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

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.

What is a working week?

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.

Can an employee receive either days or hours off instead of weeks?

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".

***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.***