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

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".

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.***