot be binding on an employee unless it is given to the employee. The Labour Court does not appear to have had regard, in that decision to Directive 91/553/EEC implemented in Ireland by the Terms of Employment (Information) Act or Case C-350/1999 Lange –v- Georg Schuenemann. The Directive 91/553/EEC clearly indicates that the principle terms must be provided to the employee in writing. Also, the issue

as to what extent parol evidence can be introduced is an issue yet to be determined.

In the writer's opinion the fact that the employee would know that he or she is employed to work on a Sunday because of the type of job he or she is employed to undertake does not bring them within the provisions of 13 (5) where the employee is not advised of same in writing.

Shops, convenience stores and department stores, for example, being open on Sundays many of the contracts do not specifically provide for Sunday working. An employee is entitled to refuse to work on a Sunday without such a clause. It is hard to conceive of any situation where an employee takes on a job working for a department store or a petrol station and would not be aware of the fact that there is a requirement to work on Sundays. Any action to dismiss or discipline an employee who refused in such circumstances to work on a Sunday maybe met with a claim under Section 26. In EMC Health Care Ltd –and- Silarska DWT12139 the case concerned a situation where the contract provided for Sunday work but the employee had signed saying she did not agree to working Sundays. The case turned on its own particular facts where the employee was not successful. There were two arguments in that case. The first is that the employee received a contract which provided for Sunday working. There can be no doubt about that. The second is that the employee signed stating that she did not accept or agree to work on Sundays. It would appear reasonable that in those circumstances the employee should simply have refused the employment in its entirety. It is certainly arguable that an employee cannot pick and choose which clauses of the contract of employment they wish to take. If they don't wish to take a contract with particular terms then it would appear irrelevant that the employee simply states that they won't take the job on until they get a new contract which excludes that provision.

<u>When the Section 13 claims arise</u>

Normally Section 13 claims will arise as part of other claims. A Section 13 claim will more usually be heard before an Adjudicator where there is also a Section 14 claim. Where Section 13 claims are taken on their own they normally arise in situations where the employer is claiming the exemption and the issue then arises as to whether the employee received the compensatory rest.

There is a new class of claim which are proceeding at the present time. They relate to higher paid employees. It is usual that what is happening is that the

employee is been contacted on for example a Sunday by a work colleague. The defence which arises in these cases is usually that the employee is an employee who sets their own hours or work. This usually turns then on the terms on the contract of employment. If the contract of employment provides for a minimum number of hours during the week or core hours of work then that argument is unlikely to be able to be made in light of the statutory provisions. Because of the requirement for more senior individuals to be available 24 hours a day 7 days a week 365 days a year with employer's providing such employees with mobile telephones and laptops the potential for such employees not receiving their entitlements under Section 13 increases.

Sunday Working – Section 14

It is now a reality of business that employees, in certain business, will be required to work on Sundays.

The provisions of Section 14 provide that,

"…, in effect, that where the requirement to work on Sunday is not otherwise taken into account in the determination of a worker's pay, he or she is entitled, inter alia to the payment of an allowance of such an amount as is reasonable in all the circumstances". Ireland's Eye Seafood Limited –and-Brekhlichuk DWT1469

This may consist of,

"(a) the payment to an employee of an allowance of such an amount as is reasonable having regard to all the circumstances; or

(b) by otherwise increasing the employee's pay by such an amount as is reasonable having regard to all the circumstance; or

(c) by granting the employee such paid time off from work as is reasonable having regard to all the circumstances; or

(d) by a combination of two or more of the means referred to in the preceding paragraphs".

The issue which arises in respect of an employee is what allowance or increased payment is reasonable.

Where a Sunday premium is set in a collective agreement it shall be regarded as reasonable (Section 14 (3)). In Flexsource Solutions –and-Rutkowski DWT1421 the employer produced evidence that a collective agreement had been entered into, and amended in 2013 to increase the pay rate to €9.90 per hour to include consolidated bonus payments. The Labour Court held,

"…that in accordance with Section 14 (3) … the value of a Sunday premium paid to a comparable employee together with their basic pay are in line with those paid to the complainant. This was collectively agreed… the Court does not find that the Respondent was in breach of Section 14 of the Act".

However, the fact that a rate of pay may equal or exceed ERO/REA is not sufficient in itself. In Duesbury Limited –and- Frost DWT3/2010 the employee was paid in excess of the ERO for the hotel industry. The employer argued that as the ERO rate inclusive of a Sunday premium would be €586 per fortnight and as she was paid €601.22 her wages therefore included a premium for Sundays. The Court rejected this stating

"It is clear from subsection (1) (b) of this Section that the right to compensation for Sunday working can be satisfied where the requirement is taken into account in determining the employee's rate of pay".

The Court went on to say,

"*This suggests that some element of the employee's pay must be specifically referable to the obligation to work on Sunday".*

The Court had heard conflicting evidence on the matter of the alleged premium. The Court held as regards the onus of proof,

"In the normal course it is for the person who asserts to prove that which they assert (see Joseph Constantine Steamship Line Limited –v- Imperial Smelting Corp Ltd AC154) Hence it is for the Respondent (employer) to show that when the Claimant's rate of pay was established a specific element of it was intended to be in consideration of her obligation to work on Sunday".

A Sunday Premium does not have to be a set amount or an hourly premium. It can be an increased hourly rate for every hour worked in a week such as in Coalquay Leisure Limited and Untea DWT1726. In that case the employee received the additional sum of €1.35 per hour to take account of a requirement to work three Sundays out of four. She was contracted to work

40 hours a week so the premium was €1.35 per hour. This case must be contrasted with Trinity Leisure Holdings Limited and Alfimova DWT173 where the contract stated:

"Your salary will be € per hour. This includes your Sunday Premium based on you getting every third Sunday off…"

In that case the Court held that the company had failed to identify any element of the hourly rate of pay specifically referable to her contractual obligation to work on Sunday. The Court awarded a 30% premium. That case went on appeal to the High Court and a decision is awaited. It is always advisable that a contract specifically and clearly identifies what element is a Sunday Premium in clear monetary terms. Even where that is done, the WRC/Labour Court may still determine if it is a reasonable sum. The reasoning for this is to be seen in the case of Viking Security and Tomas Valent DWT1489 where the Labour Court stated:

"In practice the Court can only be satisfied that an employee has received his or her entitlement under Section 14 (1) of the Act where the element of compensation for the obligation to work on Sundays is clearly discernible from the contract of employment or from the circumstances surrounding its conclusion. Where an hourly rate is intended to reflect a requirement for Sunday working that should be identified and clearly and unequivocally specified at the time the contract of employment is concluded either in the contract itself or in the Courts of its negotiations."

This case is being followed in a number of cases, such as Park House Hotel Limited and Wlodarczyk DWT1624.

The Labour Court has consistently said that mere assertions that the requirement to work on Sundays was taken into account cannot be taken on its own as evidence of compliance with Section 14 (1) as in the case of Masterlink Logistics and Rudzinski DWT171. The fact that an employee's salary equally is not evidence that the provisions have been complied with Petrogas Group Limited and Paulauskas DWT1676.

This applies where an employer alleges a payment including a Sunday premium. Various arguments are regularly raised by employers. In the case of Ballinalard Transport Limited –and- Agaskov DWT1359 the employer argued that the contract provided for a Sunday premium. The relevant clauses relied upon were,

"(e) Salary, your salary is €90 per day…

(f) Hours of work. The company operates around the clock 7 days per week.

You will be required to work up to 768 hours in any 16-week period…"

The Court held the combined effect of the two paragraphs did not have the effect claimed by the employer. In Ballinalard Transport Limited –v- Gonczi DWT1368 the Court held that where an employer claims a rate of pay includes a Sunday premium,

"…it is for the Respondent (employer) to so prove".

Where an employee is paid the same rate of pay in his/her contract and is required to work on Sunday compared to those who are not so required in Carbury Investments Limited T/A Ashbourne House Hotel and Eamon O Gorman DWT634 the Court held,

"It is axiomatic that as the claimant, who was required to work on Sunday, was paid the same rate of pay as other members of staff who had no such liability, no element of his pay could have been in consideration of the obligation to work on Sunday".

The argument that the employee was paid in excess of the National Minimum Wage is often argued. Namely that the amount in excess is a "premium". However, to so argue cogent evidence from an employer asserting must be furnished Section 14(4). In Jump Juice Bars Ltd –and-Koniczna DWT12167 the Court held,

"In the absence of such evidence the Court takes the view that the 10% premium over and above the minimum wage… was unrelated to her requirement to work on Sunday"

This issue is also claimed in Scally and Lynch and Kelly DWT102 and 103/2013. Again, the argument was that the employees were paid in excess of the National Minimum Wage the amount being in excess being a premium, the rate, in this case, was in line with a defunct ERO but exclusive of a Sunday premium. As there was no collective agreement in place the Adjudicator did not have to consider Section 14(3). The Adjudicator awarded a premium. The Labour Court rejected the appeal by the employer.

The Court in assessing an award must set an award which is reasonable. The Act gives little guidance. However, if there is a collective agreement in place then the Court must have regard to the terms of any relevant collective agreement Section 14(3) and confirmed by the Labour Court in Sandor –v- Duscan Lipak DWT1141. A comparable employee is defined in Section 14(5) as meaning,

"…an employee who is employed to do, under similar circumstances, identical or similar work in the industry or sector of employment concerned to that which the first mentioned employee in Subsection (3) is employed to do".

It does not appear necessary to identify a particular employee simply a class of employees. This makes sense where there is an ERO for a particular industry.

In DWT1682 Fernhill Meats Limited (in liquidation) and Rodriguez the Labour Court applied a rate of double time that had been in an Employment Regulation Order even though ERO's have been declared unconstitutional and the employee was not covered by it. The Court held that, that rate was indicative of a practice in the industry.

There have been some more novel arguments. Few get to the Labour Court but one did in June of 2014. In the case of Hyper Trust Limited T/A The Leopardstown Inn –and- Gordins DWT1467 the employer argued that a "free meal" provided on Sundays was a premium. It was claimed that this was a substitute for the payment of an increase in pay. The Labour Court held,

"Such a substitution is not provided for in the Act".

The employee was awarded €2,000 for this breach.

The next defence which is regularly trotted out is that the breach occurred, by which is meant the first breach more than six months before the complaint. The Labour Court have regularly debunked this argument and this is dealt with under the provisions of Section 27 of the Act (Campbell Catering Ltd –v- SIPTU DWT 35/2000

The next argument is that an employee may have a different premium rate for full and part time staff. While it is not necessary to set out the reasoning of the Labour Court in full on this point in Campbell Catering –and- SIPTU DWT35/2000 this was rejected.

For employers who have staff who work on Sundays the Decisions of the Labour Court would clearly appear to indicate,

1. If a premium or increased pay is being paid it should be clearly set out.

2. Merely saying that the rate of pay exceeds the National Minimum Wage is not sufficient.

3. If there is a composite rate of pay, say €10 per hour, to include a

   Sunday premium this in itself may not be sufficient. It appears necessary to set out what portion of the "premium" payment relates to Sundays. In Carbury Ireland Limited and Siptu DWT720 it was agreed between parties that the claimants received an extra 14% on their shift pay in consideration for working Sundays and therefore the premium had been taken into account. See also Dublin Bus –v- Derek Michael Rothwell DWT1192

4. Full-time and part-time staff may not be treated differently. If an employer has part-time staff the Sunday rate should be the same for both. Some employers may only have certain staff who work on Sunday. If full and part-time staff work on Sunday they must receive the same rate. If only part-time staff work on a Sunday. different criteria may apply.

5. Payment in kind is not a premium.

The next issue is often the level of the premium. In Group 4 Securitas –and- SIPTU DWT6/1999 the Labour Court held that where there was a negotiated premium for working on Sunday Section 14 could not be used to claim an enhanced rate. A view has been canvassed that if the employer sets the premium of 1 cent per hour or even for shift following DWT6/1999 the Labour Court cannot increase the premium. This is based on the wording of Subsection (1) where the relevant words state,

"… and the fact of his or her having to work on that day has not otherwise been taken into account of in the determination of his or her pay…"

However, the full section if read continues,

"…shall be compensated by his or her employer for being required to work on Sunday for the following means, namely

"(a)…

(b)…by otherwise increasing the employee's rate of pay by such an amount as is reasonable having regard for all the circumstances…"

This point is raised not as an academic point but as a practical issue. The writer has seen such clauses in contracts. One has gone to the Labour Court but the writer is of the opinion that such an argument that 1 cent or other minimal payment would not be upheld by the Labour Court. In the case of the 1 cent being paid which was before the Labour Court this was not provided for in the contract. Therefore, in theory the point is still open to argument.

Section 14 is one of the less used provisions for claims by employees. The reason for this is that the issue of a Sunday premium or enhanced payment is not generally considered by many employees. Part-time employees who bring claims under the Part-Time work legislation rarely consider the add on claim under Section 14. A further reason is that invariably these workers are at the lower scales of pay. Previously various ERO's/REA's would have determined the rate of pay including premiums. With their demise employers are seeking not to pay premiums. There is therefore a rise in the number of such claims. The issue in Sectoral Employment Orders have started to address this issue. Sunday premium cases can often be difficult to both bring and defend. It involves on the side of the employee checking all contracts and documents signed by the employee. These are not always immediately available. From an employer's perspective unless there is an SEO or Collective Agreement the onus of proof in the absence of very clear contractual terms, is on the employer. Claiming there is a "Collective Agreement" where there has been no Union involvement will by necessity require proof as to how the agreement was entered into, the basis of such negotiations being representative of the employees imposed "agreements" with "handpicked" employee "representatives" will be unlikely to succeed. If it was registered with the Labour Court it will clearly be binding. If it was not registered the full proof of it being a "fair" agreement will fall on the employer unless a Union was involved.

In the future the issue of what is a reasonable premium is going to be litigated upon more often particular in non-unionised companies. In unionised companies those premia are invariably negotiated.

Whether acting for an employer or employee proffering an opinion of what a Sunday premium should be by a professional adviser is fraught with problems. If a percentage or amount is proffered it is the person putting that forward to prove same. It would be far more reasonable for the State to provide either a percentage or a minimum additional payment to cover this issue.

I would advise colleagues that if they are appearing before an Adjudicator in the future or the Labour Court that if you are asked to give an opinion on what a Sunday premium is that the answer should be,

"this is outside my competency, while I may have an opinion it is merely an opinion and therefore I will leave it to (insert the title of the entity applicable) to decide on the basis that you have far more experience than I have".

I have, on a personal basis in any Sunday premium case that I have been involved in taken the view with either a Tribunal the Court I will not give a view. The best that I have got to when I have been pushed is to say that I will give an opinion but that my opinion is just an opinion and it is not being put forward on the basis of setting any view merely answering a question as to what my opinion is.

