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

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.

<u>The application of Section 12 in practice</u>

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.

What is a Rest Period?

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.

<u>The form of records which must be maintained</u>

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.

<u>What happens where there are no records?</u>

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.

<u>On –call time maybe working time</u>

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.

<u>Shop Workers</u>

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.

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.***