Rest Intervals at Work – Section 12*

This is an extract from our seminar notes given to the Southern Law Association joint seminars with the Employment Law Association of Ireland given on 29th November and 4th December 2014

This Section covers what is commonly referred to as "breaks". The Section implements Article 4 of the Directive.

The Section provides that a worker shall be entitled to a rest period of at least 15 minutes after 4.5 hours of work or 30 minutes after 6 hours work. The 30 minute break may include the 15 minute break.

This sometimes leads to confusion.

Example

Employee A starts work at 8am. The employer has a choice.

A Provide a 15 minute break at 12.30pm and a further 15 minute break at 2.15, or;
B Provide a 30 minute break at 2pm.

A rest interval at the end of a working day will not satisfy the requirements.

Section 12 (4)

The Minister may set out longer rest intervals not to exceed one hour. This the Minister has done in S.I. 57/1998 where a shop worker's hours include the hours between 11.30am and 2.30pm the worker is entitled to a one hour rest interval. In addition, the rest interval must be between those hours.

Regulation 3

The Regulations do not apply to so much of a premises as is used as a hotel for the preparation of food or catering in respect of food or drink to "any person" or to a premises with a liquor licence. A barber or hairdresser or department store worker has the rights to the one hour rest interval. A person working in the restaurant serving or preparing food would not have this right. Certain workers covered by the General Exemption Regulations are not entitled to these breaks but are entitled to compensatory breaks. This will be dealt with later in this section.

An issue which regularly arises in cases under Section 12 is that the employee had the opportunity to take a rest interval at work and this complies with the employers obligations.

The question of whether the Working Time Directive from which the Act of 1997 is derived, imposes an obligation to provide workers with the opportunity to take rest and break periods or places a positive obligation on an employer to ensure that the breaks are actually taken was considered in the ECJ case of Commission –v- United Kingdom C-484/04. In that case Advocate General Kokott stated;

"It is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community Law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. In addition, it must, however, be a matter of course within a business, in practice as well, that the workers' rights to rest periods not only exist on paper but can effectively be observed. In particular no de facto presure should arise which may deter workers from actually taking their rest periods".

The European decision is clear. The reasoning of the European Court was approved in many cases. One of these was the case of Nolan Transport and Antanas DWT1117 where it was stated;

"It is to be assumed that the State intended to fulfil its obligations under Community Law in line with that assumption the Act must be

interpreted as imposing a positive duty on employer's to ensure that not only are opportunities available to take appropriate rest but that the minimum rest periods are actually observed".

The reason for quoting so extensively from the European Court Decisions and from the Labour Court on this point is that the defence that the employee had the opportunity to take a rest interval is trotted out with such regularity that some believe that if it is stated often enough somebody might actually believe it. The second alternative is that it is a defence run out by those who believe the ECJ was wrong. As the ECJ is the highest Court that argument needs to be debunked.

It is therefore probably worth giving other cases where the Court dealt with this issue. In the case of The Tribune Printing & Publishing Group –v- Geographical Print & Media Union [2004] ELR 222 the Labour Court held that the employer was under a positive duty to ensure the employees receive their breaks when it stated;

"Merely stating that employees could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee received those breaks thus protecting his health and safety, does not discharge that duty".

In Tifco Limited –and- Smietana DTW11124 the Labour Court stated;

"the Court is satisfied that it is the duty of the employer to ensure breaks are taken and there are systems in place to ensure that scheduled breaks can be, and in fact are, availed of by the workers".

The obligation on employers is not only to ensure a system is in place where breaks are actually scheduled, the employer must make sure that those breaks are availed of by the workers. In addition, the employer must maintain records of same.