If you do set out a view as to what you, as a professional advisor, believe the premium should be you may find yourself in a situation of being required to produce evidence from comparable companies/employers unless you have wide ranging experience of the particular industry and have access to such information of potentially taking on a burden which will be difficult if not impossible to discharge. It is worth remembering that Adjudicator/Adjudicating Officers in the future, and the Labour Court will have access to information which you will not have and you could find yourself in a situation of having to justify a difficult examination of the premium which you have put forward. This advice applies to whether you are acting for an employer or an employee.

Where a premium is not provided the Court can set a premium Michael Pat Carpendale –v- Nilo Dela Pena DWT526 time and one half was awarded in Scally –v- Lynch and Kelly DWT 102/2013 equally time and one half was imposed.

Section 15 – The 48 Hour Rule

This is probably the best known of the provisions of the OWTA. For a 5-day week when the minimum breaks would be added in it would be some 50 hours and 30 minutes. As with proper structuring an employer should be able to ensure that the employees receive simply a 30-minute break in any working day.

The Section implements Article 6 of the Directive. The averaging period is four months for the majority of employees. It can be six months where the weekly working hours vary on a seasonal basis such as agricultural workers or tourism under Section 15 subsection 5 (a). It can also be six months when there is a collective agreement approved by the Labour Court under subsection 5 (b).

Section 15 (1)(b) as regards the six months averaging refers to paragraph 2.2.1 of Article 17 of Directive 93-104-EC which contains reference to such matters as security and surveillance activities requiring a permanent presence in order to protect property or persons. It would therefore appear that the averaging period for such persons is six months. See Gold Force Security MGT and Suchowiecki DWT0991.

In IBM Ireland –v- Svoboda DTW18-2008 the Labour Court stated it was "noteworthy" that the section uses the words "shall not permit". The Labour Court pointed out that the obligation created was directed at the employer not permitting an employee to work in excess of 48 hours and not merely a prohibition on employers from instructing or requiring an employee to work more than the permitted hours. The Labour Court held it created in effect a "strict liability" and therefore goes further than "knowingly permits".

This matter was again considered in Kepak Convenience Foods Unlimited Company of O'Hara DWT1820 where the Court stated:

"The operative words in Section 15 (1) of the Act are that an employer shall not 'permit'."

In calculating the 48 hours it is necessary to exclude;

(a) Any annual leave granted to the employee. It should be noted that this is the 20 days under the Act. Additional annual leave over the statutory period would be included in any reference period. This can be used to reduce the working hours.

(b) Periods of absence due to parental leave, force majeure leave or carer's leave.

(c) Absences on maternity leave and adoptive leave and;

(d) Any sick leave.

The issue yet to be addressed by the Labour Court is what happens if an employee exceeds the maximum hours in a reference period. Can the employee simply refuse to do anymore work until the average falls below the maximum hours. The issue did arise in Barber –v- RJB Mines UK Limited 1992 to C.M.L.R.833 where Gage J held that in such a circumstance the employee need not work until his working time fell within the statutory limits.

This effectively means the employee can stop working and effectively the employer can do nothing about it.

In assessing the 4 or 6-month period it would be possibly assumed that if a claim was lodged on 1st January 2015 it would be a matter of producing records only for the period July to December 2014. This would not be correct as the employee could pick the July period and go back to April 2014. Effectively it creates the potential of a 9-month reference period wherein the employee can pick any four months that are consecutive.

The case of Swords Risk Services Ltd and Damien Sheahan being a decision of the Labour Court under reference DWT435 the law of what the reference period is for a claim of working excessive hours.

The legislation is clearly set out in Section 15 Organisation of Working Time Act.

How this applies in practice is often open to discussion. In this case a complaint was made in February 2013. The employee had left work in October 2012.

The Court found;

"The Act does not prohibit the Court from calculating the average working week over a period of 6 months provided the effect of that calculation crystallises into an infringement of Section 15 of the Act within 6 months of the date on which the complaint was made by the complainant to the

Adjudicator. In this case the complaint was made in February 2013. The complainant left work in October 2012. The complainant and the Respondent are entitled to calculate the average working week in the six months up to and including the date on which he ceased working for the company".

What does this mean in practice?

An argument is sometimes put forward that the reference period will be the period from February 2013 to a date in September 2012. The effect of this Court ruling is that the averaging period would actually go back to April 2012.

This decision confirms that for claims of working excessive hours, which must be averaged over a four or six-month period of time, that provided the claim is made within six months of the employment ceasing the employee can go back six months prior to the date of leaving. This decision has important consequences for anybody bringing or defending claims.

Are the reference periods set in stone?

The answer to this is no. It is possible for employers to specify a reference period. Rather than effectively a floating reference period as being any four months or six months which crystallises within the six months of the claim being lodged an employer could designate the reference periods. If an employer has a busy December and January then by contract the employer could designate the reference periods being December to March, a second period from April to July and a third reference period, assuming the four-month period is being used, of August to November. An employer could not designate a period December to March and the next period being February to May.

Why should an employer designate a reference period?

The benefit of an employer designating a reference period is that an employer is therefore in a position to manage working hours so as not to be in breach of Section 15. It enables the employer to take account of those working hours. It enables an employer to plan, where necessary to stop an employee working so as not to be in breach of the legislation.

Excessive Work Hour Cases

This issue in excessive hour cases is probably often the easiest to determine. While the working hours may or may not exceed the maximum, where they do not issue such as breaks, and unrecorded time will often determine the issue. These cases invariably revolve around matters of fact or the correct reference period.

What are Working Hours

This issue has been discussed previously in this paper. The issue of what are Working Hours causes problems. Traveling to and from a work place is not "Working Time". However, mobile workers such as cleaners and sales people cause problems and even those who at times move between workplaces.

In Noonan Services Group Limited and Abzinova DWT1677, the Labour Court held that moving between sites, as a worker was a cleaner, was "Working Time" on the basis that the time was not at her disposal. The case commonly called the Tyco case C-266/14 does cause problems. It would appear people like sales people who do not have a fixed workplace but move from client to client are working from the time they leave home until they return. The Tyco argument was rejected in the Noonan Services Group Limited case as the employee have the same premises to clean daily. The Tyco case is the "bete noir" in the room of those dealing with employment cases. It is interesting that even if such time is ultimately held to be "Working Time" for the OWTA it is not "Working Time" for Section 8 (2)(iii) of the National Minimum Wage Act 2000. "On call" time has been held in Knockmaroon Estate Company and Labionschi DWT1660 to be Working Time but that case turned on its particular facts.

There are a number of UK cases. These have been helpful on the issue. In one case, ambulance workers were required to stay in a certain settled location and even thought they could sleep and that time was held to be Working Time. The issue of being on call would appear to be down to how it is organised. If the employee is restricted to a particular place or area or must be available within a set time then the period may not be a Rest Period as the employee may not dispose of it as he pleases. If it is not a Rest Period it is Working Time. There is no intermediate period between resting and working.

The Kepak Convenience Food Unlimited Company and O'Hara case DWT1820 is a clear warning to employers about remote working or working from home as employee data such as mobile phone and computer records are data for

the purposes of the Act and employee accessing emails on the train or bus or at home or working on a submission or case can now readily bring the employee over the 48 hours.

Working at Night – Section 16

The cases involving claims under Section 16 fall into two categories.

The first is that the employee is a special category night worker and works more than 8 hours at night Section 16 (2).

The second is that the worker works more than an average of 8 hours calculated over a period of;

(a) Two Months, or

(b) Such greater period as specified in a collective agreement approved by the Labour Court Section 16 (2) (b)

The second category of claim is the more usual. It however does not require an employee to work solely at night. Night time means a period from midnight to 7am. This is a period of 7 hours. Night work is carried out during this period. Section 16 (1). A night worker is a person who normally works 3 hours of his or her daily working time at night, and, the total number of hours worked at night equals or exceeds 50% of the total number of hours worked.

Who is a Special Category Night Worker?

Such a worker is a person carrying out activities under Section 6 and/or Section 11 (5) of the Safety Health and Welfare at Work Act 1965 by virtue of Statutory Instrument 299/2007.

An employer must without prejudice to Section 16 of that Act take account of particular risks, if any, affecting employees working alone or working in isolation in remote locations.

An employer of a night worker is obliged under Regulation 155 to carry out an assessment to take account of;

(a) The specific effect and hazards of night work, and

(b) The risks to the safety and health of the employee concerned.

Under Regulation 156 the employer must take account of the assessment and shall take such steps as are appropriate to protect the safety and health of the worker.

In the case of a night worker the employer, before employing a person as a night worker, and at regular intervals during the period that the employee is employed as a night worker make available to the night worker, free of charge, as assessment by a registered medical practitioner. If the employee becomes ill or exhibits symptoms of ill health due to night work the employer whenever possible shall assign the employee to non-night time duties to which the employee is qualified to perform. The first comment I would like to make is that in any case I have been involved with I have never come across a provision in a contract of employment for a night time worker advising them of their right to a free assessment nor that they were assessed. Further I have yet to come across an assessment carried out. I am unsure how the provision is to be applied despite being a Directive provision. It is sufficiently clear to have direct effect. Now assessments do occur. It is just that cases involving employers who are compliant do not come up for dispute. An issue yet to be determined by the Labour Court is what happens where there is no assessment carried out under Section 58 of the Safety Health and Welfare at Work Act, 2005.

There is a requirement under Article 8 of Directive 2003-88-EC to do so. In the absence of an assessment can it be argued that the worker is a special category night worker. Section 16 (2) uses the words “shall not permit”. It is therefore prescriptive. The issue will at some stage need to be addressed.

Non-Special Category Night Workers

An issue which regularly arises is to determine whether a person is a night worker. In R-v- Attorney General for Northern Ireland ex parte Burns [1999] I.R.L.R. 315 Kerr J held that the definition of “night worker” could not be confined to somebody who worked night shifts exclusively or even predominantly. The applicant who worked one week in every three weeks cycle from 9pm to 7am Sunday to Friday was deemed to be a night worker for the purposes of the Directive. In Stanislavs Grabovskis and Sam Dennigan & Co. DWT11172 the Labour Court held that the employee was contracted to work between 8pm and 4am which was a permanent roster with no alternative day working roster. Therefore;

"The Court is satisfied that the complainant's contractual hours required him to work at least 3 hours after midnight 100% of the time".

Therefore, the worker was a night worker.

All that is necessary is for the worker to work at least three hours a day after 12 midnight to be a night worker.

A worker who works from 7.30pm to 4am with a rest interval at 12 midnight for 30 minutes will be a night worker. The worker will have no claim under Section 16 as he/she does not work more than 8 hours in any 24-hour period. In addition, less than 50% of the time will be after 12 midnight.

If the worker worked from 7pm to 4.30am with a break of 30 minutes at 1am, the employee will work 9 hours. In a 5-day week the working time, excluding breaks is 45 hours. The employee will be night worker. However, the number of hours worked at night will be only 4 which is less than 50% of the hours worked.

However, if the worker who works from 8pm to 5.30am with the same break at work will qualify as a night worker and under Section 16 as 5 out of the 9 hours will be after midnight.

If a worker works over 48 hours then a claim under Section 15 and Section 16 may both apply. Compensation could only be given under one Section.

In the case of some workers the maximum hours will be 40.

However, the case of Freshcut Food Services Limited and Karpenko DWT156 is that whereas worker receives two consecutive rest days for example a 5 over 7 working week only one of those rest days is reckonable as part of the reference period. On that basis one of the rest days should be included in the divider so as to produce the average daily hours. This appears to mean to come within the Section the worker must work over 48 hours a week averaged.

The argument above seems contradictory. The alternative is that the maximum hours are 40 based on "night time" being midnight to 7am so if the worker works 8 hours average with at least a minimum of a minute over 3.5 hours after midnight that the worker can claim under Section 16, as he/she works more than 50% of their time at night. i.e. between 12 midnight and 7am.

This issue will need to be addressed at some stage. My view is that once a worker works more than 50% of the working time at night being over 3.5 hours at night and works 8 hours per day they are a night worker protected by the Act.

It would however appear that a part-time worker who works just 3 days a week from 10pm to 7am with a rest interval at 3pm for 30 minutes will work 8.5 hours a day. More than 3 hours a day will be at night time and the average will be over 50% of the hours at night. The total hours a week will be just 25.5 hours. Such a worker may well have a claim under Section 16.

What is the Reference Period?

To determine whether an employee is entitled to make a claim the averaging must be over a year. The Interpretation Act 2005 defines a "year" as

"Year" when used without qualifications means a period of 12 months beginning on the first day of January in any year".

Then when should an employee issue a claim?

The reference period will normally be two months. Therefore within 6 months of a breach.

What happens if the breach occurred in March/ April 2019

The reasoning of the Labour Court in Sam Dennigan & Co. and Grabovskis DWT11172 where the claim issued after the year ended but no breach had occurred in the preceding 6 months was one where the Labour Court held that the employees' claim was out of time. From that reasoning the situation would appear to be that the employee would issue the claim at any time up to the end of October but an Adjudicator, in the future, could not hear the claim until January 2020. The reason for this is that it would be unclear whether in the year the employee had worked more than 50% of the time at night. The reality of matters is that an employee cannot determine if there has been a breach until the 31st December in any year. This appears illogical but the alternative would be for the Labour Court to determine that the period to bring a claim would be within 6 months of the end of a year. Currently however I think the claim needs to be brought and then parked until after 1 January in the following year.

Exemptions

Employee covered by Statutory Instrument 21 of 1998 and Statutory Instrument 52 of 1998 are exempted. There are however conditions for such exemptions applying.

Transfer of Undertakings

In the case of Stobart (Ireland) Drivers Services Limited and David Burke and Others DWT1464 the Labour Court considered whether a breach transferred by virtue of the Transfer of Undertakings Regulations from a previous company. The Labour Court held that they were not satisfied the derogation from Section 16 (2) applied.

It would therefore appear that when dealing with the purchase of a company which has drivers or acquiring contracts where there are drivers that it is important as part of any due diligence to ascertain the position concerning night time working of the employees transferring.

Provision of information in relation to Working Time – Section 17

This is sometimes incorrectly referred to as the "overtime section". If there was ever a Section of the Act which, apart from possibly Section12, leads to more controversy, Section 17 would almost certainly be that Section. It often leads to protracted submissions.

The Section in subsection (1) provides that if neither the contract nor an Employment Regulation Order, Registered Employment Agreement, or, Collective Agreement specifies a normal or regular starting or finishing time the employee's employer shall notify the employee at least 24 hours in advance of the start and finishing times on each day. This is subject to the provisions of subsection (3).

The Section in subsection (2) provides that if an employee is required to work for his / her employer such hours as the employer may decide, which are referred to as "additional hours" the employer shall give 24 hours' notice to the employee of the additional hours being effectively the earlier start/finish times or the additional start/ finish times. This is against subject to subsection (3).

