Sunday Working – Section 14*

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

It is now a reality of business that employees, in certain business, will be required to work on Sundays.

The provisions of Section 14 provide that,

"…, in effect, that where the requirement to work on Sunday is not otherwise taken into account in the determination of a worker's pay, he or she is entitled, inter alia to the payment of an allowance of such an amount as is reasonable in all the circumstances". Ireland's Eye Seafood Limited –and- Brekhlichuk DWT1469

This may consist of,

"(a) the payment to an employee of an allowance of such an amount as is reasonable having regard to all the circumstances; or
(b) by otherwise increasing the employee's pay by such an amount as is reasonable having regard to all the circumstance; or
(c) by granting the employee such paid time off from work as is reasonable having regard to all the circumstances; or
(d) by a combination of two or more of the means referred to in the preceding paragraphs".

The issue which arises in respect of an employee is what allowance or increased payment is reasonable.

Where a Sunday premium is set in a collective agreement it shall be regarded as reasonable (Section 14 (3)). In Flexsource Solutions –and- Rutkowski DWT1421 the employer produced evidence that a collective agreement had been entered into and amended in 2013 to increase the pay rate to €9.90 per hour to include consolidated bonus payments. The Labour Court held,

"…that in accordance with Section 14 (3)… the value of a Sunday premium paid to a comparable employee together with their basic pay are in line with those paid to the complainant. This was collectively

agreed… the Court does not find that the Respondent was in breach of Section 14 of the Act".

However the fact that a rate of pay may equal or exceed ERO/REA is not sufficient in itself. In Duesbury Limited –and- Frost DWT3/2010 the employee was paid in excess of the ERO for the hotel industry. The employer argued that as the ERO rate inclusive of a Sunday premium would be €586 per fortnight and as she was paid €601.22 her wages therefore included a premium for Sundays. The Court rejected this stating,

"It is clear from subsection (1) (b) of this Section that the right to compensation for Sunday working can be satisfied where the requirement is taken into account in determining the employee's rate of pay".

The Court went on to say,

"This suggests that some element of the employee's pay must be specifically referable to the obligation to work on Sunday". (underlining by the writer)

The Court had heard conflicting evidence on the matter of the alleged premium. The Court held as regards the onus of proof,

"In the normal course it is for the person who asserts to prove that which they assert (see Joseph Constantine Steamship Line Limited –v- Imperial Smelting Corp Ltd AC154) Hence is for the Respondent (employer) to show that when the Claimant's rate of pay was established a specific element of it was intended to be in consideration of her obligation to work on Sunday".

This applies where an employer alleges a payment including a Sunday premium. Various arguments are regularly raised by employers. In the case of Ballinalard Transport Limited –and- Agaskov DWT1359 the employer argued that the contract provided for a Sunday premium. The relevant clauses relied upon were,

"(e) Salary, your salary is €90 per day…

(f) Hours of work. The company operates around the clock 7 days per week. You will be required to work up to 768 hours in any 16 week period…"

The Court held the combined effect of the two paragraphs did not have the effect claimed by the employer. In Ballinalard Transport Limited –v- Gonczi DWT1368 the Court held that where an employer claims a rate of pay includes a Sunday premium,

"..it is for the Respondent (employer) to so prove".

Where an employee is paid the same rate of pay in his/her contract and is required to work on Sunday compared to those who are not so required in Carbury Investments Limited T/A Ashbourne House Hotel and Eamon O Gorman DWT634 the Court held,

"It is axiomatic that as the claimant, who was required to work on Sunday, was paid the same rate of pay as other members of staff who had no such liability, no element of his pay could have been in consideration of the obligation to work on Sunday".

The argument that the employee was paid in excess of the National Minimum Wage is often argued. Namely that the amount in excess is a "premium". However to so argue cogent evidence from an employer so asserting must be furnished Section 14(4). In Jump Juice Bars Ltd –and- Koniczna DWT12167 the Court held,

"In the absence of such evidence the Court takes the view that the 10% premium over and above the minimum wage… was unrelated to her requirement to work on Sunday"

This issue is also claimed in Scally and Lynch and Kelly DWT102 and 103/2013. Again the argument was that the employees were paid in excess of the National Minimum Wage the amount being in excess being a premium, the rate, in this case, was in line with a defunct ERO but exclusive of a Sunday premium. As there was no collective agreement in place the Rights Commissioner did not have to consider Section 14(3). The Rights Commissioner awarded a premium. The Labour Court rejected the appeal by the employer.

The Court in assessing an award must set an award which is reasonable. The Act gives little guidance. However if there is a collective agreement in place then the Court must have regard to the terms of any relevant collective agreement Section 14(3) and confirmed by the Labour Court in Sandor –v- Duscan Lipak DWT1141. A comparable employee is defined in Section 14(5) as meaning,

"…an employee who is employed to do, under similar circumstances, identical or similar work in the industry or sector of employment concerned to that which the first mentioned employee in Subsection (3) is employed to do".

It does not appear necessary to identify a particular employee simply a class of employees. This makes sense where there is an ERO for a particular industry.

There have been some more novel arguments. Few get to the Labour Court but one did in June of 2014. In the case of Hyper Trust Limited T/A The Leopardstown Inn –and- Gordins DWT1467 the employer argued that a "free meal" provided on Sundays was a premium. It was claimed that this was a substitute for the payment of an increase in pay. The Labour Court held,

"Such a substitution is not provided for in the Act".

The employee was awarded €2000 for this breach.

