Provision of information in relation to Working Time – Section 17*

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 is sometimes incorrectly referred to as the "overtime section". If there was ever a Section of the Act which, apart from possibly Section12, leads to more controversy, Section 17 would almost certainly be that Section. It often leads to protracted submissions.

The Section in subsection (1) provides that if neither the contract nor an Employment Regulation Order, Registered Employment Agreement, or, Collective Agreement specifies a normal or regular starting or finishing time the employee's employer shall notify the employee at least 24 hours in advance of the start and finishing times on each day. This is subject to the provisions of subsection (3).

The Section in subsection (2) provides that if an employee is required to work for his / her employer such hours as the employer may decide, which are referred to as "additional hours" the employer shall give 24 hours' notice to the employee of the additional hours being effectively the earlier start / finish times or the additional start/ finish times. This is against subject to subsection (3).

The provisions of Section 17 (1) and (2) does include the word "require". This presupposes that the employer determines the hours of work and the employee is obliged to do so rather than situations where the hours or additional hours are done by agreement or consent. Wincanton Ireland Limited and Pavel Pioro DWT1230 was a case where there was a divergence in evidence between the employer and the employee. The employee contended he was required to undertake overtime. The employer contended the overtime was voluntary and could be accepted or rejected. The employer contended there was no element of compulsion associated with overtime work. The Labour Court held;

"The Court finds that the complainant was offered the opportunity to work overtime on a voluntary basis and he chooses to accept such offers when presented to him. The Court notes that Section 17 (1)

provides for 24 hours' notice of a "requirement to work overtime". In this case no such "requirement" was present".

A similar approach was taken by the Court in MCR Personnel Limited and Pienszke DWT11109 where the Court held;

"On a plain reading of the subsection it is intended to cover a situation where a worker is obliged to work the hours directed by the employer…accordingly the Court is satisfied that the Respondent did not contravene Section 17". See also MCR Personnel Limited and Giermawski DWT1220.

Equally where an employee requests overtime a claim under Section 17 would not arise. Michael Conlon and Juris Kruglijs DWT0939. This equally apples where the employee consents to doing the overtime. MCR Personnel Limited and Pienszke DWT11109 and Donnelly Fruit and Veg and Germovs DWT133.

A single breach, in a reference period, is not sufficient to bring a claim under Section 17 Smart Scaffolding Limited and Bunyakevych DWT877.

Subsections (1) and (2) apply to a situation where the employee is required to do overtime. The basis of this is that there is a "requirement". This will often be evident from a contract. If the employee can refuse the overtime or consents to the overtime then there is no breach of Section 17. The issue of consent is often raised. However, that does presuppose that the employee, is still employed, will be entitled to refuse overtime going forward.

The issue which regularly comes up is where the employer requires the employee to undertake overtime as to what notice the employee is obliged to give and the employee entitled to receive to be obliged to work the overtime. This issue was recently considered. In the recent case of Lucy Transport Limited and Marius Serenas DTW13141 the Court stated in relation to the legislation;

"It seems to the Court that the underlying rationale of the provision is perfectly clear. It is directed at making a sensible distinction between situations in which an employee has a fixed start and finishing time around which he or she can have private or family life and those who cannot do so due to the unpredictability of their work commitments. Where an employee has a contractual entitlement to a fixed starting and finishing time he or she cannot be obliged to start or finish work at any other time as any variation from the contractual terms can only be by mutual agreement. Where, however, an employee's starting and finishing time is determined solely by the employer the law requires that in order to maintain some degree of work/life balance reasonable notice of starting and finishing times must be furnished by the employer".

The court held that 24 hours' notice must be given and that failure to do so contravenes Section 17 of the Organisation of Working Time Act.

What does this mean in practice?

If an employee has a fixed starting and finishing time with no provision in the contract which requires the employee to undertake overtime then the employer cannot insist upon the employee doing overtime. Where a contract has a fixed starting and finishing time but there is provision allowing the employer to require the employee to undertake overtime then the employer is obliged to give 24 hours' notice of the requirement to undertake overtime.

The Lucy Transport case is important for restating the law on this issue. What is relevant however to both employers and employees is that failure to comply with this provision can result in significant awards.

In this particular case failure to notify the employee of finishing times was sufficient to result in an award, to the employee, of €2500.

In First Direct Logistics Limited and Stankiewicz DWT1450 which issued on 9 May 2014 the Labour Court was referred to DMR Transport Limited Majchrez DWT1416 where the Court stated;

"The case is not apposite in the instant case. In that case the claimant had regular starting times but his finishing times were dictated by the pace at which he completed the work to which he was assigned. The Court took the view that it was the claimant rather than his employer that determined his finishing time. On that basis the Court held that Section 17 of the Act had not been contravened.

The circumstances of the instant case are materially different. The claimant's contract of employment did not specify either a starting or finishing time. The claimant did not control or influence his starting or finishing times. While those times may have been influenced by the exigencies of the business, they were nonetheless determined by the respondent except in the circumstances referred to at subsection (4) of Section 17 of the Act (which are not relevant in this case) the Section does not provide an exemption from the requirements as to notification based on the general or continual exigencies of a business.