In Nurendale Trading as Panda Waste –and- Suvac DWT19/2014 the Labour Court held there was an obligation on an employer to maintain records of working time and breaks. The Labour Court held that the obligation could not be transferred by contract or otherwise to an employee to relieve the employer from maintaining those records. A similar approach was taken in Monkland Oyster Hotels Limited Trading as Athlone Spring Hotel Limited –and- Michelle Smith. In that case he worker contended she did take short smoke breaks on most

days but did not receive breaks or compensatory breaks. In that case there was no system in place for staff to take or record breaks. The employee contended she had been told generally she should take breaks but was never told to go on a break or advised of the time at which to do so. The employer contended that it "ensured the provision of breaks were available for the employee".

They contended that an onus on the employee to take her daily breaks – as evidenced in the employees contract of employment".

The employer also contended that there was a meeting between the HR Manager and the Head Chef whereby he confirms that the employee at all times received her daily breaks and what is more on occasions left her post to take additional breaks.

The Labour Court held that there had been a breach and awarded €5000. The case is interesting in that the employer was a hotel and could therefore avail of the exemption in S.I. 21/1998.

Some employers will attempt to shift the obligation to the employee. One method is to use the NERA OWT1 Form. The second is to put some statement at the end of a weekly time sheet requiring an employee to notify the employer if they have not received their breaks.

In Eupreida Trading as Dingle Skellig Hotels and Peninsula –and- Martin O Connor DWT13146 the employer contended that a message written at the bottom of each weekly roster outlining the statutory break entitlements and stating that if the worker had not received their breaks each day he/she should contact their manager was rejected by the Labour Court as;

"The Court is satisfied that in the main such breaks were taken by the complainant, however, this was not a satisfactory method of recording due to discrepancies identified". A sum of €1500 was awarded.

It would appear therefore that where the employer provides for breaks in a contract but does not specifically ensure breaks are taken the employer has not discharged the onus of compliance. There is a positive duty on employers to ensure the breaks are in fact taken.

Even getting the employee to sign each week confirming they received their entitlements may not be enough. Saying this, the Labour Court has appeared to take cognisance that during a period prior to the complaint the employee had raised no complaint and has taken this into account. This is evidenced in the case of Noonan Services Group Limited –and- Andrius Stasaitis DWT13121. However following the High Court decision in Stobart (Ireland) Driver Services Limited and Keith Carroll [2013] IHC581 which while dealing with the Safety Health and Welfare at Work Act 2005 held that it is "not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made". There is in addition nothing in the legislation which requires an employee to raise a grievance before bringing a claim.

In dealing with such cases the Labour Court will consistently hold that the period to which the complaint relates is a period of six months. What breach may have occurred prior to that period of six months will not be looked at by the Court. It is now becoming common that employers will contend that prior to the complaint being made that no grievance had been raised by an employee. This will invariably mean going back further than six months. It is one thing for the employer to contend that no grievance was raised in the six month period prior to the complaint being raised. If however, the employer wishes to go back outside of the six month period that there is an argument that the employee should be allowed also to go back and look at the actions of the employer in the preceding period. It must be noted that in the majority of cases where this argument arises that no complaint had been made or grievance raised by the employee there will invariable not be documentation in place advising the employee of their entitlements under Section 11, 12 and 13 of the Organisation of Working Time Act as required by Statutory Instrument 49 /1998 nor records. The argument in relation to no grievance having been made, which had been taken account of by the Labour Court is in my view an incorrect reading of the legislation. There is no requirement to raise

a grievance as the law places the obligation on the employer to ensure compliance in practice.

The argument which is often raised in tandem is that the employee did not raise the complaint at the first available opportunity. An interesting case on this issue is the High Court decision of Mr. Justice Hogan in the case of Michael Browne and Iarnrod Eireann / Irish Rail (No. 2) delivered on 5th March 2014 reference [2014] IHC117.

That case related to a breach of contract. His Honour stated;

"In these circumstances, in can hardly be a surprise that Mr. Browne elected to carry on working despite his most profound misgivings. This may thus be regarded as another example where, in the words of Lord Reid, in White and Carter, by refusing cooperation… the party in breach, "can compel the innocent party to restrict his claim to damages".

