



## **A Guide to the Law on Working Time Organisation of Working Time Act 1997**

### **Introduction**

The firm of Richard Grogan & Associates has the largest number of claims relating to the Organisation of Working Time Act before the Labour Court and Labour Relations Commission.

Whether you are an employer or an employee it is important to understand the rules relating to working time.

Where there is a breach of the Organisation of Working Time Act an employee can recover up to two years compensation for each breach. As our working time legislation implements European Law the High Court has held in the case of Royal Liver Assurance and Macken that the entitlements under our legislation are fundamental social rights as they arise from European Law. In Cementations Skanska –v- Carroll DWT38/2003 the Labour Court said that the “obligation to provide annual leave is imposed for health and safety reasons”.

The Labour Court went on to acknowledge that the right to leave has been characterised as “a fundamental social right in European Law”.

This approach has been adopted by the Labour Court in respect of all provisions of the Working Time Act which derived from the Directive.

### **Daily Rest Periods**

Every employee is entitled to rest period of not less than 11 consecutive hours in each period of 24 hours during which he or she works for his or her employer.

In practice this means that if an employee finishes work at 9pm the employee cannot recommence employment the next day before 8am.

There are exceptions to this for shift workers and for some other categories of worker under the Organisation of Working Time (General Exemptions) Regulations 1998 SI. No. 21 of 1998. However there are strict conditions for an employer to claim the exemptions particularly regulation 5.

If a worker is on a shift for example 2pm to 9pm for one week and the next week he will be on for 7am then when there is a change over from an afternoon/evening shift to a day shift the 11 hours does not need to be provided between the shifts. However, compensatory rest must be provided.



### **Rest Intervals at Work**

During the working day the employer must ensure that;

1. The employee does not work for more than four hours and 30 minutes without a break of at least 15 minutes.
2. That the employer shall not require an employee to work for a period of more than six hours without allowing him or her a break of at least 30 minutes. The 15 minute break may be included in the break of 30 minutes.

In the case of shop workers, other than shops where food is sold for consumption, on the premises these employees are entitled to a one hour break between 12 noon and 2pm.

The issue of what is and what is not working time is often difficult to determine. A very useful case, in which this office was involved, was the case of ISS Ireland Limited –v- Gfencheba DWT 57/2011. In this case the complainant was obliged to attend at up to three different locations during the course of a shift. The time spent at each location and the time allocated for travelling between those locations was set by the employer. The Labour Court was satisfied that the time allocated was “just sufficient” to enable the employee to arrive at the next location in time to commence work. The Court ruled that the time spent by the worker in travelling was wholly and exclusively and necessarily undertaken in the performance of contractual obligations and was therefore working time and not a rest period.

It is very important that employers schedule rest and break periods.

### **Weekly Rest**

An employee is entitled in each seven days to a rest period of at least 24 hours. That 24 hours must be preceded by a period of at least another 11 hours. In effect 35 hours continuous rest.

### **Sunday Work**

Unless a contract provides that an employee is required to work on Sunday Section 14 of the legislation has held that they are not required to work on Sundays.



Where an employee is employed to work on Sundays they must be paid a premium. In the case of Scally –v- Lynch and Kelly DWT102/2013 being a case in which this office was involved the Labour Court upheld a Rights Commissioner Decision that the appropriate Sunday premium was “time and one half”. The Labour Relations Commission has prepared a very useful code of practice for the purposes of this matter being the Organisation of Working Time (Code of Practice on Sunday Working in the Retail Trade and Related Matters) (Declaration) Order 1998 S.I. 444 of 1998

### **Weekly Working Hours**

An employer may not allow an employee to work in each period of 7 days more than an average of 48 hours over a reference period. The reference period is normally 4 months. It may be 6 months in certain circumstances.

In the case of IBM Ireland –v- Svoboda DWT18/2008 The Labour Court said that it was “noteworthy” that this Section provides that an employer shall not permit an employee to work excessive hours.

For mobile workers in addition no working week can be more than 60 hours.

