Section 13 – Weekly Rest Period's*

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

Section 13 implements Article 5 of the Directive

The Section requires an employee to receive, in each period of seven days, a rest period of 24 hours. The rest period of 24 hours must be preceded by a daily rest period of 11 hours.

For example an employee who finishes work on Saturday at 1pm should not recommence work until midnight on Sunday.

An employer by virtue of Section 13 (2) instead of providing the rest period in a seven day period may provide two rest periods of 24 hours each. However, this does not mean it should be preceded by two periods of 11 hours, if granted as a 48 hour period. If however it is two non-consecutive 24 hour periods the daily rest period must be granted.

There are exemptions in Section 13 (4). The 24 hour period preceded by the 11 hour period does not apply in cases were due to the technical nature and how the work is organised or an objective reason would justify the exemption applying. It is difficult to envisage circumstances where this exemption would apply. Saying this there are exceptions for activities covered in S.I. 21 and 52 of 1998 and S.I. 817 of 2004 under Section 13 (6).

The Act in Section 13 (5) provided that the rest day period of 24 hours shall be a Sunday. This Sunday rest does not apply where the employee's contract of employment provides for Sunday work.

In Laois County Council –and- Paul Delaney DWT1383 the contract for the employee provided, that as a water and sewerage caretaker, he should attend at work 7 days a week. The employee made a complaint. The Rights Commissioner accepted the employee could claim the benefit S.I. 21 of 1998. The relevant Regulation is Regulation 4. However the Rights Commissioner held that the employer had failed to provide compensatory rest and required the employer to pay €5000. The award was paid but still went on appeal. The employee's hours of work had been altered. The matter went on

appeal with the employer contending that they had complied with the decision of the Rights Commissioner. The issue on appeal was whether the Respondent had complied with the decision of the Rights Commissioner. This in turn raised the question of whether the Claimants revised attendance patterns complied with Regulation 4 S.I. 21/1998.

The Court found that the claimant finished work at 2.30pm on Friday. He recommenced work at 8am on the following Saturday. The Court held that he had a rest period of 17.5 hours. He finished work at 11am on Saturday and recommenced work at 11 am on Sunday. The Court held that he therefore had a rest period of 24 hours.

The employee had contended that the rest period of 24 hours should be preceded by rest period of 11 hours as is required by Section 13 (2) of the Act. It was accepted by the Court that the employer was exempted from the requirements of Section 13. The question was whether he was provided with a rest period and breaks that in all the circumstances can reasonably regarded as equivalent as a rest period and breaks to which he would otherwise be entitled. The Court held;

"In this context, all of the circumstances includes the exigencies of the job that the claimant is employed to perform. He obtains a rest period of 17.5 hours between finishing work on Friday and recommencing work on Sunday. He works for 3 hours and then has a rest period of 24 hours. In the Court's view this pattern can, in all the circumstances, reasonably be regarded as equivalent to the rest period normally required by Section 13 (2) of the Act"

This case is interesting in that the Labour Court not only looked at the exemption but also looked at the exigencies of the job which the employee was employed to do to ascertain whether the employer had complied with the requirement of providing compensatory rest. The decision would appear to place a high bar on employers to show that compensatory rest had been provided.

The provisions relating to the 24 hour rest period are covered by the Directive in Article 5. There is an obligation on employers to ensure the employee takes this rest Case C – 484/04 Commission –v- United Kingdom.

Two very interesting decisions of the Labour Court on the issue are Stobart (Ireland) Driver Services Ltd –and- Seven Workers DWT1437/2014 and Stobart (Ireland) Driver Services Ltd –and- David Burke and Others DTW1464/2014.

In both these cases there was no argument that the employees did not receive the period of 35 hours. However the employees, in both cases, were required to phone during the second "rest period" to get their shift starting times. In DTW1437/12 there is a very extensive determination of the law on this issue.

The Labour Court in that case held that the purpose of the Act in the relevant parts was to provide for the implementation of Directive 1993/104/ECC of the 23 of November 1983. The Court referred to Section 2 of the Act which defined the rest period in the following terms;

"Rest period's means any time that is not working time"

The Court pointed out that the definition of working time is;

"Working time means any time the employee is

(a) At his or her place of work or at his or her employers disposal; and,

(b) Carrying on or performing the activities or duties of his or her work and,

"Work shall be construed accordingly"

The Court in that case set out the provisions of Section 13 and Article 5 of the Directive.

The Court pointed out;

"Words or phrases in the Act have the same meaning as words or phrases in the Directive unless the contrary is indicated"

The Court stated that there was no question but that the individuals received 35 hours between the shifts. However the Court held;

"The question maybe more precisely rephrased in the following terms: "Does a requirement to telephone the employer during a rest period bring the employee within the definition of "working times" and/or does it amount to an interruption the weekly rest period"

The Court held that in order to bring an employee within the definition of working time the employee must "be at his or her place of work or at his or her employer's disposal and be carrying out or performing the activities or duties of his or her works.

The Court held;

"It is common case that the claimants are under an obligation to make the phone call to the employer while on a weekly rest period"

The Court went on to state;

"It is clear therefore that the claimants were performing the activities or duties of his or her work…"

The Court went on to find therefore that the statutory requirements to qualify as working time were met.