The employer is invariably in the dominant position. The issue has to be asked is whether there was a robust system in place for grievances to be dealt with properly and independently. In my view, the issue of whether a complaint or grievance was raised with an employer at any time during the employment is an irrelevant factor particularly where the breach complained of is one covered by the Directive.

What is a rest period

It may sound, at first sight, unusual that this question is asked. However the issue of what is or is not a rest period is often raised. The first issue which is often raised is that the employee received "smoke breaks" of 5-10 minutes. It could be claimed that there was a number of these during the day. This argument regularly arises. A rest interval of less than 15 minutes is not a rest interval and must be disregarded for the purposes of the Act. The determination of what is a rest period means it is necessary for it to be distinguished with working time.

Section 2 (1) of the Act contains the following definition

"rest period" means any time that is not working time.

"Working Time" means any time that the employee is

(a) At his or her place of work or at his or her employer's disposal and
(b) Carrying on or performing the activities or duties of his or her work

and shall be construed accordingly.

Article 2 of the Directive contains the following definition.

1. Working Time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national law and/ or practice.
2. Rest period shall mean any period which is not working time;

In ISS Ireland Limited and Vyara Gfencheva DWT1157 the Labour Court had to consider a situation where employees moved between locations. The employees had sufficient time to get to the next location but no longer. The employer contended that the period travelling between locations was a rest period.

The Labour Court in this case reviewed a number of ECJ Decision including Case C-300-98 SIMPA Case. In this case Doctors were required to be at a medical centre and available to perform work if required. The ECJ held that this was working time. Similarly, in Case C-151-02 Jaeger the Doctors were provided with a room in which they could sleep. Again, the ECJ held that this was working Time as the ECJ at paragraph 95 stated;

"In order to be able to rest effectively the worker must be able to remove himself from his working environment…".

The Labour Court held;

1. The time during which a person is working, at the employer's disposal and carrying out his or her duties is working time.
2. Time during which a person is at a place designed by his/her employer, and is required to undertake his/her activities or duties if directed to do so by the employer, is working time.
3. The notion of working time and that of rest periods are mutually exclusive.
4. A period of rest is a period which is not working time during which a worker can relax and dispel the fatigue caused by the performance of his/her duties.

The ECJ has in Case C-14/04 Dellas ruled that there is no "intermediary category" between "working time" and "rest periods".

The issue then arises is whether a person is at "rest" if that person can be interrupted. The answer would appear to be an emphatic "No". The issue arose in a number of cases involving Stobart (Ireland) Driver Services Limited DWT1438, 1437 and 1464. The drivers had to make one or more phone calls during a break and there was a contractual obligation to do so. The Labour Court held that the time was not "absolutely at the employees disposal" and the requirement to make the call meant the employee was at the employers disposal. While the case concerned Section 13 a similar approach would apply to section 12. Therefore if the employee has to be "available" it is not a rest period. The common issue which currently arises is that an employee must be available to return to work. That mere availability would undermine the argument that it is a "rest period". An argument which often arises is that the rest period exceeded the Statutory period but with the employee arguing the employee could not know when it would end.

In JP Gallagher –v- Alpha Catering Services Limited [2004] EWCA CIV 1557 the UK Court of Appeal held that the employee must know at the start of a rest period that it is such and which "the worker can use as he pleases". It would therefore appear that an employee may not know when a rest interval may start but must know when it will finish. Sending a worker on a rest period and not telling them what length of time that rest period is will not be a rest period. If an employer says to an employee to go on a rest period and to take 30 minutes but after

that the employee does not need to come back to the office or the workplace until they are called then that is a 30 minute rest period.

Anything after 30 minutes is time that the employee is at the employers control as the employee can be called back at any stage and is therefore "working time".

If an employer tells an employee go on your break now and I will call you when you are to come back that is not a break at all even if it exceeds 30 minutes as the employee is not free to dispose of the time as they wish.