In these circumstances the Court finds that Section 17 was contravened by the Respondent in relation to the claimant".

This case confirms that the requirement of a business are not a reason for an employee not to receive notifications in accordance with the Act. See also Anglo Irish Beef Processors and SIPTU DWT19/2000.

<u>Notice for the Following Week</u>

Subsection (3) applies to require that where an employee does not have a fixed start and finishing time notice for the following week, where an employee works Monday to Friday, will be on Thursday. If the days worked are Tuesday to Saturday the notice must be given on Friday.

Where an employee has no set starting and finishing times then again the employer must notify the employee at least 24 hours in advance of the start and finishing times.

In some businesses individuals will work on different shifts. These shifts may change from week to work. The law on this provides that the notice to employees of the requirement to work a particular shift for example a shift starting Monday must be notified the previous Friday. This is an exception to the 24 hour rule. If an employee comes to work on Monday at 9am and the employer wants to change the start time on Tuesday to 8am it is not sufficient to give notice at 9am on Monday as that will not be 24 hours. If however the employer wanted to change the finishing time on Tuesday to 6pm rather than 5pm it would be sufficient if the notice was given any time before 6pm on Monday.

This is one of the unusual provisions of the Act and one which may catch out many employers where they do not have fixed starting and finishing times. It does require that rosters are properly prepared.

Subsection 3 was specifically inserted during the Dail debates to provide for adequate notice to an employee.

Unforeseen circumstances

Subsection (4) provides an exception for an employer where due to circumstances "which could not reasonably be foreseen" then 24 hours' notice is not required. The exigencies of the business is not sufficient as held in Nurendale Limited T/A Panda Waste and Suvac. Equally in Scally and Lynch and Kelly DWT102/2013 the employer sought to rely on subsection (4) where the employees would be required to work overtime due to the arrival of a large number of customers following a football match or concert. The Labour Court held that in running a service station the Court would not accept that the occurrence of exceptional demands on the business due to a match or concert was an unforeseeable event as contemplated by this Section.

It is not sufficient for an employer to simply contend there were exceptional circumstances without proving these on a case by case basis. In Stobart (Ireland) Driver Services Limited and Michael O'Riordan DWT12170 the Court stated "…. the Respondent said that it did not remember the circumstances which prevailed at the time…". The Court held against the employer.

In Lucy Transport Limited and Sereanas DWT13144 the Labour Court held;

"In any event, it is for the employer who seeks to rely on the subsection to establish on cogent evidence what the intervening events actually were on the basis upon which it was contended that they were unforeseen".

It is interesting that the Labour Court appears to allow a difference under Section 17 (4) in circumstances where there is a breach of Section 15 excessive hours which has a prohibition on an employer allowing an employee to work over 48 hours on average as arose in South East Concrete Limited and Grossfeldt DWT1093.

In that case the average hour working time excluding rest / breaks was 48.52 hours. The employer contended that on certain occasions due to weather conditions the claimant was required to pour concrete outside its normal working hours for which it may not have been always possible to give the requisite 24 hours' notice. Now it appears axiomatic to me that where there was a breach of Section 15 which has an absolute prohibition on the employee working in excess of 48 hours averaged the employer could still rely on section 17 (4). I cannot accept this reasoning as sustainable as regardless of the "circumstances which could not be reasonably foreseen" the employer cannot even permit the employee to work in such circumstances so therefore it appears to me that Section 17 (4) cannot be availed of in such circumstances. Saying this, the Labour Court has held that that is what the law is.

It is possible that the relief in Section 5 of the Act equally does not apply as it has to be an "exceptional circumstance" which could not have been avoided despite the exercise of all due care. It would appear to me that at a very minimum Section 17 (4) would require a test of "which could not have been avoided despite the exercise of all due care". The issue in such cases will very much depend on whether you read the Act in the whole or whether you read the Sections as

completely separate and distinct. This is a personal view but I am not sure that the South East Concrete Limited would be decided now in the way it was in the light of the recent case of Nurendale Limited and Suvac, the Scally and Lynch and Lynch and Kelly case and the Lucey Transport Limited and Serenas cases. I was the Solicitor in the South East Concrete case and readily admit that I have a significant problem with that decision. Saying this, it is a decision of the Labour Court and therefore it is one that I have to accept that this the law on Section 17, as it currently stands.

Conclusion

The defence of the exigencies of the business are regularly raises. Unless he employer can come within the provisions of the exemption in Section 5 or in subsection (4) of Section 17 then the exigencies of the business are irrelevant. If an employer is going to rely on subsection (4) then cogent evidence will be required by the employer to prove same on each occasion that this arose. This does require maintaining records.

Section 17 is not there to cover situations where the employee consents or agrees to do the overtime or requests overtime. It is there to cover situations where the employee is required to do overtime.

Employers have to run a balance, in managing a business, to determine whether they require overtime to be worked. In such circumstances the provisions of Section 17 must be complied with. It might appear at first sight that the easiest way of dealing with matters is simply not to include a provision requiring the employee to work overtime. If there is no provision in a contract providing that an employee has to work overtime then the employee is entitled to refuse the overtime and the employer cannot take any action against the employee for doing so as if they do then there is a potential claim under Section 26 for penalisation.

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