### **Night Time Working**

Night Time means a period between 12 Midnight and 7am. An employee who is a Night Time worker may not work more than 40 hours where the number of hours worked by the employee during night time in each year equals or exceeds 50% of the total number of hours worked by him or her during that year. In reality this means more than 20 hours per week averaged.

If the worker is a special category worker where under Section 58 of the Safety Health and Welfare at Work 2005 there are particular risks associated the maximum that the employee can work is 8 hours at night per shift where over 50% of the time is night work.

The reference period for Section 16 of the Act, which deals with night time working is two months.

### **Notification of Overtime**

This causes significant difficulties for employers and employees. The Act provides that a minimum of 24 hours notice must be given by the employer to the employee of the requirement to work overtime. If this is not given the employee does not have to work overtime.



The normal defence that is put up is that it is an exceptional circumstance. In *Sally - v- Lynch and Kelly* DWT102/2013 the employees gave evidence that they were requested to work overtime and received little or no notice in circumstances which included the arrival of a large number of customers following a football match or a concert. The Labour Court did not accept that this was “an exceptional demand” on the business and was not an “unforeseeable event” as contemplated by the section.

The legislation was amended at the Bill stage in the Dail to provide that notification of hours of work for the following week must be given on a Thursday evening for the following Monday work unless the hours are specified by contract.

### **Annual Leave**

Every employer must ensure that an employee receives their leave entitlement. Normally this is four weeks.

The employer must ensure that the employee receives an uninterrupted break of at least two weeks.

Some employees would rather take four one week breaks.

An employer may not permit this. If an employer does, even where the employee has requested this, because of the wording of the legislation and Decisions of the Labour Court the employer will be in breach of the Working Time legislation.

The Labour Court in a number of cases has held that weekly pay cannot be paid in lieu of the employee taking their legal entitlement.

If an employee is sick during a leave year the employee is still entitled to their full holiday entitlement. There are a number of cases, currently before the Labour Court on this issue. It certainly is our view that if an employee is on sick leave and cannot take their leave entitlement during a leave year then once they return from sick leave they are entitled to take annual leave which arose in the preceding 18 months. This may seem unfair to employers but this is the effect of Decisions of the European Court of Justice. The case of *Case C/350/06 Schutz – Hoff* [2009] E.C.R 1/179 is a case where the Court of Justice ruled that the right to paid annual leave cannot be made subject to an obligation to have actually worked during the leave year.

Many employers in their contracts of employment and staff handbooks provide that the leave year will be from the 1st of January to the 31st of December. The leave year set out on the legislation is from the 1st of April to the following 31st of March. This may mean that an employee may well be able to bring a claim against an employer even when they have received 4 weeks holiday.



Example: The contract provides a leave year from 1 January to 31 December. In 2013 the employee takes three weeks holiday in the first three weeks of March. The employee takes a further week of holidays in August. On the 2nd of April 2014 the employee brings a claim that they did not receive their holiday entitlement. In the period 1 April 2013 to 31 March 2014 the employee has received only one weeks holidays. The employer is in breach of the legislation. This may seem hard on employers and this is why it is important that the provision of leave is clearly set out.

### **Time and Pay for Annual Leave**

The pay for annual leave is the normal pay which the employee receives.

Issues are now arising as to whether this includes bonus payments. The Labour Court have constantly held that it does not include overtime unless it is regular rostered overtime. Arguments are arising that where the employee is entitled to a bonus for example reaching monthly targets that this must be taken into account in calculating holiday pay. This matter is likely to be litigated upon in the near future. In addition cases are arising where the contract provides the employee is obliged to do overtime and therefore that “pay” must be taken into account to calculate holiday pay.

Holiday pay must be paid in advance of taking holidays. It is always accepted that where an employee is paid on a monthly basis that failure to pay the salary in advance is not a claim.

The employer may determine and decide when employees take breaks provided one months notice is given.

### **Conclusion**

This is a Guide only. Before acting or refraining from acting on anything contained herein professional advice should always be obtained from a Solicitor regulated by the Law Society of Ireland.