There are exemptions from the requirements to provide rest intervals. S.I.21 of 1998 exempts certain workers from the requirements of Sections 11, 12, 13 and 16. Where an employee is not entitled by reason of the exemption to the rest period and break referred to in Sections 11. 12 and 13 of the Act equivalent rest or break periods must be provided.

The exemption in Regulation 3 is conditional on Regulation 5 being complied with. Regulation 5 provides that the employer shall not require a worker to whom the exemption applies to work for a period of more than 6 hours without allowing him or her a break of such duration as the employer determines. In doing so, the employer should have regard to the Organisation of Working Time (Code of Practice on Compensatory Rest and Related Matters) (Declaration Order) 1998 S.I. 44/1988.

The Labour Court appears to have taken a contradictory view of such exemptions. In Michael O Neill Mushrooms Limited –v- Tiatova DWT103/2012. The Labour Court held that this required a positive demonstration that an equivalent rest period to the statutory rest period had been made available to and availed of by the worker concerned. However, in Noonan Services Group Limited and Stasaitis DWT13121 the employer argued that the respondent did not specifically determine any period to be regarded as a break. The respondent argued that the complainant was provided with kitchen facilities in the Security Hut in which he worked and there was substantial periods of inactivity during which breaks could be taken.

The Labour Court held that as a matter of probability the claimant was told he could take breaks during periods of inactivity during his shift. The decision of the Labour Court was upheld by Kearns P [2014] IEHC199. The Labour Court decision referred to disputes being avoided by a suitably worded notice advising security guards of the obligation to take a break. This would be in line with the case of Hughes –v- The Corps of Commissionaires Management Limited UK EAT / 0173/10/SM where the complainant was a security guard who worked a 12 hour shift on his own. The Tribunal came to the conclusion that, on the facts, the employer had afforded the claimant with appropriate protection in order to safeguard his health and safety. They took account in particular of the fact that he was afforded breaks and that although he was on call during them and could be called he was allowed to start his break again.

The Tribunal held the employee was afforded rest but it did not have the features of a "Gallagher" rest period. The EAT on appeal however held that while the employee might have the break interrupted he was allowed to decide when to start his break and if interrupted to start his break again. The decision of the UK EAT appears to make perfect sense. Where the employer has clear and precise rules relating to compensatory rest. In the case of Noonan Services Group Limited and Staitis the Labour Court held that it was "probable" such rules applied even though there were no actual rules of the employer stating this.

Saying this, following the advice set out by the Labour Court and the rationale in Michael O Neill Mushrooms Limited and Tiatova, referred to previously, it is far more advisable for employers to be able to demonstrate equivalent rest periods being available.

Section 12 claims by employees are almost invariably ones which will be the subject of disputes because of the lack of records of such breaks. In addition, they usually arise because of a lack of clear and precise rules in the employment related to breaks. Section 12 claims relate to fairly minimal rest periods. An employee who commences work at 7am and receives a rest period of 30 minutes at 1pm and then works on until 6pm and received a 15 minute break can then work on until 7.30pm. That employee will have received their full entitlements. Effectively in any period of less than 12 hours working the full entitlement of the employee is to a 45 minute rest interval.

There are special rules for some categories of workers such as drivers and they will be dealt with separately.

The Burden of Proof in Section 12 Cases

Section 25 of the Act sets out the requirement that in the absence of records the Burden of Proof rests on the employer. The issue was dealt with at length as to the proof and the burden of proof as it applies in the case of ISS Ireland Limited and Vyara Gfencheva where the Court stated;

"The normal rule in civil proceedings is that the person bringing proceedings bears the burden of proving every element of the wrong on which their claim is founded. It is also the normal rule that the part who bears the legal burden of proof also bears the evidential burden. The effect of S.25(4) of the Act is to shift the burden to the Respondent in cases where records in the statutory form were not maintained. Thus a form of rebuttable presumption of non-compliance arises in such cases.