The provisions of Section 17 (1) and (2) does include the word "require". This presupposes that the employer determines the hours of work and the employee is obliged to do so rather than situations where the hours or additional hours are done by agreement or consent. Wincanton Ireland Limited and Pavel Pioro DWT1230 was a case where there was a divergence in evidence between the employer and the employee. The employee contended he was required to undertake overtime. The employer contended the overtime was voluntary and could be accepted or rejected. The employer contended there was no element of compulsion associated with overtime work. The Labour Court held;

"The Court finds that the complainant was offered the opportunity to work overtime on a voluntary basis and he chooses to accept such offers when presented to him. The Court notes that Section 17 (1) provides for 24 hours' notice of a "requirement to work overtime". In this case no such "requirement" was present".

A similar approach was taken by the Court in MCR Personnel Limited and Pienszke DWT11109 where the Court held;

"*On a plain reading of the subsection it is intended to cover a situation where a worker is obliged to work the hours directed by the employer…accordingly the Court is satisfied that the Respondent did not contravene Section 17*". See also MCR Personnel Limited and Giermawski DWT1220.

Equally where an employee requests overtime a claim under Section 17 would not arise. Michael Conlon and Juris Kruglijs DWT0939. This equally applies where the employee consents to doing the overtime. MCR Personnel Limited and Pienszke DWT11109 and Donnelly Fruit and Veg and Germovs DWT133.

A single breach, in a reference period, is not sufficient to bring a claim under Section 17 Smart Scaffolding Limited and Bunyakevych DWT877.

Subsections (1) and (2) apply to a situation where the employee is required to do overtime. The basis of this is that there is a "requirement". This will often be evident from a contract. If the employee can refuse the overtime or consents to the overtime then there is no breach of Section 17. The issue of consent is often raised. However, that does presuppose that the employee, is still employed, will be entitled to refuse overtime going forward.

The issue which regularly comes up is where the employer requires the employee to undertake overtime as to what notice the employee is obliged to give and the employee entitled to receive to be obliged to work the overtime. This issue was considered in the recent case of Lucy Transport Limited and Marius Serenas DTW13141 the Court stated in relation to the legislation;

"It seems to the Court that the underlying rationale of the provision is perfectly clear. It is directed at making a sensible distinction between situations in which an employee has a fixed start and finishing time around which he or she can have private or family life and those who cannot do so due to the unpredictability of their work commitments. Where an employee has a contractual entitlement to a fixed starting and finishing time he or she cannot be obliged to start or finish work at any other time as any variation from the contractual terms can only be by mutual agreement. Where, however, an employee's starting and finishing time is determined solely by the employer the law requires that in order to maintain some degree of work/life balance reasonable notice of starting and finishing times must be furnished by the employer".

In DWT1825 Musgrave Limited and Vasilijevs the Labour Court held:

"The Court finds a worker is entitled to 24 hours' notice of their start and finishing times so as to enable them to reconcile their work/life commitments."

The Court then stated:

"It is not sufficient to supply a start time with no certainty as to finish time, allowing for unforeseeable circumstances."

The issue task to finish was considered in such cases as Stobart (Ireland) Driver Services Limited and 14 workers DWT1438 and Stobart (Ireland) Driver Services Limited and Robert Kennedy and others DWT1815 where the Court stated:

"The Court remains formally of the view that Section 17 (1) of the Act clearly requires that, in order for an employer to be able to rely on the saver in that subsection - an employer must have notified by means of expressed written terms in his contract of employment, or by one of the other documented means provided for in the subsection (of his finish and start) times."

Similar issues arose in the case of the Carambola Limited and Kanios DWT1811.

The court held that 24 hours' notice must be given and that failure to do so contravenes Section 17 of the Organisation of Working Time Act.

What does this mean in practice?

If an employee has a fixed starting and finishing time with no provision in the contract which requires the employee to undertake overtime then the employer cannot insist upon the employee doing overtime. Where a contract has a fixed starting and finishing time but there is provision allowing the employer to require the employee to undertake overtime then the employer is obliged to give 24 hours' notice of the requirement to undertake overtime.

The Lucy Transport case is important for restating the law on this issue. What is relevant however to both employers and employees is that failure to comply with this provision can result in significant awards.

In this particular case failure to notify the employee of finishing times was sufficient to result in an award, to the employee, of €2500.

In First Direct Logistics Limited and Stankiewicz DWT1450 which issued on 9 May 2014 the Labour Court was referred to DMR Transport Limited Majchrez DWT1416 where the Court stated;

"The case is not apposite in the instant case". In that case the Claimant had regular starting times but his finishing times were dictated by the pace at which he completed the work to which he was assigned. The Court took the view that it was the claimant rather than his employer that determined his finishing time. On that basis the Court held that Section 17 of the Act had not been contravened.

The circumstances of the instant case are materially different. The claimant's contract of employment did not specify either a starting or finishing time. The claimant did not control or influence his starting or finishing times. While those times may have been influenced by the exigencies of the business, they were nonetheless determined by the respondent except in the circumstances referred to at subsection (4) of Section 17 of the Act (which are not relevant in this case) the Section does not provide an exemption from the requirements as to notification based on the general or continual exigencies of a business.

In these circumstances the Court finds that Section 17 was contravened by the Respondent in relation to the claimant".

This case confirms that the requirement of a business is not a reason for an employee not to receive notifications in accordance with the Act. See also Anglo Irish Beef Processors and SIPTU DWT19/2000.

In O'Leary International Limited and Gurkovs DWT1679, the Court pointed out that the employer may not act in "*disregard of its obligations"* and went to state an employer must manage their business in a *"lawful manner".*

Notice for the Following Week

Subsection (3) applies to require that where an employee does not have a fixed start and finishing time notice for the following week, where an employee works Monday to Friday, will be on Thursday. If the days worked are Tuesday to Saturday the notice must be given on Friday.

Where an employee has no set starting and finishing times, then again, the employer must notify the employee at least 24 hours in advance of the start and finishing times.

In some businesses individuals will work on different shifts. These shifts may change from week to week. The law on this provides that the notice to employees of the requirement to work a particular shift for example a shift starting Monday must be notified the previous Friday. This is an exception to the 24-hour rule. If an employee comes to work on Monday at 9am and the employer wants to change the start time on Tuesday to 8am it is not sufficient to give notice at 9am on Monday as that will not be 24 hours. If however the employer wanted to change the finishing time on Tuesday to 6pm rather than 5pm it would be sufficient if the notice was given any time before 6pm on Monday.

This is one of the unusual provisions of the Act and one which may catch out many employers where they do not have fixed starting and finishing times. It does require that rosters are properly prepared.

Subsection 3 was specifically inserted during the Dail debates to provide for adequate notice to an employee.

Unforeseen circumstances

Subsection (4) provides an exception for an employer where due to circumstances "which could not reasonably be foreseen" then 24 hours' notice is not required. The exigencies of the business are not sufficient as held in Nurendale Limited T/A Panda Waste and Suvac. Equally in Scally and Lynch and Kelly DWT13102 the employer sought to rely on subsection (4) where the employees would be required to work overtime due to the arrival of a large number of customers following a football match or concert. The Labour Court held that in running an Applegreen Service Station the Court would not accept that the occurrence of exceptional demands on the business due to a match or concert was an unforeseeable event as contemplated by this Section.

It is not sufficient for an employer to simply contend there were exceptional circumstances without proving these on a case by case basis. In Stobart (Ireland) Driver Services Limited and Michael O'Riordan DWT12170 the Court stated *"… the Respondent said that it did not remember the circumstances which prevailed at the time …"*. The Court held against the employer.

In Lucy Transport Limited and Sereanas DWT13144 the Labour Court held;

"In any event, it is for the employer who seeks to rely on the subsection to establish on cogent evidence what the intervening events actually were on the basis upon which it was contended that they were unforeseen".

It is interesting that the Labour Court appears to allow a difference under Section 17 (4) in circumstances where there is a breach of Section 15 excessive hours which has a prohibition on an employer allowing an employee to work over 48 hours on average as arose in South East Concrete Limited and Grossfeldt DWT1093.

In that case the average hour working time excluding rest / breaks was 48.52 hours. The employer contended that on certain occasions due to weather conditions the claimant was required to pour concrete outside its normal working hours for which it may not have been always possible to give the requisite 24 hours' notice. Now it appears axiomatic to me that where there was a breach of Section 15 which has an absolute prohibition on the employee working in excess of 48 hours averaged the employer could still rely on section 17 (4). I cannot accept this reasoning as sustainable as regardless of the "*circumstances which could not be reasonably foreseen*" the

employer cannot even permit the employee to work in such circumstances so therefore it appears to me that Section 17 (4) cannot be availed of in such circumstances. Saying this, the Labour Court has held that that is what the law is.

It is possible that the relief in Section 5 of the Act equally does not apply as it has to be an "exceptional circumstance" which could not have been avoided despite the exercise of all due care. It would appear to me that at a very minimum Section 17 (4) would require a test of "*which could not have been avoided despite the exercise of all due care*". The issue in such cases will very much depend on whether you read the Act in the whole or whether you read the Sections as completely separate and distinct. This is a personal view but I am not sure that the South East Concrete Limited would be decided now in the way it was in the light of the recent case of Nurendale Limited and Suvac, the Scally and Lynch and Lynch and Kelly case and the Lucey Transport Limited and Serenas cases. I was the Solicitor in the South East Concrete case and readily admit that I have a significant problem with that decision. Saying this, it is a decision of the Labour Court and therefore it is one that I have to accept that this is the law on Section 17, as it currently stands.

Conclusion

The defence of the exigencies of the business are regularly raises. Unless he employer can come within the provisions of the exemption in Section 5 or in subsection (4) of Section 17 then the exigencies of the business are irrelevant. If an employer is going to rely on subsection (4) then cogent evidence will be required by the employer to prove same on each occasion that this arose. This does require maintaining records.

However, if an employee does not have to accept the additional hours then no claim arises Martin Quigley (Nenagh) Limited and Karavajeva DWT1625.

Section 17 is not there to cover situations where the employee consents or agrees to do the overtime or requests overtime. It is there to cover situations where the employee is required to do overtime.

Employers have to run a balance, in managing a business, to determine whether they require overtime to be worked. In such circumstances the provisions of Section 17 must be complied with. It might appear at first sight that the easiest way of dealing with matters is simply not to include a provision requiring the employee to work overtime. If there is no provision in

a contract providing that an employee has to work overtime then the employee is entitled to refuse the overtime and the employer cannot take any action against the employee for doing so as if they do then there is a potential claim under Section 26 for penalisation.

Zero Hour Working Practices – Section 18

This Section is one I believe is going to become more relevant in coming years.

There is a misconception that the Act applies only to zero-hour contracts. It actually applies to zero hour working practices.

Zero Hour Working Practices – Not Zero Hour Contracts – The Real Test

The case of Ticketline Trading as Ticket Master and Sarah Mullen DWT1434 which issued on 10th April 2014 is an important decision clarifying the issue in relation to what are commonly called zero-hour contracts. The Court in this case set out a detailed overview of the legislation.

The Court held that the employee, in this case, had a contract which was operated as though she was required to be available for work at all times. This is in line with Section 18 of the Act which refers to contracts where there are a certain number of hours, or, as and when the employer requires him or her to be available for work, or both a certain number of hours and when the employer requires him or her to be available for work.

The Court found that where the employer requires an employee to keep themselves available for work the employee comes within the scope of Section 18 of the Act.

This case has significant implications for both employers and employees. It goes further than the normal "zero-hour contracts" situations.

If a contract of employment requires an employee to work say 40 hours per week and the employer does not provide work then the employee may bring a claim under the Payment of Wages Act but may also bring a claim under the Organisation of Working Time Act.

Under the Organisation of Working Time Act the employee would be entitled to claim 10 hours pay for each week. However, in addition, the Organisation of Working Time Act provides for compensation of up to 2 years wages.

A number of employers will have what are commonly called "zero-hour contracts". However, the actual wording of same, and, the way they operate in practice will now be subject to review as to whether the employee does have rights under the Organisation of Working Time Act. Clearly if the employer requires the employee to be available, or, if the contract provides for a set number of hours or a combination of either of these two situations the employee will have a claim against the employer.

The case is also important in that it confirms that the Labour Court will not look just at the written terms of any contract but will also look at what the relationship between the employer and the employee was. The Court will consider what representations and statements were made by or on behalf of the employer. In this case the Labour Court accepted that the statements were made on behalf of the employer which required the employee to be available for work. As a result of this the Labour Court awarded compensation of €3000. The experience in Ireland is different than that in the United Kingdom. In the UK, there is no obligation on an employer even if they require an employee to make themselves available, to pay the employee or to suffer the potential of a claim under the equivalent of Section 18 OWTA if work is not provided. The Irish legislation is different. There is some advice issuing from certain entities that the alternative is to provide a contract as a "casual worker". Merely calling a contract a "casual employment" is not in itself sufficient. A Court in Ireland will look behind the title of any contract to find out what it actually says. The most recent decision of the Labour Court enables the Court to look at what the actual relationship between the employer and employee was. In addition, the Court will look to see what was said to the employee by way of statements or representations. Employers who are considering either zero-hour contracts or casual contracts of employment need to carefully look at all documentation to make sure that there is no requirement whatsoever for the employee to be available to work.

In addition, employers must make sure that managers or supervisors do not say anything to such employees which could be deemed to be a requirement for the employee to be available or required to be available to work.

By judicious planning it is reasonably easy for an employer to avoid section 18 entirely by having a properly drafted contract. In addition, the employer can have the added benefit of an exclusivity clause. Put another way an

employer can have "bonded employees", who are not given any particular hours and cannot work for anybody else. As Section 18 is not a Directive provision there is no fall back to the Directive. This issue of zero-hour contracts is under review both in the United Kingdom and here in Ireland. It is widely open to abuse. It is therefore reasonable to believe that this Section will be amended into the future.

Who does Section 18 apply to?

Section 18 applies to an employer who requires an employee to make himself or herself available to work for the employer in a week;

(a) A certain number of hours (the contract hours), or
(b) As and when the employer requires him or her or
(c) Both a certain number of hours and as and when required.

Section 18(1)

Section 18 (1) does not apply to casual workers even when there would be a reasonable expectation that the employee would be required to do such work. See Contract Personnel Marketing Ireland –and – Buckley DWT45/2011.

The Section in subsection (2) provides an employee will have a right to claim for a particular week if the employee is not provided with work

(a) In the case of a contract providing for a certain number of hours 25% of those hours, or

(b) Where the employer requires the employee to be available as and when required or both a certain number of hours as and when required. Then when work of the type which the employee is required to make themselves available for has been done for the employer in that week at least 25% of the hours for which such work has been done in that week.

Who is a "casual worker"?

The term casual worker is not defined. Section 11 of the Protection of Employees (Part-Time) Work Act, 2001 does define casual worker and it refers to a worker not being a casual worker if they work for the employer for over 13 weeks and the work they do could not be regarded as regular or seasonal employment.

