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

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.

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.***

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