Minefield of Traps

Richard Grogan warns colleagues about some pitfalls when bringing or defending cases under the National Minimum Wage Act 2000 at the Workplace Relations Commission (WRC)

This problem goes to the jurisdiction of an Adjudication Officer to hear a case. It deals with what the Director General of the WRC must do before a case is sent to the Adjudication Officer and the issue of costs. There are issues which are arising in National Minimum Wage claims where colleagues are getting caught. This article is intended to avoid that situation arising.

The first issue is that claims under the National Minimum Wage Act currently can go back for a period of six years. This is an exception to the normal WRC procedures and something some colleagues miss when acting for employers and employees.

Before a claim can be made under the National Minimum Wage Act it is important that a request is made under Section 23 of the Act for a statement for any pay reference period falling within 12 months preceding the request [Section 23 (1)].

A problem arises in relation to what is a pay reference period. If a pay reference period is not specified in the contract or in the staff handbook given to the employee, colleagues bringing claims need to be careful. Even when a pay reference period is specified it would be our view that you would cover matters on the following basis: namely that you would request a pay reference period for a week, two weeks, three weeks, four weeks and a calendar month. Effectively this covers all the bases. In this year for example, for the month of January it would be from 1 January 2017 to 7 January 2017, 1 January 2017 to 14 January 2017, 1 January 2017 to 21 January 2017, 1 January 2017 to 28 January 2017 and 1 January 2017 to 31 January 2017.

Under Section 10 of the Act an employer may select the pay reference period. However that may not exceed one month.

By covering every possible combination in bringing a claim you must have covered a pay reference period.

For those who are observant they will note that the 1 January 2017 was a Sunday. You may ask why that date was specifically picked. The answer is simple. A week is not defined in the National Minimum Wage Act 2000 as amended. Therefore you must go to the Interpretation Act. The Interpretation Act defines a week as commencing at midnight on Saturday (which is effectively the Sunday) and ending at midnight on the following Saturday.

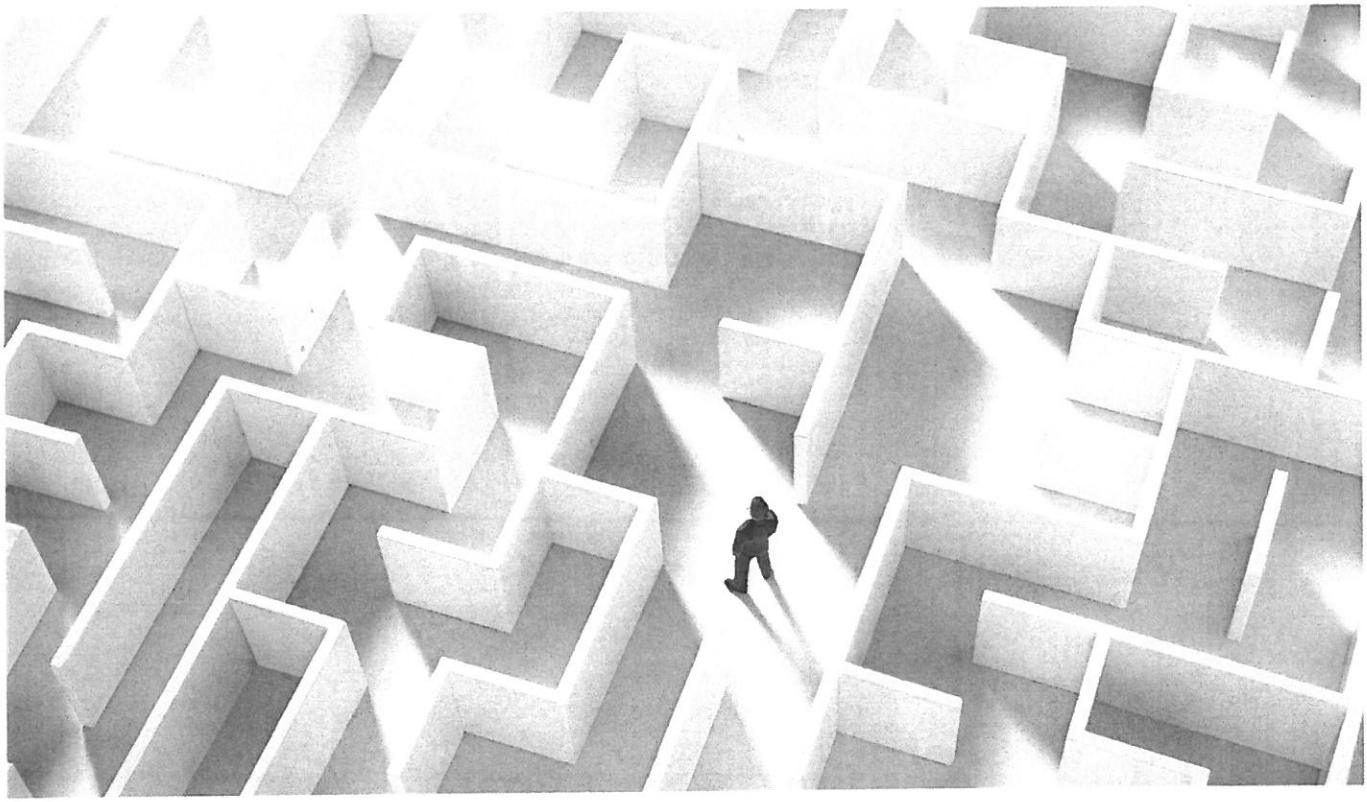
If a Section 23 notice in accordance with the Act has not been furnished, the Adjudication Officer has no jurisdiction to hear the case. This is important for both those representing employers and employees.