The Labour Court has not for the purpose of the OWTA defined who is a casual worker or the test to be applied. Because of some "schemes" currently in existence or under "construction" at some stage this issue will need to be addressed. The Labour Court with its specialist knowledge of the workplace is best suited to address this.

When is it allowed not to provide work for an employee?

The provisions of Section 18 have exemptions. An employer will have a defence where there is a lay-off or the employee is kept on short time for that week. For there to be a lay-off the provisions of the Redundancy Payments Acts would need to apply. In the case of placing an employee on short-time the contract of employment would need to have such a provision. There is an argument, though it is not relevant to this seminar today, that where an employee is placed on short time that this can be a breach of the employee's contract entitling the employee to claim Unfair Dismissal.

There is a complete exclusion for casual workers. The issue is who is a casual worker as discussed above.

Even where an employer is held to have breached Section 25 the maximum award is 25% of the contracted hours. The Act in this section would also not seem to apply to a worker who works during the week for an employer at least 25% of the contracted hours. Therefore, if an employee has a contract to work 20 hours a week and receives 5 hours' work there is no claim.

When can an employee bring a claim?

Where the employee has been required to work for the employer for less than 15 hours in a week the employee is entitled to have his or her pay calculated on the basis that he or she worked for the employer in that week, the percentage of hours referred to in subsection 2 (a) or subsection (b) which would be 25%. The provisions of Section 18 will not apply where an employee is absent due to illness or for any other reason. Section 18 (3) (b). If 25% of the contracted hours would be less than 15 hours the maximum financial loss is 25% of the contracted hours. Compensation of two years wages can be awarded for any breach, in addition.

Calculating the entitlement

Where an employee is requited to work as and when required or a set number of hours and as and when required the reference in subsection (2)

(b) to the hours for which work of the type referred to in that provision is to be construed as a reference to the number of hours done by another employee or two or more employees in that week then the employee may effectively seek to rely on the employee who does the greatest number of hours subsection (4).

In practice this means that if an employee would normally work 40 hours a week and is not provided with work and another employee during that week works 30 hours doing the same work as the employee who is bringing the claim would have done then the employee bringing the claim can claim 25% of 30 hours.

An employee will not be covered in situations where the employee is required to be on call to deal with emergencies or other events which may or may not occur subsection (5).

How to avoid Section 18

The Labour Court has held that the section operates on the basis of "Zero Hour Practices". However, it is worth looking at the Section as to how an employer can avoid the Section. The first is that even where the contract provides for 40 hours a week and the employee is not given any work in that week the Labour Court has in cases held that the Act does not apply. That appears to be contradicted by the Ticketline case.

While the Labour Court recently has referred to "zero hour working practices" the Act refers to "any week". There is a difference between a zero-hour working practice and it happening in any week. This issue is likely to arise by way of legal argument into the future.

The second is to simply structure a contract to evade the Act and you do not use the words "avoid". I purposely use the word "evade". It appears to the writer reasonable easy to evade the Section. It appears there is little that an Adjudicator, an Adjudication Officer in the future, or, the Labour Court can do about it.

The basis of structuring matters is to provide a contract which provides for zero hours. The second is to provide that it will be a casual contract to work as and when required. The third is to provide that the employee can refuse any work assignment or decline work for any reason and that there would be no disciplinary action as a result of doing so.

The above structure would appear to be possible because of the strict wording of the legislation. The difficulty is that it will require managers to fully understand the scheme and not to place any pressure on a worker to come to work. A slight variation would be to;

1. Provide that the employee will work say 1 hour a day for 5 days a week

2. To provide that further hours may be provided on a casual basis and that in respect of the extra hours the employee will not be disciplined for refusing same and can refuse same for whatever reason

3. To include an exclusivity clause.

Now it is reasonably easy to "mess up" an employee who does not comply with whatever hours the employer wants the employee to work. By calling the employee to work at short notice, but at least 11 hours, then if the employee does not come to work the employer does not have to pay for that period. Calling an employee for one hour a day means the employee cannot claim Social Welfare for that day. In addition, and we have seen where the employee is called and cannot get to work when the employer is contacted by Social Welfare the employer will say that they offered work to the employee and the employee refused it. In such circumstances Social Welfare will not pay for that day.

In such situations the employee cannot claim more than 1.25 days' pay per week under Section 18 at best. It would appear possible to the writer to structure matters so that it is still a zero-hour contract with everything else being on a casual basis. In such circumstances 25% of zero is zero.

At the present time the use of exclusivity clauses is under review in the United Kingdom. The current position is that colleagues, whom I know in the UK, are already working on schemes to avoid the proposed UK review.

There are legitimate reasons for zero-hour contracts. There are legitimate reasons for a limited number of hour contracts on a daily basis. There are legitimate reasons for casual employees. However, zero-hour contracts are being abused to effectively provide for a form of bonded labour with a prohibition on working for any other employer.

There is little that an Adjudicator or the Labour Court can do to unwind such schemes, unless the definition of a "casual worker" is addressed.

Luckily the Act is being reviewed in Ireland and the Minister for State and the Department of Jobs, Enterprise and Innovation must be congratulated for taking this on. However, it would appear to the writer that there is little comprehension on just how these schemes are being used to create effectively a bonded labour workforce.

How has the Section been applied in practice?

The issue arose in the case of Anora Commercial Limited and Regina Stasytiene DWT13119. In that case the employee had a contact to work 39 Hours per week. The employee was not provided with work for the week starting the 5th January 2013. The Labour Court rejected the claim on the basis that the employee was not employed on a zero-hour contract. This is despite the fact that the Court quoted Section 18 (1) which refers to;

(a) A contract of employment

(b) Which operates to require the employee to make herself available to work, and
(c) That the contract provided for a certain number of hours.

The employee in that case complied with the three tests yet the Labour Court held against the employee. The argument of a zero hour working contracts is irrelevant to the provisions in the writer's view. A contrasting position then was taken in the case of Twenty Four Seven Recruitment Services Limited and Kozak DWT12148 in 2012. In that case the Labour Court held the contract of employment did not assist the Court as the contract was drafted as a contract for services not a contract of service despite being subsequently accepted as a contract of service. i.e. an employment contract. The Labour Court in that case confirmed that there was no evidence to the Court that the employee was a casual worker. The claim of the employee succeeded.

These are contradictory Decisions of the Labour Court. The Decision in Anora Commercial Limited DWT 13119 and the Ticketline DWT1434 appear contradictory. I may be wrong on this point.

Conclusion Concerning Section 18

It is my view, and it is only my view, that the issue of Section 18 is only now beginning to become important because some employers are structuring matters in a particular way. The issue as to whether the provision applies to situations where an employee has a contract to work a set number of hours per week and is not provided with work is still entitled to claim under Section 18 will need to be addressed by the Court to deal with the possible contradictions in decisions. It is my view that an employee could bring a claim under Section 18 for 25% of their hours and subsequently a Payment of Wages claim for breach of contract either in the Courts or under the Payment of Wages Act for the difference. In addition, Section 18 of the Act allows the Labour Court to award compensation for any breach of up to 2 years wages. It will be interesting to see how the jurisdiction of the Labour Court develops in relation to Section 18.

It will be equally as interesting to see how some employers will seek to structure arrangements going forward to avoid Section 18. A considerable amount of legal expertise is currently being utilised to create robust structures which will be impregnable to attack. Employers who have a form of "bonded worker" who is exclusively tied to them but with no guarantee of work are particularly vulnerable and open to abuse. Those wishing to maintain this control will certainly agitate to retain same. The only viable way to give some protection is to utilise the definition in the Protection of Employees (Part-Time-Work Act, 2001 or for the Labour Court to specify what type of arrangements are "casual" and when does "casual" working cease to be "casual".

Entitlement to Annual Leave – Section 19

This Section implements Article 7 of the Directive. In Case C-282/10 Dominguez the ECJ ruled that Article 7 was sufficiently unconditional to have "direct effect".

Section 19 sets out three entitlements to paid annual leave being;

(a) 4 working weeks in a leave year in which the employee works at least 1365 hours (unless the employee changes employment in the leave year). This exclusion in the case of a change of employer would not apply where the TUPE Regulations apply.

(b) 1/3 of a working week for each month where the employee works 117 hours, or

(c) 8% of the hours he or she works in a leave year up to a maximum of 4 weeks. Section 19 (1).

The employee is entitled to whichever of (a), (b), or (c) is the greater.

An issue which is arising and has arisen is for example Yupon Limited and Lacplesis DWT1670 in relation to Section 19 (3). That Section is one which directs that an employee who works 8 years or more is entitled to two weeks uninterrupted leave. In that case it was upheld by the Labour Court. In another case the Court held as the employee had requested "days" it came under Section 20 and was more beneficial to the employee.

Section 19 (3) is a stand-alone Section. Again, following case C-684/16 employers need to be vigilant in applying this provision. As many contracts set out:

"You may not take more than two weeks at any one time."

They may now need to be changed to:

"You are required to take an unbroken period of two weeks at least once during the leave year and failure to do so shall be a disciplinary offence."

In George D O'Malley and Liachavicius DWT074 the Court referred to the case of Edward James Feeney and Milagros Bacquiran [2004] 15 E.L.R. 304 where;

"…this Court made it clear that the provisions of the Act and of the Directive on which it is based, are health and safety imperatives". Here the Court said the following.

"In Cementation Skanska (formerly Kavaerner Cementation) –v- Carroll Labour Court determination WTC0338 (October 28 2003) this Court stated as follows in relation to the computation of compensation for failure to provide annual leave in accordance with the Act. The obligation to provide annual leave is imposed for health and safety reasons and the right to leave has been characterised as a fundamental social right in European Law (see comments of Advocate General Tizzano in R-v-Secretary of State for Trade and Industry ex parte Broadcasting, Entertainment Cinematography and

Theatre Union [2001] I.R.L.R. 559 which was quoted with approval by Lavin J. in the Royal Liver case.

In Case C-12405 Federalie Nederlandse Vakbeweging –v- Staat der Nederlanden the ECJ described the entitlement of the worker to paid annual leave as a "*particularly important principle of Community Social Law from which there can be no derogation*".

In Rutledge recruitment and Training Limited and Lemanski DWT15102 the Labour Court specifically referred to the above case and went on to say;

"*The right of a worker to avail himself/herself of a period of paid annual leave is a fundamental social right*". The Court awarded €3,000.

Where an employee becomes ill on holidays that day or days will not count towards the holiday entitlement provided a certificate is provided from a medical practitioner Sophie Litiali Hair and Design and Victoria O'Reilly DWT1824. Section 19 (2). The Act does not set out when such a certificate should be provided but it would, by necessity, need to be furnished within the leave year.

The issue as to what is a leave year consistently causes difficulties. This may seem strange. The Interpretation Act defines a year as effectively the calendar year unless a contrary interpretation applies. Section 2 of the Act defines a leave year for the purposes of the Act as commencing on 1 April in one year and finishing on the following 31 March. Many employers and their representatives will argue that the contract with the employee provides for the annual leave year 1 January to 31 December. The Labour Court has consistently refused to accept same. The reason is simple. In Royal Liver Assurance Limited –v- Macken [2002] 4 IR427 Lavin J held that the leave year was a fixed period set by Statute and there was no provision to alter same. Lavin J held that an infringement of Section 19 of the Act could not be deemed to have occurred within the time scale of the leave year having expired without the paid leave having been granted. This was confirmed in the case of Meades Bar Limited and Smali DWT1727. The employee than has six months i.e. until 30th September to bring a claim. In Medicus Medical Centre Limited and Terlecka DWT10101 the employer's representative argued that the employee could only go back six months from the date of the claim. The Labour Court rejected this and held that the complaint within six months of the leave year finishing related to the entire leave year. See also Waterford City Council and O'Donoghue DWT0963.

In the UK the statutory leave year is the default provision where a leave year is not specified by contract. My own view is that this would be a preferable position. Unfortunately, our legislation does not account for same.

Where an employee works 8 months or more in a leave year the employee is entitled to an unbroken period of two weeks. This means uninterrupted. This means the employee can leave their laptop and mobile phone on their desk. They can refuse to take calls. They should not even be contacted during their holidays. This provision is however subject to the provisions of an Employment Regulation Order, a Registered Employment Agreement or Collective Agreement. Importantly it also covers any agreement with the employer. In Fannin Limited and Marek Marciniuk DWT1344 the employer argued that the practice was that employees requested holidays.

In case of Meades Bar Limited trading as Victoria Café and Layala Smalli DWT1727 is a case where the employee appealed the decision of the Adjudication Officer. A compensation of six days pay for Annual leave and three days pay for Public Holidays was granted. The Court in this case reviewed the legislation at depth including the jurisdictional issue which is covered in the case of Royal Liver Assurance -v- Macken and others, the High Court 15th November 2002 which held that an infringement of Section 19 of the Act crystallised at the end of the leave year to which it relates. The Court also pointed out that Mr Justice Lavin found that each breach of the Act in respect of an employee's entitlement to receive pay for working on a Public Holiday was a discrete contravention of the Act and a complaint in respect of that offence must be brought within six months of its occurrence. In this case the Labour Court held that employee submitted her claim on the 29th August 2016. The employee's employment had finished on the 2nd July 2016. The Labour Court held that the relevant period was from the 23rd October 2015 to the 2nd July 2016. The employee commenced employment in October 2015. The Court found that therefore the claim as it related to failure to provide the Complainant with her entitlement to Annual Leave in a leave year ending on the 31st March 2016 and the entitlement to Leave in the leave year commencing on the 1st April 2016 could all be heard.

The Labour Court helpfully set out the legislation and significant amount of case law relating to Article 7 of the Directive 93/104/EC and in relation to the issue of Annual Leave and pointed out that paid Annual Leave is a fundamental social right in the law of the community. The Labour Court found that the employee was entitled to the sum of €320 in respect of the breach of Section 21 of the Act and €1,152 in respect of Section 23 of the Act being the underpayment of the Public Holidays and Annual Leave. The Court

then pointed out that the Complainant is not limited to recovering the economic or monetary value of the payment withheld. The Court pointed out that compensation up to two years pay could be made. The Court ordered a compensation of €2,000 to include the outstanding Annual Leave and Public Holiday payment as found by the Court to be paid.

Therefore, if the employee went the whole year without 2 weeks annual leave being taken this was in effect by agreement. The Labour Court upheld the employer's argument on a reading of Section 19 (3). The two weeks uninterrupted provision is a Statutory not a Directive provision.

An issue which has yet to be addressed is whether this has to be an informed consent or whether it can simply be imposed by an employer. The Labour Court has yet to rule on whether an employer must advise an employee of their entitlement to two weeks holidays being an uninterrupted period of two weeks.