The burden of proof must be applied in a way that confirms to the requirements of natural justice and the right of the respondent to mount a defence. This suggests, at a minimum, the respondent must know, with reasonability clarity, what it is expected to rebut.

The burden on the respondent of proving compliance with the Act arises in proceedings in which a complaint of non-compliance is made. It is clear from S.27 (2) of the Act that the jurisdiction of the Rights Commissioner is invoked by an aggrieved worker or his/her Trade Union by presenting a complaint to a Rights Commissioner that his/her employer has contravened a relevant provision of the Act in relation to him/her. The subsection goes on to provide that where a complaint was made the Rights Commissioner shall give the parties an opportunity to be heard and to present to the Commissioner any evidence relevant to the complaint. This suggests that the evidential burden is on the claimant to produce such evidence as it available to support a statable case of non-compliance with a relevant provision of the Act. It seems to the Court, that, as a matter of basic fairness, the claimant should be required to do so with sufficient particularity and to allow the respondent to know, in broad terms, the nature of the complaint and the case that they are expected to meet.

As was pointed out by Lord Devlin in Bratty –v- Attorney General for Northern Ireland [1963] A.C. 386 an evidential burden is satisfied where the evidence adduced is sufficient to suggest "a reasonable possibility".

The respondent should then be called upon to put the records required by S.25 (1) of the Act in evidence showing compliance with the relevance provision in issue. If records in the prescribed form are produced, and show compliance on their face, the legal burden will be on the claimant to satisfy the Rights Commissioner, or the Court on appeal, that the records are not to be accepted as evidence of compliance. Thus the claimant will bear both the evidential and legal burden of proving on the balance of probabilities under the Act were contravened in the manner alleged. If the claimant fails to discharge that burden he or she cannot succeed. Where records in the prescribed form are not produced and the claimant has satisfied the evidential burden which he or she bares it will be for the Respondent to establish on credible evidence that the relevant provisions were complied with in relation to the claimant. The respondent will thus be required to carry the full legal burden of proving on the balance of probabilities, that the Act was not contravened in the manner alleged by the claimant. If the respondent fails to discharge that burden the claimant will succeed".

A very similar approach was taken by the Labour Court in Nolan Transport and Antanas referred to previously.

It is now common for representatives of employers to raise the argument that the employee must be in a position to provide dates on which the employee did not receive their entitlement. This argument goes far further than the test set out by the Labour Court and the Act. For that argument to succeed it would first presuppose that the employer had notified the employee of all entitlements and that the employee was effectively walking around with a clocking system themselves. The employee need only set out the claim in the broadest terms. The issue of how far the employee has to go in setting out their

claim has yet to be fully determined by the Court. It would appear to me to be sufficient if the employee is able to say that they did not get their 30 minute break within 6 hours of starting work on a regular or irregular basis or that they did not get 15 minute or 30 minute breaks at any time during most days or on occasions. Giving particulars of the claim does not mean the employee is required to give times and dates.

Where an employee has elected to put in a request under the Data Protection Act and it has been held by the European Court of Justice that working time records are data then if those records are furnished clearly the employee will have to go further than simply making broad statements. Where the employee makes broad statements then it is a matter for the employer to put the records into evidence if they have not already been provided or requested. Where those records are put in place and they are not in the prescribed form, or there are no records, then the legal and evidential burden will pass to the employer.

<u>The form of records which must be maintained.</u>

S.I. No. 473/2001 in Regulation 3 sets out the form of records which must be maintained under Section 25 of the Act. These records must set out;

(a) The name and address of each employee and their PPS number.
(b) A copy of their statement under the Terms of Employment (Information) Act 1994 and S.I. 49/1998.
(c) The days and total hours worked in each week by each employee, any days and hours of leave in each week granted b way of annual leave or as a public holiday and any additional days pay referred to in Section 21 in each week to each employee concerned.
(d) A copy of the written record of notifications issued under Section 17.

This is quite an extensive list but those Regulations have now been in place for 13 years.