The next defence which is regularly trotted out is that the breach occurred, by which is meant the first breach more than six months before the complaint. The Labour Court have regularly debunked this argument and this is dealt with under the provisions of Section 27 of the Act (Campbell Catering Ltd –v- SIPTU DWT 35/2000)

The next argument is that an employee may have a different premium rate for full and part time staff. While it is not necessary to set out the reasoning of the Labour Court in full on this point in Campbell Catering –and- SIPTU DWT35/2000 this was rejected.

For employers who have staff who work on Sundays the Decisions of the Labour Court would clearly appear to indicate,

1. If a premium or increased pay is being paid it should be clearly set out.
2. Merely saying that the rate of pay exceeds the National Minimum Wage is not sufficient.
3. If there is a composite rate of pay, say €10 per hour, to include a Sunday premium this in itself may not be sufficient. It appears necessary to set out what portion of the "premium" payment relates to Sundays. In Carbury Ireland Limited and Siptu DWT720 it was agreed between parties that the claimants

received an extra 14% on their shift pay in consideration for working Sundays and therefore the premium had been taken into account. See also Dublin Bus –v- Derek Michael Rothwell DWT1192

4. Full-time and part-time staff may not be treated differently. If an employer has part-time staff the Sunday rate should be the same for both. Some employers may only have certain staff who work on Sunday. If full and part-time staff work on Sunday they must receive the same rate. If only part-time staff work on a Sunday different criteria may apply.
5. Payment in kind is not a premium.

The next issue is often the level of the premium. In Group 4 Securitas –and- SIPTU DWT6/1999 the Labour Court held that where there was a negotiated premium for working on Sunday Section 14 could not be used to claim an enhanced rate. A view has been canvassed that if the employer sets the premium of 1 cent per hour or even for shift following DWT6/1999 the Labour Court cannot increase the premium. This is based on the wording of Subsection (1) where the relevant words state,

"…(and the fact of his or her having to work on that day has not otherwise been taken into account of in the determination of his or her pay)…"

However the full section if read continues,

"…shall be compensated by his or her employer for being required to work on Sunday for the following means, namely
"(a)…
(b)..by otherwise increasing the employee's rate of pay by such an amount as is reasonable having regard for all the circumstances…"

This point is raised not as an academic point but as a practical issue. The writer has seen such clauses in contracts. One has gone to the Labour Court but the writer is of the opinion that such an argument that 1 cent or other minimal payment would not be upheld by the Labour Court. In the case of the 1 cent being paid which was before the Labour Court this was not provided for in the contract. Therefore in theory the point is still open to argument.

Section 14 is one of the less used provisions for claims by employees. The reason for this is that the issue of a Sunday premium or

enhanced payment is not generally considered by many employees. Part-time employees who bring claims under the Part-Time work legislation rarely consider the add on claim under Section 14. A further reason is that invariably these workers are at the lower scales of pay. Previously various ERO's/ REA's would have determined the rate of pay including premiums. With their demise employers are seeking not to pay premiums. There is therefore a rise in the number of such claims. The issue of Employment Regulation Orders is likely to be addressed in the future. Sunday premium cases can often be difficult to both bring and defend. It involves on the side of the employee checking all contracts and documents signed by the employee. These are not always immediately available. From an employer's perspective unless there is an ERO or Collective Agreement the onus of proof in the absence of very clear contractual terms, is on the employer. Claiming there is a "Collective Agreement" where there has been no Union involvement will by necessity require proof as to how the agreement was entered into, the basis of such negotiations being representative of the employees imposed "agreements" with "hand picked" employee "representatives" will be unlikely to succeed. If it was registered with the Labour Court it will clearly be binding. If it was not registered the full proof of it being a "fair" agreement will fall on the employer unless a Union was involved.

In the future the issue of what is a reasonable premium is going to be litigated upon more often particular in non unionised companies. In unionised companies those premia are invariably negotiated.

Whether acting for an employer or employee proffering an opinion of what a Sunday premium should be by a professional adviser is fraught with problems. If a percentage or amount is proffered it is the person putting that forward to prove same. It would be far more reasonable for the State to provide either a percentage or a minimum additional payment to cover this issue.

I would advise colleagues that if they are appearing before a Rights Commissioner or Adjudicating Officer in the future or the Labour Court that if you are asked to give an opinion on what a Sunday premium is that the answer should be,

"this is outside my competency, while I may have an opinion it is merely an opinion and therefore I will leave it to (insert the title of the entity applicable) to decide on the basis that you have far more experience than I have".

I have, on a personal basis in any Sunday premium case that I have been involved in taken the view with either a Tribunal the Court I will not give a view. The best that I have got to when I have been pushed is to say that I will give an opinion but that my opinion is just an opinion and it is not being put forward on the basis of setting any view merely answering a question as to what my opinion is.

If you do set out a view as to what you, as a professional advisor, believe the premium should be you may find yourself in a situation of being required to produce evidence from comparable companies/employers unless you have wide ranging experience of the particular industry and have access to such information of potentially taking on a burden which will be difficult if not impossible to discharge. It is worth remembering that Rights Commissioner/Adjudicating Officers in the future, and the Labour Court will have access to information which you will not have and you could find yourself in a situation of having to justify a difficult examination of the premium which you have put forward. This advice applies to whether you are acting for an employer or an employee.

Where a premium is not provided the Court can set a premium Michael Pat Carpendale –v- Nilo Dela Pena DWT526 time and one half was awarded in Scally –v- Lynch and Kelly DWT 102/2013 equally time and one half was imposed.

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