This is an extract from a seminar paper given by Richard Grogan of this firm to The Southern Law Association on 30th November 2018.

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.

Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.
****In contentious cases, a solicitor may not charge fees as a proportion or percentage of any award or settlement.***