The second question which the Court had to raise was whether the employees;

"Are at their place of work. The answer to this question is more difficult as their place of work is not easily identified. It maybe the company, the depot or the truck to which they are assigned or any place they are require to deliver or to collect from by their employer in the course of their employment"

The Court however went on to state;

"However the requirement is to be at one's place of work is one of two alternative requirements in the Statue. It appears from a plain reading of the Section that it is sufficient that one be either at one's place of work or at one's employer's disposal. It appears as a Court

that these must be read as alternatives either of which meets the statutory of requirements to comply with the test of working time.

The Court went on to hold the mandatory requirement to make the phone call brought the employees into the category of working time.

In DWT1464 the Court restated this view.

It would therefore appear that any interruption of the rest period in effect causes a break in the rest period entitling the employee to issue a claim.

Because of the way that work is currently organised now particular for those working on shifts, and, those paid on an hourly rate it is becoming common for an employer to require an employee to phone in to get their shift time starts. This leaves the employer open to a claim under Section 13. There may also be subsequent claims also under Sections 11 and 17 as regards notification of start times. It is sufficient to state that employer's need to be extremely careful in requiring employees to phone in to get shift times. The writer is not aware of any situation where an employee has to check their mobile whereby they will be notified by text or their start times.

It would appear to the writer that if such a procedure occurs while an employee is on a rest period under Section 13 and has to check their mobile phone for a text from their employer this may equally come within the reasoning of the Court in the Stobart cases referred to previously.

<u>Drafting a contract to include Sunday work</u>

Where an employer requires an employee to work on Sunday it is important to ensure that the contract is specifically provides for Sunday working. It must be self-evident from the contract.

The clause which states;

"Your hours of work shall be X hours per week rostered over Monday to Sunday"

Equally a statement that says;

"The a company works on a 7 day a week basis and you maybe rostered to work on any day"

This may also be sufficient but it would be more advisable to add in the words "which may include a Sunday".

Where Sunday work is not specified and the employment is not covered by one of the exemptions then it would appear that the employee is entitled to refuse to work on a Sunday. If an employee is disciplined or dismissed in certain circumstances the employee may well have a claim for penalisation under the provisions of Section 26 of the Act.

How this however is applied in practise is sometimes difficult to follow.

In the case of The Fleet Street in Dublin Ltd –and- Burtan DWT123/2012 the employer contended the employee was employed to act as a doorman on Saturday evening and Sunday morning. The employer prepared a contract for the employee. The employer could not confirm it was ever giving to the employee. The employer submitted that the employee always knew that he had to work on Sunday. The Labour Court held that the employee was "employed for the express purposes of providing door security services…at the weekend". The Labour Court held that the contract for the employee contained a provision that required him to work on Sunday.

The writer has a difficulty with the reasoning of the Labour Court on this point. The Labour Court does not appear to have had regard to Section 13 (5) which provides that there such a clause must be

provided in the contract. A contract cannot be binding on an employee unless it is giving to the employee. The Labour Court does not appear to have had regard, in that decision to Directive 91/553/EEC implemented in Ireland by the Terms of Employment (Information) Act or Case C-350/1999 Lange –v- Georg Schuenemann. The Directive 91/553/EEC clearly indicates that the principle terms must be provided to the employee in writing.

In the writers opinion the fact that the employee would know that he or she is employed to work on a Sunday even because of the type of job he or she is employed to undertake does not bring them within the provisions of 13 (5) where the employee is not advised of same in writing.

Shops, convenience stores and department stores, for example, being open on Sundays many contracts do not specifically provide for Sunday working. An employee is entitled to refuse to work on a Sunday without such a clause. It is hard to conceive of any situation where an employee takes on a job working for a department store or a petrol station would not be aware of the fact that there is a requirement to work on Sundays. Any action to dismiss or discipline an employee who refused in such circumstances to work on a Sunday maybe met with a claim under Section 26. In EMC Health Care Ltd –and- Silarska DWT12139 the case concerned a situation where the contract provided for Sunday work but the employee had signed saying she did not agree to working Sundays. The case turned on its particular facts where the employee was not successful. There were two arguments in that case. The first is that the employee received a contract which provided for Sunday working. There can be no doubt about that. The second is that the employee signed stating that she did not accept or agree to work on Sundays. It would appear reasonable that in those circumstances the employee should simply have refused the employment in its entirety. It is certainly arguable that an employee cannot pick and choose which clauses of the contract of employment they wish to take. If they don't wish to take a contract with particular terms then it would appear irrelevant that the employee simply states that they won't take the job on until they get a new contract which excludes that provision.

When the Section 13 claims arise

Normally Section 13 claims will arise as part of other claims. A Section 13 claim will more usually be heard before a Rights Commissioner where there is also a Section 14 claim. Where Section 13 claims are taken on their own they normally arise in situations where they employer is claiming the exemption and the issue then arises as to whether the employee received the compensatory rest.

There is a new class of claim which are proceeding at the present time. They relate to higher paid employees. It is usual that what is happening is that the employee is been contacted on for example a Sunday by a work colleague. The defence which arises in these cases is usually that the employee is an employee who sets their own hours or work. This usually turns then on the terms on the contract of employment. If the contract of employment provides for a minimum number of hours during the week or core hours of work then that argument is unlikely to be able to be made in light of the statutory provisions. Because of the requirement for more senior individuals to be available 24 hours a day 7 days a week 365 days a year with employer's providing such employees with mobile telephones and laptops the potential for such employees not receiving their entitlements under Section 13 increases.

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