<u>What is a working week?</u>

The phrase "working week" is nowhere defined in the legislation. In Irish Ferries and Seamens Union of Ireland DWT35/2001 this issue arose. In this case the employees worked an annualised contract. They were required to work a little over 2000 hours per year. The employees were rostered to work on a continuous 7-day period. They were then rostered off duty for the next following 7 days. The company calculated the annual leave entitlements as being 168 hours paid leave. This was 14 days by 12 hours. This was equivalent to 8.33% of the hours worked. The Union disagreed with this. The Union contended that they effectively only received two weeks paid holidays per year. The Labour Court rejected the claim. The Court said that the entitlement to annual leave must correspond to the amount of time which the employee would normally be required to work in each work cycle. In this case the employees were required to work 12-hour days or 168 hours over each four-week period. On that basis their entitlement had been correctly calculated. It is however noteworthy that in the case of Tithe Saoirse Chleire Teo and Noel O'Driscoll DWT1170 the Labour Court in a case where the employees worked 2 weeks on and 2 weeks off stated;

"The term paid annual leave is not defined in the Act or in the Directive. It is however, a term of common usage in industrial relations and is well understood as meaning a period of rest and relaxation during which a worker is paid his or her normal wages without any obligation to work or provide any service to the employer. In the Courts view what is required by Article 7 of the Directive

and by the Act is not only that workers received the requisite leave but that they be unconditionally and automatically be paid their normal weekly rate specifically in respect of that leave".

In that case the employees, unlike in the previous case referred to, did not receive any payment from the employer specifically in respect of holidays. Compensation in respect of €3000 was awarded.

It would appear that if the employer had during the year on two occasions stated that a portion of each monthly salary was holiday pay i.e. two weeks at a time then the employees may well not have had a claim.

These two cases highlight the importance of employers structuring matters correctly and ensuring that appropriate communications are made to employees as regards their entitlements. If the employer does it correctly as in the Irish Ferries Case the employer wins. If the employer does not do it correctly then the employer loses. It may be said that this sounds incredible. The converse is that if the employer structures matters properly they can get away with paying the employees who do this type of week on week off work effectively two weeks paid leave a year instead of four weeks paid leave in a year. It is in effect a structuring of matters to limit the amount of holidays pay an employer has to pay. If they do it right they get away with it. That's the law.

<u>What happens where an employee's holiday includes a Public Holiday?</u>

When an employee's holiday includes a Public Holiday that Public Holiday would have to be separately paid for. However, in calculating the period of 2 weeks unbroken leave subsection (4) confirms a Public Holidays would be taken into account.

For example, an employee who goes on holidays starting on a Bank Holiday Monday in August and returns to work two weeks later will have obtained 9 days Annual Leave and 1 Public Holiday but for calculating the two weeks uninterrupted leave entitlement they will have received two weeks unbroken leave.

<u>Can an employee receive either days or hours off instead of weeks?</u>

The legislation refers to four working weeks in a leave year. Two of them must be uninterrupted subject to certain exemptions and exceptions referred to previously. It would therefore appear, that from a strict wording

of the Act it is a working week that the employee must receive off not individual days. However, following the reasoning in Fanning Limited Case DWT1344 it may well be possible to argue that where the employer and the employee agree that days will be taken, provided that the employee receives the full two weeks uninterrupted leave the balance can be taken by way of days. However, I am not sure this is the law. Such an argument, if made, will be unpopular with Adjudicators and the Labour Court. Saying this, it may well be the law that Annual Leave has to be calculated as a "week" not "days".

What is the position of employees on sick leave?

In the case of workers on sick leave there are a number of cases currently before the Labour Court. The Irish legislation is clearly at variance with the ECJ ruling on Article 7. The Minister for Jobs, Enterprise and Innovation has been aware of this.

The European Court of Justice ("ECJ") has ruled on a worker's entitlement to be paid for annual leave / holidays while on sick leave.

There are two important European Court decisions on this being case C-350/06 and C-520/06 both which are commonly called the Stringer case. These decisions of the ECJ have huge significance for employers and employees throughout Europe.

The Findings of the Court

The ECJ held that a worker's annual leave / holiday entitlement continues during periods of sick leave.

- A worker's entitlement to have worked during the leave year in question is not necessary to obtain such rights.

- A worker's annual leave / holiday entitlement in a given year may not lapse at the end of the leave year or any carry over period due to the worker's inability to work.

- The maximum period of leave which a worker on sick leave can obtain is limited to 18 months. Therefore, the maximum leave which can an accrue is 6 weeks being four weeks a maximum period of 18 months.

- Where a worker does not return to work prior to his / her employment being terminated (whether by the employer or by the employee) the worker is entitled to payment in lieu of the outstanding Annual Leave / Holiday Leave entitlement not taken during the period of his or her sick leave.

There is an argument that Irish law currently does not comply fully with the rulings of the ECJ. The Organisation of Working Time Act 1997 requires the worker to actually have worked in order to obtain the Annual Leave / Holiday Leave entitlements. The Workplace Relations Act 2015 in Section 86 has amended the Act of 1997 to provide for such payments but only past 1 August 2015. To claim same the employee must be able to show evidence of providing medical certificates to the employer. The Labour Court in Jurys Inns Group and Nikodem DWT 1592 held it did not have power to go back prior to 1 August 2015. I agree there is a strong argument this is correct. The Counter argument is applying the Directive as found by the ECJ.

What if the Irish law is not compliant with the ECJ ruling. Then employers will have no liability or potential liability. This does not mean that the worker will lose their rights. The worker will be entitled to sue the Irish State for the loss. It would appear that any worker, whether or not they have brought a claim before the WRC or the Labour Court and whether or not they have complained to their employer will be entitled to bring a claim if it has arisen in the last six years and possibly back to when the Act came into force. This could be a substantial cost to the Irish State.

If the Irish legislation is in compliance with the ECJ ruling, which is questionable to say the least, then employers will have a liability. Even if employers at the present time do not have a liability, employers need to deal with workers' who are on long term sick leave rather than allowing them to remain on the books indefinitely as such workers' will become entitled to Annual Leave / Holiday entitlements in respect of the entire period that he or she was out sick. The Organisation of Working Time Act was amended by the Workplace Relations Act 2015.

Questions will arise as to what the effect of the ECJ ruling is. The ECJ ruling only applies to the 4-week mandatory Annual Leave / Holiday entitlement which workers are entitled to obtain. Additional Annual Leave over and above the Statutory Minimum will not be affected by the ECJ ruling.

Is it possible to pay the employee their holiday pay weekly or monthly?

The Labour Court has held in Mikoinan and Motovilova DWT54/2007 and P.B. Cygon Limited and Kowalik DWT34/2010 it is not permissible to pay an employee an "allowance" in lieu of holiday pay. Employers cannot pay 8% weekly or monthly to cover holiday pay. This was held to be the position in case C-131/04 and C-257/04 C D Robinson Steele and others where the CJEU stated:

"… Article 7 of the Directive precludes the payment for minimum annual leave within the meaning of that provision from being made in the form part payments staggered over the corresponding annual period of work and paid together with the renumeration for work done, rather than in the form a payment in respect of a specified period during which the worker actually takes leave."

This was affirmed by the Labour Court in the case of Meade's Bar Limited Trading as Victoria Café and Smalli DWT1727 where the Labour Court stated:

"It is clear from the foregoing that the right to worker to paid annual leave is a fundamental social right… consequently by domestic law, is that workers receive holidays as periods of rest and that they are paid specifically in respect of such periods at the time the leave is taken and in advance."

In that case the Court held that the principles in Von Colson and Kamann C-14/83 applied.

"You shall be paid an additional 8% of your wages / salary as a payment of your holiday pay weekly".

Time and Pay for Annual Leave – Section 20

This Section can effectively be split into two distinct portions.

The first part in subsection (1) sets out that it is the employer who shall decide the time at which annual leave is granted to an employee. It is not however an unlimited discretion for an employer. The employer must take into account;

(a) The need of the employee to reconcile work and family responsibilities and

(b) The opportunities for rest and relaxation available to the employee. Subsection 1(i) and (ii).

The employer must consult the employee or the Trade Union (if any) representing the employee. Subsection 1 (b). This must first presuppose that the employer consults rather than dictates. The employer it would appear could not determine that all holidays would be taken in November or February. In the case of a worker with children holidays would have to be scheduled during holiday periods. The employer must also look at the opportunities for rest and relaxation. This therefore on the wording of legislation requires a positive engagement by the employer. This will always be a matter of evidence and probably records. In a unionised working environment, it would be easier. Clearly in some industries such as the building industry we had the historical builders' holidays in the first two weeks of August. Factories did usually close for certain defined periods. Now this is less so. The employer must determine same not later than one month before the day on which the annual leave or the portion thereof is due to commence. Subsection 1 (c). Where employer does not "consult" but merely "imposes" leave it will not be deemed to be Annual Leave.

This was clearly seen in the case of R & M Quarries Ltd and Ronan Galvin, DWT1224. In that case the employer did not give one months' notice to the employee. The employee submitted to the Labour Court that there were six days when the employer used the Annual Leave entitlement to pay the employee for days when there was no work available therefore leaving the employee with no pay for 6 days when he was actually on holidays. The Court held that this was not in compliance with the Statutory provisions and found that the employer was in breach of Section 20 of the Act. An award of €1800 was made in respect of the breach.

<u>Pay in Lieu of Holidays</u>

ECJ Case 124/05 Federatie Nederlandse Vakbeweging –v- Staat der Nederlanden ruled that Article 7 of the Directive precluded the replacement by an allowance in lieu of untaken days of annual leave. The ECJ held it would create an incentive not to take leave or would encourage employees not to do so. In Bernard Welden and Stephen Poleon DWT928 the issue related to what holiday pay had or had not been taken and paid. There were no records. The employee contended he worked some of the time paid as Annual Leave. The Court determined the employee has received 20 of the 35 days due to him during his employment and awarded €1500 as compensation. In John Hetherton and Jaininne O'Reilly DWT10108 the

Labour Court held that the inclusion of an element in the employee's pay to cover holidays, which may or may not be taken at some point in the future, is inconsistent with the result envisaged by the Act in the case of Kvaerner Cementation (Ireland) Limited and Martin Treacy DWT017.

The Decision in the Bernard Weldon case is certainly consistent with the Act and the ECJ decision in Case 124/05. It is hard to see how the case of Martin Treacy DWT017 is. Paying an allowance whether weekly, monthly or at the end of a leave year may create an incentive not to take holidays. Including for example a percent of weekly pay in a pay packet as being towards holidays is more likely than not to be treated by the employee as weekly pay. It may well leave the employee in a position of being unable to take holidays or certainly not able to take them fully and enjoy those holidays as an opportunity for rest and relaxation. The Labour Court has held it is consistent but I would disagree.

Can holidays be carried over?

The employer may grant the Annual Leave to the leave year to which it relates within 6 months of the end of the leave year. However, the consent of the employer is required. Section 20 (1) (C). In Royal Liver Assurance –v-Macken [2002] 4 I.R. 427 at 433 Mr. Justice Lavin stated this was;

"… the enable flexibility so that the employer may reconcile the needs of the business with the rights of the employee".

Mr. Justice Lavin went on to point out that the express language of the Section required the consent of the employee and was: -

"… a condition precedent to the ability of the employer to extend the leave year by an additional six months".

An interesting case is the case of Wicklow Co. Counsel and Winters DWT171/2012. In that case the employee was employed on a fixed term contract which was due to expire on 1 July 2011. On 3 June 2011 the employee was told to make arrangements with regard to his outstanding annual leave entitlements. When the employment came to an end the employee still had outstanding entitlements to four days leave. Wicklow Co. Council refused to pay him cessor pay pursuant to Section 23 of the Act on the basis that he had been grated his Annual Leave.

The Labour Court importantly found that contrary to subsections 1 (a) and

(b) the Council had neither consulted with the claimant not later than one month before the portion of the Annual Leave concerned was due to commence nor taking into account his need to reconcile work and family responsibilities. In that case the Court determined that this was a valid claim under the Act.

The calculation of Holiday pay

The calculation of an employee's pay for holiday pay purposes is a combination of Section 20 of the Act and the Organisation of Working Time Act (Determination of Pay for Holidays Regulations) 1997 S.I. 475/1997.

Subsection (2) provides that pay in respect of an employee's Annual Leave shall

(a) be paid to the employee in advance of his or her taking the leave,

(b) At the normal weekly rate or proportionate to the normal weekly rate and

(c) Where the pay includes board or lodging or both then compensation for same at the prescribed rate must be paid. This will be the rate, in effect, in the National Minimum Wage Act.

The normal weekly rate is determined in accordance with S.I. 475 of 1997 by subsection (4). Where the salary or wages is determined wholly by reference to a term or fixed rate or salary or any rate which does not vary the normal weekly rate of pay shall be the sum (including any regular bonus or allowance the amount of which does not vary in relation to the work done but excluding any pay for overtime) which is paid in respect of a normal weekly working hours last worked by the employee before the annual leave.

For many workers who are paid a salary or a fixed number of hours per week at a fixed rate it is relatively easy to calculate the entitlement. If the salary or wage includes any regular allowance which does not vary that is easy to calculate also. However, overtime is excluded by Regulation 3 (2). Where the pay is not calculated wholly by reference to the matters in Regulation 3 (2) it is necessary to look at the average weekly pay (including any pay for overtime, calculated either

(a) In the period of 13 weekly immediately before the Annual Leave or the cessor of employment, or

(b) If no time was working in these 13 weeks, then 13 weeks ended on the day the employee last worked before the Annual Leave. This will cover a situation where an employee had been on lay-off Regulation 3 (3) or on sick leave.

If the employee is on short time there would at first sight appear to be a difficulty for the employee getting their proper entitlements to their normal weekly wage although it is arguable that it would be the normal weekly wage not the short time wage which will apply.

In Broadford Cleaning & Maintenance Services Ltd T/A Direct Cleaning Services and Irena Kalcuka DWT 14106 the Court held that merely requiring the employer to pay the economic value of the holidays does not provide sufficient redress. It went on to state the award should "act as a deterrent".

What happens where the employee earns commission?

In Case C-539-12 which issued on 12th May in a case of Lock –v- British Gas Trading Limited the ECJ had to consider the issue of how holiday pay was calculated for a salesperson. This decision will apply to any individual who received commission.

The Working Time Directive provides that every worker has a right to paid annual leave of at least 4 weeks. In this case the employee had been employed by British Gas as a consultant. His remuneration package had two main elements. He had a basic salary and commission. The commission was payable on a monthly basis in arrears. The UK Employment Tribunal referred a case to the Court of Justice asking whether the commission which a worker would have earned during his annual leave must be taken into account in calculating his holiday pay and how must it be calculated.

In the Judgement the Court pointed out that during annul leave a worker must receive their normal remuneration. They stated that the purpose of holiday pay is to put the worker during that period of rest in a situation which, as regards the employee's salary, was comparable to periods of work.

The company argued that the objective was achieved as the employee received during his annual leave a salary including not only his basic salary but also the commission resulting from sales achieved during previous

weeks. The Court rejected that argument. The Court took the view that notwithstanding the payment received by the employee during his annual leave, the financial disadvantage which, although referred, is none the less genuinely suffered by the employee during the period following leave, may deter the employee from exercising the right to annual leave.

