Working at Night – Section 16*

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

The cases involving claims under Section 16 fall into two categories.

The first is that the employee is a special category night worker and works more than 8 hours at night Section 16 (2).

The second is that the worker works more than an average of 8 hours calculated over a period of;

(a) Two Months, or
(b) Such greater period as specified in a collective agreement approved by the Labour Court Section 16 (2) (b)

The second category of claim is the more usual. It however does not require an employee to work solely at night. Night time means a period from midnight to 7am. This is a period of 7 hours. Night work is carried out during this period. Section 16 (1). A night worker is a person who normally works 3 hours of his or her daily working time at night, and, the total number of hours worked at night equals or exceeds 50% of the total number of hours worked.

Who is a Special Category Night Worker?

Such a worker is a person carrying out activities under Section 6 and/or Section 11 (5) of the Safety Health and Welfare at Work Act 1965 by virtue of Statutory Instrument 299/2007.

An employer must without prejudice to Section 19 of that Act take account of particular risks, if any, affecting employees working alone or working in isolation in remote locations.

An employer of a night worker is obliged under Regulation 155 to carry out an assessment to take account of;

(a) The specific effect and hazards of night work, and

(b) The risks to the safety and health of the employee concerned.

Under Regulation 156 the employer must take account of the assessment and shall take such steps as are appropriate to protect the safety and health of the worker.

In the case of a night worker the employer, before employing a person as a night worker, and at regular intervals during the period that the employee is employed as a night worker make available to the night worker, free of charge, as assessment by a registered medical practitioner. If the employee becomes ill or exhibits symptoms of ill health due to night work the employer whenever possible shall assign the employee to non-night time duties to which the employee is qualified to perform. The first comment I would like to make is that in any case I have been involved with I have never come across a provision in a contract of employment for a night time worker advising them of their right to a free assessment nor that they were assessed. Further I have yet to come across an assessment carried out. I am unsure how the provision is to be applied despite being a Directive provision. It is sufficiently clear to have direct effect. Now assessments do occur. It is just that cases involving employers who are compliant do not come up for dispute. An issue yet to be determined by the Labour Court is what happens where there is no assessment carried out under Section 58 of the Safety Health and Welfare at Work Act, 2005.

There is a requirement under Article 8 of Directive 2003-88-EC to do so. In the absence of an assessment can it be argued that the worker is a special category night worker. Section 16 (2) uses the words “shall not permit”. It is therefore prescriptive. The issue will at some stage need to be addressed.

Non Special Category Night Workers

An issue which regularly arises is to determine whether a person is a night worker. In R-v- Attorney General for Northern Ireland ex parte

Burns [1999] I.R.L.R. 315 Kerr J held that the definition of "night worker" could not be confined to somebody who worked night shifts exclusively or even predominantly. The applicant who worked one week in every three weeks cycle from 9pm to 7am Sunday to Friday was deemed to be a night worker for the purposes of the Directive. In Stanislavs Grabovskis and Sam Dennigan & Co. DWT11172 the Labour Court held that the employee was contracted to work between 8pm and 4am which was a permanent roster with no alternative day working roster. Therefore;

"The Court is satisfied that the complainant's contractual hours required him to work at least 3 hours after midnight 100% of the time".

Therefore the worker was a night worker.

All that is necessary is for the worker to work at least three hours a day after 12 midnight to be a night worker.

A worker who works from 7.30pm to 4am with a rest interval at 12 midnight for 30 minutes will be a night worker. The worker will have no claim under Section 16 as he/she does not work more than 8 hours in any 24 hour period. In addition, less than 50% of the time will be after 12 midnight.

If the worker worked from 7pm to 4.30am with a break of 30 minutes at 1am, the employee will work 9 hours. In a five day week the working time, excluding breaks is 45 hours. The employee will be night worker. However, the number of hours worked at night will be only 4 which is less than 50% of the hours worked.

However, if the worker who works from 8pm to 5.30am with the same break at work will qualify as a night worker and under Section 16 as 5 out of the 9 hours will be after midnight.

If a worker works over 48 hours then a claim under Section 15 and Section 16 may both apply. Compensation could only be given under one Section.

In the case of some workers the maximum hours will be 40.

The argument above seems contradictory. The alternative is that the maximum hours are 40 based on "night time" being midnight to 7am so if the worker works 8 hours average with at least a minimum of a minute over 3.5 hours after midnight that the worker can claim under Section 16, as he/she works more than 50% of their time at night. i.e. between 12 midnight and 7am.

This issue will need to be addressed at some stage. My view is that once a worker works more than 50% of the working at night being over 3.5 hours at night and works 8 hours per day they are a night worker protected by the Act.

It would however appear that a part-time worker who works just 3 days a week from 10pm to 7am with a rest interval at 3pm for 30 minutes will work 8.5 hours a day. More than 3 hours a day will be at night time and the average will be over 50% of the hours at night. The total hours a week will be just 25.5 hours. Such a worker may well have a claim under Section 16.

What is the Reference Period?

To determine whether an employee is entitled to make a claim the averaging must be over a year. The Interpretation Act 2005 defines a "year" as

"Year" when used without qualifications means a period of 12 months beginning on the first day of January in any year".

Then when should an employee issue a claim?

The reference period will normally be two months. Therefore within 6 months of a breach.

What happens if the breach occurs in March/ April 215

The reasoning of the Labour Court in Sam Dennigan & Co. and Grabovskis DWT11172 where the claim issued after the year ended but no breach had occurred in the preceding 6 months was one where the Labour Court held that the employees' claim was out of time. From that reasoning the situation would appear to be that the employee would issue the claim at any time up to the end of October but the Rights Commissioner or an Adjudicating Officer, in the future, could not hear the claim until January 2016. The reason for this is that it would be unclear whether in the year the employee had worked more than 50% of the time at night. The reality of matters is that an employee cannot determine if there has been a breach until the 31st December in any year. This appears illogical but the alternative would be for the Labour Court to determine that the period to bring a claim would be within 6 months of the end of a year. Currently however I think the claim needs to be brought and then parked until after 1 January in the following year.

Exemptions

Employee covered by Statutory Instrument 21 of 1998 and Statutory Instrument 52 of 1998 are exempted. There are however conditions for such exemptions applying.

Transfer of Undertakings

In the case of Stobart (Ireland) Drivers Services Limited and David Burke and Others DWT1464 the Labour Court considered whether a breach transferred by virtue of the Transfer of Undertakings Regulations from a previous company. The Labour Court held that they were not satisfied the derogation from Section 16 (2) applied.

It would therefore appear that when dealing with the purchase of a company which has drivers or acquiring contracts where there are drivers that it is important as part of any due diligence to ascertain the position concerning night time working of the employees transferring.

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