Where a statement is served the claim should not be sent to the WRC for a period of one month thereafter. It is always advisable to leave an extra couple of days.

Do not worry about the normal statutory periods.

Let us say an employee was dismissed on 31 December 2016. They come to you on the 1 July 2017. You can pick any pay reference period effectively back to August 2016 to put a request in to cover. Let us say you do that in early August. You then have to wait one month but you effectively have a further five months effectively in which to lodge the claim. Therefore an employee who leaves employment on 31 December 2016 means you have up until 30 December 2017 to serve a request under Section 23 and have a further six months in which to lodge the claim. When lodging the claim you should also send a letter to the Director General requesting under Section 26 (1) (a) that she checks the notice under Section 23 and the evidence of service of the said notice, before referring same to an Adjudication Officer. Section 26 was inserted by Section 52 of the Workplace Relations Act 2015 and

Richard Grogan is principal of **Richard Grogan & Associates Solicitors & Registered Tax Consultants**



places a specific obligation on the Director General to check that a valid request under Section 23 has been served. Of course the WRC does not check anything. This statutory provision is simply being ignored by them. Therefore to cover yourself you can put the liability on to them as you are perfectly entitled to do, if they do not check.

You may lodge a claim within the one-month period after service of a request under Section 23 if you receive a response from the employer setting out the average hourly rate of pay. Otherwise you must wait one month. If you do get the certificate you should include that with the documentation you send to the Director General for her to check.

When you run a case before an Adjudication Officer you should ask the Adjudication Officer to confirm that Section 26 has been complied with. You are also entitled if acting for an employee, to request reasonable expenses in connection with the dispute. In MWD8/2013 a sum of €150 was awarded. I am of the view that the employee is entitled to claim their travel costs, the out of pocket expenses in attending at any hearing and any lost pay for the day in attending. The issue is going to arise as to whether they are entitled to their legal fees involved in putting together a request under Section 23. The reason for this is that there is no guide from the WRC which does not have a huge legal disclaimer on it and therefore it is arguable. Employees bringing a claim should get legal advice and should be reimbursed for the cost of full compliance with Section 23, particularly as the legislation is less than specific, particularly in determining what is the pay reference period for putting in a Section 23 notice.

One issue which is constantly coming up is the calculation of pay. I would refer colleagues to the Schedule to the Act of 2000. Part 1 sets out reckonable components. Part 2 sets out non-reckonable components. For example, overtime premiums, callout premiums, service pay and Sunday premiums are examples of non-reckonable components. Any form of non-taxable expense is not included. I would advise colleagues not to look at the right hand side of a payslip but to look at the left hand side. The employee might receive €400 net a week for a 40-hour week. However, if their wage was €250 and they received €150 as expenses or any of the non-reckonable components, the rate of pay is not €10 an hour but in fact just €6.25 per hour. If they were employed just for 2016 the loss is €2.90 per hour being €116 per week being €6,032 for the full year. They would also have effectively been underpaid public holidays and their annual leave payments which are cases where additional compensation could also be obtained. I would advise colleagues that there is an epidemic problem of some employers trying to categorise part of wages as "expenses". This is usually for the employer to save the employer's social security contributions. It can also be due to bad tax advice and in addition, it can be down to pure stupidity in assuming that a non-reckonable component of pay is included in the National Minimum Wage.

Unfortunately, a significant percentage of National Minimum Wage claims are lost because employees or their representatives do not issue the claim correctly. This is the reason I advise colleagues issuing claims to put the obligations squarely on the Director and if there is any loss occasioned then you can sue the WRC/the Department of Business, Enterprise and Innovation.

The National Minimum Wage Act 2000, as amended, is a minefield of traps for the unwary. This article is intended to assist colleagues avoiding those traps.

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