The Court held that as the worker did not generate any commission during the period of annual leave that the consequence of this is that in the period following the annual leave the worker is only paid their basic salary. The Court therefore found that such a reduction in holiday pay is liable to deter the worker from actually exercising their right to take annual leave. They held that this was contrary to the objectives pursued by the Working Time Directive.

The Court held that it would be necessary for the worker to have their pay, during the period of annual leave, determined in such a way as to correspond to the normal remuneration received by the worker.

The issue is how is this going to operate in practice.

Possibly an example might best explain the situation.

Example

Employee A received four weeks holidays.

Employee A therefore works for 11 months in the year and has one month off. Employee A therefore earns €11,000 commission in the year.

As Employee A would normally earn €1000 commission in a month for the period of time that the employee takes holidays effectively the Court has held that the commission he would have earned during the period must be included in holiday pay.

What does this mean in practice?

This means in practice that instead of Employee A receiving commission, during the year or €11,000, Employee A will receive commission of €12,000. The reason for this is so that in the month following the leave, Employee A will not be in a position that he received no commission payment.

The result for the employee

The result for employees who are on commission is that effectively they will receive 1-13th (as there are 52 weeks in the year) additional commission.

The result for employers is that additional commission is going to have to be paid.

Conclusion

This decision only issued on 22nd May 2014.

Employers who pay commission need to review this decision immediately. Failure to do so could result in claims being brought to Court. It could be extremely expensive for them.

This Court decision will affect not only sales persons but anybody who earns commission. The practical implementation of this decision in Ireland will have to await a decision from the Labour Court. In the meantime, employers need to be careful and take advice about the effect of this decision.

The press release relating to this decision is available on http://cusia.europa.eu/jcms/upload/doc/application/pdf/2012-ot/cp14007en.pdf

The ECJ decision mirrors an earlier decision by the Labour Court in Hidden Hearings Limited and Smart DWT0516. That case in 2005 in Ireland which was some nine years before the decision of the ECJ also dealt with the issue of commission. In that case the Labour Court stated;

"It is difficult to envisage how these objectives could be fulfilled if a worker could be made to suffer a significant reduction in his or her income while on holiday".

That was a particularly difficult case in that if the Labour Court had not found in favour of the employee the employee would have been receiving, during holidays, a sum less than the National Minimum Wage.

There is a view that the decision of the ECJ goes further than that of the Labour Court and opens up the potential of overtime being included. The Labour Court has determined that pay is to be determined in accordance with Regulation (3). However, the ECJ Decision appears to effectively require

the "commission" to be parked until the employee returns from holiday but during his holiday receive an amount equivalent to the commission. The Labour Court decision in Hidden Hearings Limited did not go as far as that of the ECJ. It will be interesting to see how this jurisprudence develops.

What happens when the employee is not paid the correct rate of pay?

In Annaclone Construction Limited and Kenneth Travers DWT1617 the Labour Court stated that failure to pay the correct Annual Leave was "an egregious breach of the 1997 Act".

In MCM Security Ltd and Power DWT95/2008, the Labour Court held that overtime is not payable in calculating either annual leave or public holidays. The employees were employed in the Security Industry covered by an ERO which required regular rostered overtime to be included in holiday pay. The claimants claimed that by virtue of Section 44 Industrial relations Act 1946 they had a contractual right to the inclusion of regular rostered overtime. The Labour Court rejected the claim on the basis that regulation 3 (2) and Regulation 5 (1) did not provide for same. A similar approach was taken in O'Brien and Kulajevs DWT92/2010 and Malone and Barczak DWT162/2010.

However, this basis of reading the legislation changed in the case of Comerford Developments (Ireland) Limited and Robertas Preiksaitis DWT1247. In that case a different argument was put forward. This was that in reading Regulation 3 (2) and 5 (1) these has to be read in the light of Regulation 2. The legislation is set out at length in the decision. Saying this, the basis proposition is that Regulation 2 refers to;

"… a sum liable to be paid…".

The contract for the employee provided for €11.45 per hour. The REA for the Construction Industry for him was €16.37.

The Labour Court held that the reference to the "sum paid" must be read in the context of Regulation 2 and to Section 30 (2) of the Industrial Relations Act 1946. The Labour Court held the employee was entitled to be paid a sum of €16.37 per hour for holidays and public holidays. This decision issued in 2012.

I mentioned this case specifically and for some reason it is not referred to in Kerr's Irish Employment Law which is the "gospel" for all employment lawyers.

Overtime

The Labour Court has held in MCM Security Limited and Power DWT95/2008 that even where an employee is contractually required to work overtime failure to include such overtime in holiday pay cannot give rise to a complaint under the Act. The issue however is whether the Lock Decision of the ECJ, referred to previously, can be interpreted as applying to overtime.

Assuming the Labour Court is correct the following structure would appear to enable an employer to pay €50 per week as holiday pay or €10 per day for a public holiday not worked. Even where an employee would normally work 40 hours a week and earn €400 per week. This structure will be;

(1) The contract provides for the employee working from 9am to 10am five days a week.

(2) The contract further provides the employee will be available to do overtime every day from 11am to 1pm and from 2pm to 6pm

(3) The contract provides for a flat rate of pay of €10 per hour.

(4) The contract provides the employee will not normally be required to work on a Public Holiday.

The requirement to be available to work and the obligation to do so create a contractual entitlement to 8 hours per day, 5 days a week, being €400 a week. As 7 hours per day are described as "overtime" then for Public Holidays the rate of pay will be €10 per day and for holidays €50 per week.

The "overtime" is regular. It is daily. It is rostered. It is a contractual provision. Effectively it is a disguised form of normal working hours. When an employee is contractually obliged to do overtime and the employer contractually obliged to provide it then it is possible the Labour Court may revisit this issue. The example given may be extreme but I can envisage a variation which will be less extreme but would clearly reduce the liability of an employer to pay Holiday Pay or pay Public Holidays at the "real" rate of pay.

Overtime historically was not contractual. It was a "perk" which employees sought and which employers gave as a perk. It was something which may be regular but was rarely if ever guaranteed. It was of variable length. The

working environment has changed. Now overtime is becoming a contractual obligation. It is often no longer voluntary. The term overtime is not defined in the legislation. In a number of Industrial Relations Act claims the Labour Court has recommended that regular rostered overtime would be paid as paid of holiday pay. The Labour Court is in a unique situation in that it has a unique understanding of the workings of business because of its structure. It draws members from both sides of industry. It is not difficult to conceive that the Labour Court would be well able to determine what constitutes what could be termed as normal overtime and what is effectively normal working time but which is described as overtime.

Public Holidays – Section 21 and Section 22

In reading Sections 21 and 22 it is also necessary to consider Statutory Instrument 475 of 1997 being the Organisation of Working Time (Determination) of Pay for Holidays (Regulations) 1997

One issue which did in the past come up is that an employee would claim for Bank Holidays. There is no entitlement in the Act to a Bank Holiday only to Public Holidays.

While it may still appear in the body of the complaint the heading in the new form is Public Holidays which cures this issue for claimants. The use of the word "Bank Holiday" as opposed to "Public Holidays" has been used in the past to defeat claims.

There are currently 9 Public Holidays. They are set out in the Second Schedule of the Act. Good Friday is a Bank Holiday. It is not a Public Holiday.

What are the entitlements of an employee?

An employee is entitled to whichever one of the following the employer determines;

(a) A paid day off on that day
(b) A paid day off within a month of that day
(c) An additional day of annual leave
(d) An additional day's pay / Section 21 (1).

It should be noted that if the day on which the Public Holiday is a day on which the employee would be entitled to paid day off then subsection (1) is read as if (a) was omitted.

This can be relevant in a number of situations. Unlike the issue of Annual leave there is no requirement to consult with the employee.

For employees who work up to the 48-hour maximum they will at times need to be sent home on full pay to bring their average down.

If the Public Holiday falls on one of those days then they are already on a paid day off so options (b) (c) or (d) have to be decided upon.

For many office workers if a Public Holiday falls on a Saturday or Sunday they will get the following Monday off. In Revenue Commissioners and Gerard Doyle DWT0625 the Labour Court held;

"… the Court is satisfied that the employer may determine when the benefit will be provided. Where the Public Holiday falls on a Saturday or Sunday, Mondays are usually selected as the days when employees, who are otherwise off on those days, will benefit from the holiday entitlement".

The reason for this is that subsection (6) provides that subsection (1) applies to a day on which the employee is not required to work.

This makes logical sense. Otherwise employees would not need to be paid for a Public Holiday other than a day on which the employee was required to work.

In the absence of contractual provisions an employee may not later than 21 days before a Public Holiday request an employer to make a determination under section 20 (1) and to notify the employee within 14 days of the Public Holiday (subsection 2). If the employer fails to do so the employee is entitled to a paid day of on that day. Where an employee issues a request under Section 21 (2) an employer needs to elect otherwise the employee is entitled to the paid day off on that day. This was held in the case of E Smith School t/a The High School and Sean McDonnell DWT1411. The employee was a Supervisor. The employee was told he had no entitlement to Public Holidays and the employee accepted this. On a Public Holiday the school was closed and the employee had a day off but was not paid. This omission was rectified subsequently.

In this case the Labour Court quoted the case of Royal Liver Assurance –v- Macken [2002] 4 I.R. 427 where Lavin J stated;

"The requisite infringement for the purposes of Section 21 (1) would arise in contexts where the employer has failed to elect between the various entitlements of an employee under Section 21 (1), where the employer fails to give a paid day off on the Public Holiday or an additional day pay, as the case may be. In each case it seems the infringement would arise on the date of the Public Holiday itself".

The Court held that the Act had been infringed as the employee had not been paid at the time despite the fact that the issue had been rectified by the employer subsequently. Compensation of €1500 was awarded.

<u>The position where an employee is not required to work on a Public Holiday</u>

The leading case on this issue is Thermo King and Pat Kenny DWT0611. The background is probably relevant in explaining this provision. The employee was on certified sick leave. During his sick leave there were four Public Holidays. During the certified sick leave, the employee was entitled to his full pay under a collective agreement. The Adjudicator held that only two options were practicable namely an additional day's annual leave or an additional day's pay. The Labour Court held that it was clear that the days in question were part of his entitlement to sick pay under a collective agreement and were offset against the total entitlement. The Labour Court held that in such circumstances they could not be treated as also discharging the statutory obligation. The Labour Court the circumstances came within subsection (1) and (6) where the Court stated;

"The clear import of these provisions is that where an employee is otherwise entitled to a paid day off on a day which is a Public Holiday the granting of that day off with pay cannot subsume the employee's statutory entitlement in respect of the Public Holiday".

A similar approach was taken in An Post and Glenn King DWT072.

In HSE West and Alison Mehan DWT0884 the HSE on appeal contended the decision in Thermo King should not apply to them as retrospectively they had decided to treat the payment which the employee received for the day in question as being in respect of her statutory entitlement rather than under the sick pay scheme. The Labour Court rejected this and affirmed the Adjudicator's decision of an additional days annual leave or an additional

days pay to be implemented within 6 weeks. The decision is HSE West and Fiona Dermody DWT1044 is very similar.

Where the sick pay scheme which operates provides that the entitlement to Public Holidays is neither subsumed nor offset by the occurrence of a Public Holiday during a period of sick leave there will be no claim. Lufthansa Technic Airmotive Ireland and Ulick Daly DWT091 and Leitrim County Council and Alan Martin DWT0914.

This issue arises in cases involving sick pay schemes. When devising a sick pay scheme, which is a paid sick pay scheme it is important to provide that where a Public Holiday falls on a day during the Sick Leave that two provisions operate namely;

(a) That the employee receives an extra days annual leave, or

(b) That the employee is paid for the Public Holiday and the leave period is extended by any period covered by a Public Holiday.

<u>The position of Part-Time Workers</u>

This issue was considered in Revenue Commissioners and Gerard Doyle DWT0625. The employee was on a contract for 80% of the time of a full-time worker but was not required and in fact prohibited from working on a Monday and on a Friday afternoon.

The Labour Court referred to Regulation 5 (2) which provides that where the employee does not normally work on that day that the appropriate rate is 1/5 of a week's pay. The Labour Court held that Regulation 3 (2) would apply and Regulation 5 (1) (a) would apply which would be the employees' normal daily hours last worked prior to the Public Holiday.

The Court pointed out that there is no definition of "normal daily hours". The Court considered what it could mean when they stated;

"The term "normal" daily hours can have many shades of meaning. In the context in which it is used in the Regulations it can mean the hours routinely or regularly worked on a particular day or it can mean the hours worked on a day to which no special or particular arrangements can apply. It can also mean the normal hours worked by the employee and averaged over a period of time. The Court is satisfied however that what appears not to be open on the language of the statutory provision is the interpretation

which would fix an employee's entitlement in respect of a Public Holiday by reference to the daily rate to which he or she would have been entitled had they worked on that day.

Having examined his contractual working pattern the Court is satisfied that in this case special arrangements applies to the Complainant which results in his working week being 80% of the working time of a full-time member being spread over 5 days, and therefore the hours worked on Mondays and Fridays cannot be regarded as his normal daily hours.

The Court is assisted in this conclusion by the terms used in Regulation 5 (1) (b) which state;

(b) In any other case, the relevant rate in respect of that Public Holiday shall be the sum that is equal to the average daily pay (excluding any pay for overtime) of the employee calculated over.

(i) A period of 13 weeks immediately before that Public Holiday, or,

(ii) If no time was worked by the employee during that period, the period of 13 weeks ending on the day on which was last worked by the employee before that Public Holiday.

Section 5 (1) (b) clearly provide for the calculation of "average daily pay excluding overtime pay" calculated over a set period. This averaging provision is in line with that provided in subsection 1 (a).

The Court is furthermore satisfied that Regulation 5 (2) and Regulation 6 "relevant rate for certain categories of job sharers similarly provides methods for calculating an "average daily rate". Therefore, the Court is satisfied that a calculation of the complainant's rate of pay for the purposes of his Public Holiday in respect of Public Holidays which fall on Mondays and Fridays should be the average daily rate, based on his contracted working arrangements, i.e. 1/5 of his weekly rate of pay equals 6.5 hours. However, since the complainant already works for part of that day and is therefore already on paid time off for that part of the day the Court interprets this to mean that he is therefore entitled to be paid an extra 2.56 hours for such Public Holiday on the basis that he is already paid 4 hours on those days."

On this basis the employee was going to be paid 8.12 hours for a Public Holiday which would have been more than the pay the employee would have received on a normal day that he worked. This is a vagrancy of the legislation.

Job Sharers

Regulation 6 provides that where there are job sharers who work half the time required to be worked by a whole-time employee of the employer the rate of pay will be 1/10th of the sum that is paid in respect of the last two weeks of normal working hours worked by the employee before the Public Holiday.