Where there is no clocking in facilities in place then an OWT1 Form or a form similar to it should be used.

There are exemptions from Section 25. The exemption applies where the employer has electronic record keeping facilities. This would include flexitime or clocking in facilities.

Employers who have a manual record and have agreed with the employee that the employee will complete the OWT1 Form and will present the completed form to the employer for counter signature and retention. This exemption only applies to an employer if he or she complies with three conditions namely;

1. The employer notifies the employee of Sections 11, 12 and 13 of the Act. Exemptions also apply where there is a collective agreement, an Employment Regulation Order or a Collective Agreement registered.
2. The employer notifies in writing each employee of the procedures which the employee may notify the employer of in respect of any rest or break period referred to in Sections 11, 12 and 13 of the Act to which the employee is entitled and was not able to avail himself or herself of, and
3. The employer keeps a record of having notifying each employee of the matter set out at 1 above, a records of matters 1, 2 and 3.

<u>What happens where there are no records?</u>

Where there are no records the evidential burden and the legal burden rests on the employer. In the case of a factory where there is a production line it is usual that a production line will cease on regular occasions for rest and break periods. That will be a form of evidence. In the case of an office it would be that there is a procedure in place that individuals take a break at lunch time when an office will be closed for a period of time.

Because of the way businesses now work, which is effectively the 24/7/365 that form of evidence is becoming less available. The normal evidence which is given is that the employer will contend that everybody took breaks or will bring in a work colleague to say that the saw the employee take breaks. That is never going to be sufficient. Where the employer bears the evidential and legal burden then there is an entitlement to the employee to request the employer to produce evidence of the exact start and finishing time of each break. It is highly advisable that employers have in place procedures for recording individuals signing in and signing out for their rest periods. It is advisable that the procedures are in place with scheduled rest periods and that managers and those responsible for the workplace are advised to ensure that those reporting to them obtain their proper rest intervals.

As a matter of practice claims under Section 12 are probably one of the most difficult for both employers and employees and ones where the greatest length of time is taken up in examining whether individual receive their entitlements. These problems invariably arise where there are incomplete or improper recording procedures in place in the workplace coupled with failure to notify employees of their entitlements.

<u>On –call time maybe working time.</u>

In a UK EAT case of Truslove and Another –v- Scottish Ambulance Service UK EAT /0053/13/JW the claimants were ambulance paramedics. The claimant sometimes worked on-call night shift duties away from their home base station. On such occasion they were required to take accommodation within a three mile radius of the ambulance station. This is where they were to park the ambulance.

They were required to meet a target time of three minutes within which to respond to a call. The claimants claimed that time spent on

call counted as working time and so they were entitled to rest periods according to the Working Time Regulations.

The Employment Tribunal in the UK dismissed their claim. The UK Employment Tribunal decided that the claimants in this case were not confined to unspecific location and therefore were at rest during the periods they spent on call. The case was appealed to the UK EAT.

The UK EAT allowed the appeal. The UK EAT held that it was clear that the time of the claimants was not their own while on duty. They held that the central question as whether the employees were on the facts required to be present at a place determined by their employer. They held that they had to be where they were within narrow limits. They could not be at home.

Therefore they could not enjoy the quality of rest that they were entitled to under the UK Working Time Regulations which are similar to ours. In Particular the UK EAT looked at the case of Landeshaupsadet Kiel –v- Jaever [2004] ICR 1528.

This case may well be interesting for the principles which it sets out.

The reasoning is a reasonable approach to the issue of rest periods.

Conclusion

The issue of rest intervals at work is for some reason the most contentious of all claims and disputes. The disputes arise because of lack of records. There is a legal requirement to maintain such records. In the UK employers invariably do because of the actions of the regulatory authorities. In Ireland even when the Labour Court determines records have not been kept NERA are less than proactive in pursuing compliance.

*In contentious cases a solicitor may not charge fees or other expenses as a percentage or proportion of any award or settlement.