Now, when this is considered with the decision in Revenue Commissioners and Gerard Doyle, discussed previously, there are significant benefits in monetary terms for the employer having job sharers rather than part time workers.

Lay-off Provisions

Because of the way the provisions of Section 21 and 22 are structured along with the Regulations where an employee is on lay-off the provisions relating Regulation 5 (1) (b) will ensure that the employee will receive a payment for a Public Holiday during the first 13 weeks of any lay-off where it occurs.

Special Entitlements to Public Holidays

In the Third Schedule of the Act there are four provisions sometimes overlooked covering Section 21 (5);

(1) Where an employee has had an occupational accident, Public Holidays must be paid for 52 weeks from the date when the employee has been absent on sick leave

(2) For Public Holidays which fall within 26 weeks by reason of an injury sustained by the employee in an accident or by reason of a disease from which the employee suffers these must also be paid. Therefore, an employee who is involved in for example a car accident would be able to receive this entitlement. It would also cover an employee who was injured as a result of being involved in a sporting accident which might have nothing whatsoever to do with their employment.

(3) Where the Public Holiday falls within 13 weeks of a period during which the employee has not been provided with work. This would include a lay-off situation.

(4) An absence due to a strike in the business or industry.

If an employee is absent for any other reason such as absenteeism then by virtue of Section 21 (5) the employee will not have an entitlement. In addition, if an employee does not come within the provisions of the third schedule equally there will be no entitlement.

Overtime

In MCM Security Limited and Tom Power DWT0895 the Labour Court reviewed Regulation 3 (2) and Regulation 5 (1) and stated;

"It is clear from the wording of both Regulation 3 (2) and Regulation 5 (1) that payment in respect of overtime is not reckonable in the calculation of pay for … Public Holidays".

A contrary view was taken by the Labour Court in Headway Security Services Limited and Peter Finn DWT 1579 where overtime was taken into account to calculate the entitlement.

TUPE Transfers

Where there is a transfer under the Transfer of Undertaking Regulations then the transferee assumes full responsibility for any breach which occurred prior to the transfer. This was confirmed in the case of Top Security Limited and Group of Workers DWT071.

Rate of Pay

While claims under Section 21 and Section 22 are not Directive provisions. The Labour Court in such cases as Cheshire Ireland and Gallagher DWT1675 have held that the clear import of Sections 21 and 22 and SI 475/1997 is that to ensure that during Public Holidays an employee receives "no less and no more" than he or she would receive if he or she had been working. The Labour Court relied on the reasoning of the CJEU in case C-155/10 Williams -v- British Airways, Case C-539/12 Lock -v- British Gas Trading Limited and the principles applied in Hidden Hearings Limited and Smart [2005] 16ELR367 by the High Court.

Conclusion

The issue of Public Holidays and the pay for same is invariably one of a mixture of fact and law. The difficulty for practitioners is sometimes aligning the facts to the law or the law to the facts. The difficulties are particularly compounded when there is a divergence due to lack of contractual documentation, and /or records, as to what is the normal working time. The Regulations were drafted in different business times with different business models. There is a strong argument the Regulations need to be reviewed to mirror the reality of current relationships and the manner in which businesses operate. However, that discussion is outside of the scope of this seminar which is to deal with the law as we have to bring and defend claims under.

Penalisation of a Worker – Section 26

Section 26 sets out that an employer shall not penalise an employee for having in good faith opposed by lawful means an Act which is unlawful under the Act or the Activities of Doctors in Training Regulations. Where a penalisation of an employee, in contravention of the Act, constitutes a dismissal of the employee within the meaning of the Unfair Dismissals Acts 1977 to 2007 relief may not be granted to the employee in respect of penalisation both under the OWTA and under those Acts. The legislation however does not preclude a claim for claiming compensation and obtaining compensation both under the OWTA and the Safety Health and Welfare at Work Act.

In Paris Bakery and Pastry Ltd and Mrzliak DWT68-2014 the Labour Court confirmed that penalisation includes what is generally referred to as a constructive dismissal. The Labour Court considered Sections 26 of the Act in detail.

The Court pointed out that the term “dismissal” is not defined in the Act. The Court logically determined that the reference in Section 26 to the Unfair Dismissal Acts suggests that the term should be given the same meaning as is ascribed to it in those Acts. The Court referred to Section 1 of the Unfair Dismissal Acts 1977 to 2007 and in particular referred to Section 1 (b) and (c). The Court held that where the employer commenced a repudiatory breach of contract the employees entitled to accept the repudiation and consider himself or herself dismissed. In this case the conduct of the proprietor of the respondent company in perpetrating a serious and unprovoked assault on

the employee had the effect of undermining the duty of mutual trust and confidence. The Court measured the quantum of compensation as being €10,000. In this case the employee had complained about not receiving a break at work and had informed the proprietor that he was entitled to receive a break.

The ECJ has ruled that where an employee objects to working over 48 hours but is normally working 48 hours where an employer reduces the employee's hours and reduces their wages that by reducing the hours to below 48 where an employee is entitled to work 48 hours a week amounts to penalisation Case C-243-09 Fuss –v- Stadt Halle and Case 429/09 Fuss –v-Stadt Halle (No. 2).

In First Glass Limited and Babianskas DWT1647 the Labour Court held that while penalisation is not defined, it is:

"Generally accepted as the imposition on the employee of some detriment."

Can an employer threaten an employee? If they do is this penalisation?

An employer it appears under the OWTA can threaten an employee and it does not amount to penalisation. This was held by the Labour Court in the case of Nurendale Limited and Ainars Lucens. Ainars Lucens worked for Nurendale Limited T/A Panda Waste. The employee made a complaint that he had been penalised. The employee in this case had issued a complaint against the employer. A Decision of the Adjudicator was made which was appealed. The employee then submitted a fresh series of complaints to the Adjudicator. Shortly after this the complainant was called to a meeting with the company manager. In the conversation that took place at this meeting the employee maintains it amounted to penalisation.

The Court had to consider did this amount to penalisation. The Court stated;

"However, the section appears to apply in circumstances where penalisation has actually taken place. The section does not appear to protect a worker against a threat of penalisation".

The Labour Court pointed out that an employer shall not penalise an employee for having in good faith opposed by lawful means an Act which is unlawful under the Act. The Labour Court contrasted Section 26 of the OWTA with Section 27 (3) of the Safety Health and Welfare at Work Act 2005 which

states that an employer shall not penalise or threaten penalisation against an employee.

The Labour Court therefore properly held that the Oireachtas could have chosen to protect employees against a threat of penalisation under Section 26 of the Act. The Court held that as the evidence did not disclose any actual detriment that had been suffered by the employee therefore the Court had to conclude that Section 26 of the Act had not been infringed.

The effect of this decision is that an employer can with immunity threaten an employee. It is not a complete immunity. For example, if an employee was put in fear of physical abuse that would of course be penalisation. However, for example a threat that an employee would be fired, demoted, or have their pay reduced but with none of these actually happening would only be a threat and would not be covered under the provisions of the Act.

This is certainly a shortfall in the legislation.

Section 17 Employment (Miscellaneous Provisions) Bill 2017 will rectify this defect.

Assessing Compensation

The Labour Court deals with effectively two different compensation issues. The first is those provisions covered by the Directive. The second are those which are not covered by the Directive.

The Labour Court does make a distinction between the two. In my view it is difficult to see why there should be although there is an argument that the Directive provisions would be a more serious breach. If that is true then where there is a breach of a Directive provision the breach would need to be minimum to attract significant compensation, as a breach of a fundamental right.

The Directive Provisions

In Royal Liver Assurance and Macken [2002] 4 I.R. 427 Lavin J held that the entitlements under Section 19 of the Act was a fundamental right. This Decision is quoted often by the Labour Court in applying to other Directive provisions.

The Labour Court in considering an award of compensation applies the test set out by the ECJ in Sabine Von Colson and Elisabeth Kamann –v- Land Nordrhein –Westfalenset which set out the principles to be applied in determining compensation for breach of community law as;

"… then in order to ensure that it is effective and that it has a deterrent effect that compensation must in any event be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation such as, for example, the reimbursement only of the expenses incurred in connection with the application".

These principles have been stated by the Labour Court on many occasions such as Bryan Cullen and Witko DWT10104.

However, the issue of equivalence has not as yet been addressed by the Labour Court and where there is a considerable amount of European Law.

I will be referring to the High Court Decision Michael Browne and Iarnrod Eireann/Irish Rail (No.2) being a Decision of Mr. Justice Hogan delivered on the 5th of March 2014 High Court Reference 2008/379S [2014] IEHC117.

It has been held by the Labour Court, in a number of cases that the Von Colson and Kamann principle applies.

It is also been held that breach of the Directive amounts to a breach of a fundamental social right as held by Mr. Justice Lavin in the Royal Liver Assurance case which case has been referred to by the Labour Court on many occasions.

The Von Colson case held that for the purposes of imposing a sanction for the breach of a prohibition it leaves it to the Member States free to choose between the different solutions suitable for achieving its objectives. This is also the position in relation to the Regulations and the Directive. The ECJ held that it requires that if Member States chooses to penalise breaches of that prohibition by the award of compensation then in order to ensure that it is effective and that it has a deterrent effect the compensation must be adequate in relation to the damage sustained and must therefore amount to more than purely nominal compensation. The ECJ held that it was for the National Court to interpret and apply the legislation adopted for the implementation of the Directive in conformity with the requirements of

Community Law in so far as it is to give discretion to do so under National Law.

Under our National Law the legislation and the Regulations provide for up to two years compensation in respect of any of the Sections of the Act which are breached. By which I mean two years for each and every breach for each Section.

The ECJ held that the Directive and effectively all European legislation relating to Working Time does not include any unconditional and sufficiently precise obligations which in the absence of implementing measures adopted within the prescribed time limit may be relied on by an individual in order to obtain specific compensation under the Directive where that is not provided for or permitted under National Law.

In the Judgement of Mr. Justice Hogan referred to previously the cases in question had Mr. Browne retired in September 2006 he would have received a voluntary severance package of €148,157 together with a monthly annuity of €2174. Because he could not avail or was not allowed avail of the voluntary severance offer the employee earned just over €300,000 in total over these three years. His capital sum increased to €10,000 and his annual annuity increased by a figure of €2800. The Plaintiff Mr. Browne claimed the sum of €2174 per month together with interest as contract debt for that three-year period of time.

Mr. Justice Hogan awarded the employee a sum of €20,000 for each of the three years he was obliged to work by way of damages for breach of contract making a total award of €60,000.

A considerable part of the case related to the question as to whether the Plaintiff be permitted to recover the contract debt and whether this would amount to a form of double recover given that the plaintiff did in fact work for a further three years and his retirement package was in fact enhanced by reason of the fact that he worked the extra three years.

In the Browne case, referred to previously it was held by Mr. Justice Hogan,

"In these circumstances, it can hardly be a surprise that Mr. Browne elected to carry on working despite his most profound misgivings. This may thus be regarded as another example of where, in the words of Lord Reid in White and Carter, by refusing cooperation (i.e. namely to pay out on the early retirement agreement) the party in breach, "Can compel the innocent party to restrict his

claim to damages" this is effectively what happened here since, for all practical reasons I have just mentioned, Mr. Browne must be regarded as having accepted the repatriation by then returning to work and indeed, continued to work for another three years".

It is noteworthy that in that case it was stated at paragraph 14,

"It was at this point that Mr. Browne had an option, namely, to accept the repudiation and to sue for damages for breach of contract or alternatively, to refuse to accept it and, if necessary, to sue to enforce the subsisting contract. As applied to the facts of this case it meant that he could accept the repudiation and return to work, while later suing for damages. Or, alternatively, he could refuse to return to work and insist that the early retirement contract was still in force and effect. This would not have been an easy choice to make. Specifically, as I noted in the first Judgement, it would probably have been financially unrealistic for the plaintiff to elect to ignore the wrongful repudiation of the early retirement contract by Iarnrod Eireann, this would have left him bereft of any income while he sued to enforce the September, 2006 agreement".

"It is by reason of those facts that Mr. Browne forfeited his right to sue in debt for the liquidated sum promised by the early retirement package. Having been compelled by force of circumstances to accept the repudiation, his remedy now confined to damages for breach of contract. What, then, was his loss?"

As Mr. Justice Hogan pointed out Mr. Browne did not suffer any direct financial loss. Indeed, his lump sum and final retirement pension were all enhanced. His loss was therefore,

"A different loss, namely, being deprived of his right to take early retirement after long years of as an exemplary employee".

Where employees have for example not received their rest period or worked in excess of 48 hours they may have no financial loss and may even have a financial gain. They have the loss of failure to get an entitlement.

Mr. Justice Hogan considered this issue and referred to a number of Decisions noted McMahon J in Johnson [1976-77] I.L.R.M.93/105,

"It appears to me that in principle damages may be awarded for inconvenience or loss of enjoyment where these are within the presumed contemplation of the parties as likely to result from a breach of contract. That was certainly the case in contract to provide entertainment or enjoyment, but there is no reason

why it should not also be the case in other types of contracts were the parties can foresee that enjoyment or convenience is likely to be an important benefit to be obtained from the due performance of that contract".

Mr. Justice Hogan held that at paragraph 20,

"The type of loss and inconvenience suffered by the plaintiff is undoubtedly intangible and very difficult to measure, it is a real one".

Mr. Justice Hogan went on to state in the conclusion at paragraph 21,

"While the measurement of this loss in monetary terms is in many ways all but impossible, I think that the yard stick should be that any damages award should be tangible and significant, without being excessive or even generous".

The Oireachtas in their wisdom have set a monetary limit for any single breach of the Organisation of Working Time Act. That limit is two years remuneration for each Section. The State has therefore implemented the Directive.

In the Von Colson case the Court stated,

"Finally, it is in keeping with the purpose of Directive number 76/207/EEC for the purpose of imposing a sanction… it leaves to Member States the choice and the determination of the sanctions…. however, that principle applies only in conjunction with the general principle which underlies any directive that the implementation must produce effective results".

The Working Time Directive have substantial obligations which are extremely clear. The ECJ held out what that these were rights.

The Court stated:

"Nevertheless, the rights accorded to candidates who have been discriminated against must be such a nature as to evince an effective implementation of the objectives of the Directive. That means that the legal consequences of a breach of the principle of equal treatment must not, in any event, be so derisory that an employer may ignore them in deciding whether to accept or reject an application".

The Court went on to say,

"The principle according to which the implementation of the Directive must be effective requires that those rights must be such as to represent for the candidate, whose rights have been infringed, appropriate compensation and for the employer, a means of pressure to be taken seriously, which encourages him to respect the principle of equal treatment".

It is settled law that a Directive shall be binding as to the results to be achieved upon each member State to which is addressed but shall leave to the National Authority the choice of form and methods. The Irish Government did so by way of compensation. In the case of Browne and Iarnrod Eireann the employee in that case had no financial loss. In fact the employee had a financial gain.

In Browne and Iarnrod Eireann it was a breach of contract case. The Working Time Act relates to a breach of a fundamental social right. The Directive lays down minimum safety and health requirements for the Organisation of Working Time in Directive 2003/88/EC. The legislation states, in the long title to the Act that it is for the,

"Protection of the Health and Safety of Employees".

In the case of Ainars Lucens and Nurendale Limited, being a Decision of the Labour Court, the Court pointed out that an issue arose about the fact that the employee, during the period of his employment had not raised any form of grievance. I am contending in cases that the issue of a formal grievance is not relevant nor should it be taken into account in assessing compensation under the Act. There is no requirement to raise a grievance.

I am contending that in applying Von Colsen and Kamann the Labour Court should in setting compensation have regard for the reasoning in the case of Browne and Ianrod Eireann as authority for the proposition that even where the employee ends up better off a breach of contract case for damages a significant level of compensation was awarded. The equivalent to 20% of the individual's annual income. The Browne case was determined in circumstances where there was no breach of a fundamental social right merely a damages case for breach of contract. Saying this Mr. Justice Hogan in the conclusion of paragraph 21 stated,

"While the measurement of this loss in monetary terms is in many ways all but impossible, I think that the yard stick should be that any damages awarded should be tangible and significant, without being excessive or even generous".

I would contend that this is a reasonable approach to take and that any compensation awarded to the employee should be tangible and significant, but not generous.

I would refer to the Judgement of the ECJ of the 25th of November 2010 being a case of Gunter Fub and Stadt Halle Case C-429/09.

In this case the ECJ Court stated that,

"By contrast, Directive 2003/88 does not, as the European Commission has correctly pointed out, contain any provisions regarding the sanctions applicable for the minimum requirements laid down by it are in infringed, for example regarding the duration of working time, and therefore it contains no specific rules regarding the reparation for the loss or damage which may have been suffered by workers as a result of such infringement".

The Court went on to state,

"In any event, an infringement of EU Law will be sufficiently serious where the decision concerned was made in manifest breach of the case law of the Court".

The Court went on to state,

"In those circumstances, it must be held, that since the failure to comply with the requirements of Article 6 (b) of Directive 2003/88 during the period at issue in the main proceedings occurred in obvious disregard of the Court's case law, it must be regarded as sufficiently serious breach of EU Law".

I accept that this case does relate to the State liability but the principles set out apply equally to employers in general. The Court went on to state,

"In that regard, it should be noted that, as is clear from the case law referred to in paragraph 62 of the present Judgment, it is for the Member States, in the absence of provisions of EU Law on the matter, to lay down the detailed procedure of rules governing actions for safe guarding of rights which individuals derive from EU Law provided those rules observe the principles of equivalence and effectiveness".

The Court went on to state,

"As the Court has already held, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer being in a position to impose upon him a restriction of his rights".

The Court went on to state,

"...in the absence of relevant EU Law provisions, it is for the domestic legal system of each Member State, subject to observance of the principle of equivalence and effectiveness, to set the criteria for determining the extent of reparation".

The Court went on to state,

"*With regard more particularly to the form that the reparation of loss or damage should take, it must be noted, that since neither the grant of additional time in lieu or of a financial payment appears likely to make it, in practice, impossible or excessively difficult to obtain such reparation, the referring Court must in particular satisfy itself that the method of reparation adopted observes the principle of equivalence, assessed in the light of the reparation granted by National Courts in the context of similar domestic claims or actions based on National Law"* (underlined by me).

There is I contend an argument that on the principles of equivalence and effectiveness that the National rules would be those relating to a breach of contract provision as a minimum and probably breach of a constitutional right.

Therefore, the argument would be that the decision of Mr. Justice Hogan as regards the test would not be an unreasonable test for the Labour Court to apply.

The issue of equivalence has yet to be determined by the Labour Court.

The Labour Court has been prominent in quoting the Von Colson case. The issue of equivalence is not one where the Court has issued a decision on, as yet. In saying the words "as yet" the argument has been put before the Labour Court and a decision is awaited. However recently in the case of C and F Tooling Limited and Jason Cunniffe DWT 15125 the Labour Court stated

"that case [Von Colson] needs to be understood in the context of th factual matrix in which it was decided".

The Court went on to state

"... Von Colson is authority only for what it decided. While in the passage quoted above by the Court referred to a member state chooses to penalise breaches of a Directive with an award of compensation that cannot be taken to mean that a statutory Tribunal, such as this Court, can purport to apply a sanction in the nature of a punishment for a contravention of the law. In our law, punishment for illegality can only be imposed by the ordinary Courts and not by statutory tribunals exercising limited civil jurisdiction. It follows that any compensatory redress awarded by this Court must remain within the grounds of what is capable of being redressed by compensation. That includes any present or future loss suffered by the claimant as well as any loss, damage inconvenience or expense which follows from the wrong which he or she suffered".

If the Court is correct then Irish law is not in conformity with the Directive.

This case has to be compared with the case of HSE South and Kerry General Hospital and Peter Kukco DWT1560 where the Court stated;

"*In the well-known Von Colson case, referred to by Counsel for the complainant, the CJEU made it clear that where a right which is derived from the law of the communities is infringed the sanction for breaches must be effective, proportionate and dissuasive and must provide a real deterrent against future infractions. However, the Court pointed out that the redress must be proportionate and appropriate*".

The Court awarded €20,000. Now that case may well have turned on deliberate breaches.

These cases are somewhat contradictory.

The legislation provides for compensation of up to two years wages for any breach. Since the legislation came in in 1997 there has never been a decision where two years compensation has ever been awarded. On a personal level I must say that I know of no criteria which the Labour Court has ever set down to set out what would be a sufficient breach to warrant compensation of two years. In reviewing the decisions of the Labour Court, I can find no case where twelve months wages were ever awarded. There are many companies who regularly appear before the Labour Court. One would have

assumed that at some stage the Court would have taken a view that compensation has to be set at a level which will be persuasive of an employer going forward. When an argument of this type is raised the invariable response of the Labour Court is that they are satisfied that further breaches will not occur. This has occurred in cases even where the Labour Court has previously been advised that the employer has put in place procedures to ensure that there would be compliance going forward.

An example of this would be the case of Nurendale T/A Panda Waste and Augustus Samaitis where such a statement was made. As recently as a few months ago in a case of the same company and Ainars Lucens the Labour Court determined that they were satisfied that it was unlikely that there would be further breaches.

While there are a certain number of cases where the Labour Court have directed employers going forward be compliant with the legislation they are limited. However possibly more common as was seen in Andrew Brooks and Jegorova DWT165. The Organisation of Working Time Act is a piece of Health and Safety Legislation. Under the Safety Health and Welfare at Work Act an employer is obliged to manage safety and protect health "so far as is reasonably practicable".

At any time "reasonably practicable" means the acceptable good practice relevant to the type of work. In determining what is reasonably practicable in a particular situation a Court will balance the extent of the risk involved against the cost of protection against that. A very high risk that is cheap to prevent can be contracted with a very low risk which is comparatively expensive to prevent. It should be noted that the standard of case imposed by "reasonably practicable" exceeds the common law duty of care. The main effect being the onus put upon the employer to prove that reasonable precautions were taken against foreseeable risks. In the case of Boyle –v- Marathon Petroleum Ireland Limited 1999 the Supreme Court reviewed the meaning of the term "reasonably practicable". While the subject matter of the case application was Section 10 (5) of the Safety Health and Welfare (Off Shore Installations) Act 1987 the Supreme Courts view of the text of "reasonably practicable" has boarder application. O' Flaherty J affirmed the view of the High Court that the onus of proof was on the defendant to show that what he did was reasonably practicable and O' Flaherty J then reviewed the standard of reasonably practicable in the following terms;

"I am …of the opinion that this duty is more extensive than the common law duty which devolves on employers to exercise reasonable care in various

aspects as regards their employees. It is an obligation to take all practical steps. That seems to me to involve more than that they should respond that they, as employers, did all that was reasonably to be expected of them in a particular situation. An employer might sometimes be able to say that what he did by way of exercising reasonable care was done in the "agony of the moment" but that might not be enough to discharge his statutory duty under the section in question".

Reasonably practicable is an altogether different legal concept from that of negligence. The burden imposed by what is "reasonably practicable" is set at a higher standard than that imposed by the general principles of negligence. For reasonably practicable there must be a gross disproportion. In financial terms this means that the money required to be spent would have to be very significant before it would not be reasonably practicable to take the precautions.

Saying this, it would appear to this writer that it would be reasonably practicable for virtually every organisation to maintain working time records and that where an employer, comes before an Adjudicator where in future an adjudication offer or on appeal to the Labour Court that there is a very strong argument that where records are not produced in the statutory form that an Adjudicator, an adjudication officer or the Labour Court should be directing the employer going forward to maintain the records in accordance with the legislation so that if an issue arises in the future there will be no argument as the records should be available.

The sad fact of matters is that records invariably are the matters which prove an employee's case. In the absence of records the potential for the employee to prove their case is limited because it descends into a swearing match. However, when it comes to assessing compensation one of the compensation issues which the Court is entitled to deal with and which the Court has in the past but not to the extent that one would have expected directed employers going forward to be compliant. It would be particularly important in cases where the employee is still in employment.

It will be interesting to see going forward how the Court addresses the issue of equivalence in Irish Law taking account of the fact that the European Court of Justice has specifically required that equivalence will be taken into account. The Decision of the Labour Court in the C & F Tooling case would appear to discount this an option for the Court. The level of compensation where there is a breach of for example Section 11,12 or 13 involving rest periods or where the employee is required to work in excess of 48 hours is

one where there can invariably be no financial loss. The employee however lost the benefit of rest periods or has been required to work excessive hours and these are health and safety issues which can have significant impact on an employee's health and safety as various reports have identified. This is particularly so in relation to Section 16 which relates to night-time workers.

In the case of annual leave entitlements where an employee has not received their entitlement the level of compensation is usually the economic loss together with some multiple of it. However, this is a breach of a fundamental social right as determined by the High Court in the Royal Liver Assurance case. Such claims are where the employee has not received their minimum statutory requirement but which is also a fundamental right under European Law. One would have thought that failure to give an individual a fundamental right would be a significant breach. I would be the first to admit that there is a difference between an employee who does not receive their annual leave entitlements on cessation as opposed to an employee who during a leave year did not receive their entitlement. There is a difference between a case which issues and an employer can demonstrate on objective criteria that the breach has been remedied before a case comes on for hearing and one which has to go to hearing. There would equally be a difference between a case where the breach is accepted with evidence of matters having been rectified but mitigation is pleaded as opposed to one where the breach is fought.

It would be my view, and I may well be wrong, that the issue of the level of compensation awarded is one that is going to become more relevant in the following years. In setting out any decision it appears to me that the Adjudication Officer or Labour Court should seek to explain their decision and set out their figures as follows: -

1. The first to cover the economic loss, if applicable

2. The second to set out the compensation for the employee suffering the breach, and

3. The element designed to secure compliance going forward by the employer.

It would be my view that both employers and employees following the rationale in ECJ are entitled to know this.

My opinion on this will not be popular as this is not the current practice. However, for employers to understand the risk associated with non-

compliance they need to know the potential cost. Put another way the reality is just how more beneficial financially is it for the employer not to comply. For large employers currently, it is generally more economical to be non-compliant.

I must add that the issue of the level of compensation currently awarded is often difficult to comprehend. In one case employees received their holidays and holiday pay but did not get proper notice of taking these holidays and the compensation varied from 1,800 to 500 DWT1224 to 1226.

In other cases, even where the employer fails to attend or seek to explain issues of employees not receiving their entitlement at all to any entitlements or less than their full entitlements not only is significantly higher compensation not awarded but lower compensation is awarded.

If we are to have a world class employment rights service there is no logical reason we could not have a book of quantum. If the Courts can have such a system for injuries there is no reason it would not apply to employment rights. It would reduce costs to the State and to employers and employees. It would help to minimise claims against employers as they would know the exposure and may be more inclined to be compliant.

Defences

I think it is useful to finish up by setting out some of the defences which are raised which may not obtain traction.

Defences sometimes raised that the employee specifically requested that work be scheduled in a manner which broke the Act. This issue arose, for example, in Petrogas Group Limited and Paulauskas DWT1676. In that case the employer contended as regards the Section 11 rest intervals that the employee sought accommodation around the scheduling of his shifts to enable him to meet family requirements. The Court held that there was no evidence of this but importantly stated:

"Even if it was however [that] would not amount to a justification for infringement of the Act."

In other cases, it may be argued that a plant was unionised and that breaches would not be tolerated as in the JI Boning (Ireland) Limited and Orlovicius DWT1644. In that case the Court held in the absence of records under Section 17 this was a breach of SI 473 of 2001 and therefore under Section 25 the

burden of proof was on the employer and as no such evidence was produced they upheld the complaint.

You may get a defence that there is a "collective agreement". In a Public Transport Company and Worker DWT179 the Labour Court rejected that as a defence where there was a systematic infringement. Neither by collective agreement or by contract can parties contract out of the Act.

It is regularly raised that in cases it is a matter for the employee to particularise each and every breach that has occurred. This defence which is regularly raised has a hopefully being debunked in this paper as a legitimate as a defence.

There are number of cases where the employer would contend that the employee effectively manages their own time. If that argument is being raised it is useful to look at the case of M&J Gleeson and Company -v- Malone DWT1395, Erac Ireland Limited -v- Murphy DWT1583. Unless an employee can determine their own start and finishing times they can effectively decide when they are going to go on holidays, decide whether to come to work today or not and other than specifying minimum hours employer is effectively saying that the employee controls everything that they do by which I mean the employee rather than the employer.

The most regular defence which is run out is that the employee had the opportunity to take the relevant rest or break periods or that the employee decided themselves to work excessive hours or that the employee themselves decided that this is the way that they were going to work. Again, in this paper I hope that this, as a defence, has been debunked. It is however surprising that this defence is consistently being raised.

Conclusion

In today's seminar note I have tried to give a broad outline of the more common sections which we as colleagues, dealing with employment law, have to address.

I have not dealt with sections 2-10 inclusive. I have not dealt with the issues relating to the procedures for bringing claims nor have I addressed the issue of extension of time issues.

This seminar note can never be comprehensive. It can only scrape the surface of the issues which we need to address. I do however hope that colleagues will agree that this is a complex area of law and that the nuances of this Act, which while it appears to be relatively straight forward, are in fact complex.

In the course of the seminar notes I have expressed certain opinions on certain matters. These are my opinions. Courting popularity has never been something I have been accused of. Straight talking and being prepared to express an opinion and to back up that opinion is something that I am known for and it is a trait which has been passed down to me. It should not be conceived that in any comments that I have made that I am critical of the Labour Court. Far from it. I am extremely supportive of the Labour Court.

I have the greatest of respect for the Labour Court and admiration for the professional manner and courteous way they deal with those before them and for the quality of their judgements.