Entitlement to Annual Leave – Section 19*

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 implements Article 7 of the Directive. In Case C-282/10 Dominguez the ECJ ruled that Article 7 was sufficiently unconditional to have "direct effect".

Section 19 sets out three entitlements to paid annual leave being;

(a) 4 working weeks in a leave year in which the employee works at least 1365 hours (unless the employee changes employment in the leave year). This exclusion in the case of a change of employer would not apply where the TUPE Regulations apply.
(b) 1/3 of a working week for each month where the employee works 117 hours, or
(c) 8% of the hours he or she works in a leave year up to a maximum of 4 weeks. Section 19 (1).

The employee is entitled to whichever of (a), (b), or (c) is the greater.

In George D O'Malley and Liachavicius DWT074 the Court referred to the case of Edward James Feeney and Milagros Bacquiran [2004] 15 E.L.R. 304 where;

"…this Court made it clear that the provisions of the Act and of the Directive on which it is based, are health and safety imperatives. Here the Court said the following.

"In Cementation Skanska (formerly Kavaerner Cementation) –v- Carroll Labour Court determination WTC0338 (October 28 2003) this Court stated as follows in relation to the computation of compensation for failure to provide annual leave in accordance with the Act. The obligation to provide annual leave is imposed for health and safety reasons and the right to leave has been characterised as a fundamental social right in European Law (see comments of Advocate General Tizzano in R-v-Secretary of State for Trade and Industry ex parte Broadcasting, Entertainment Cinematography and Theatre

Union [2001] I.R.L.R. 559 which was quoted with approved by Lavin J. in the Royal Liver case.

In Case C-12405 Federalie Nederlandse Vakbeweging –v- Staat der Nederlanden the ECJ described the entitlement of the worker to paid annual leave as a "particularly important principle of Community Social Law from which there can be no derogation".

Where an employee becomes ill on holidays that day or days will not count towards the holiday entitlement provided a certificate is provided from a medical practitioner. Section 19 (2). The Act does not set out when such a certificate should be provided but it would, by necessity, need to be furnished within the leave year.

The issue as to what is a leave year consistently causes difficulties. This may seem strange. The Interpretation Act defines a year as effectively the calendar year unless a contrary interpretation applies. Section 2 of the Act defines a leave year for the purposes of the Act as commencing on 1 April in one year and finishing on the following 31 Match. Many employers and their representatives will argue that the contract with the employee provides for the annual leave year 1 January to 31 December. The Labour Court has consistently refused to accept same. The reason is simple. In Royal Liver Assurance Limited –v- Macken [2002] 4 IR427 Lavin J held that the leave year was a fixed period set by Statute and there was no provision to alter same. Lavin J held that an infringement of Section 19 of the Act could not be deemed to have occurred within the time scale of the leave year having expired without the paid leave having been granted. The employee than has six months i.e. until 30th September to bring a claim. In Medicus Medical Centre Limited and Terlecka DWT10101 the employer's representative argued that the employee could only go back six months from the date of the claim. The Labour Court rejected this and held that the complaint within six months of the leave year finishing related to the entire leave year. See also Waterford City Council and O 'Donoghue DWT0963.

In the UK the statutory leave year is the default provision where a leave year is not specified by contract. My own view is that this would

be a preferable position. Unfortunately our legislation does not account for same.

Where an employee works 8 months or more in a leave year the employee is entitled to an unbroken period of two weeks. This means uninterrupted. This means the employee can leave their laptop and mobile phone on their desk. They can refuse to take calls. They should not even be contacted during their holidays. This provision is however subject to the provisions of an Employment Regulation Order, a Registered Employment Agreement or Collective Agreement. Importantly it also covers any agreement with the employer. In Fannin Limited and Marek Marciniuk DWT1344 the employer argued that the practice was that employees requested holidays. Therefore if the employee went the whole year without 2 weeks annual leave being taken this was in effect by agreement. The Labour Court upheld the employer's argument on a reading of Section 19 (3). The two weeks uninterrupted provision is a Statutory not a Directive provision.

An issue which has yet to be addressed is whether this has to be an informed consent or whether it can simply be imposed by an employer. The Labour Court has yet to rule on whether an employer must advise an employee of their entitlement to two weeks holidays being an uninterrupted period of two weeks.

What is a working week?

The phrase "working week" is nowhere defined in the legislation. In Irish Ferries and Seamens Union of Ireland DWT35/2001 this issue arose. In this case the employees worked an annualised contract. They were required to work a little over 2000 hours per year. The employees were rostered to work on a continuous 7 day period. They were then rostered off duty for the next following 7 days. The company calculated the annual leave entitlements as being 168 hours paid leave. This was 14 days by 12 hours. This was equivalent to 8.33% of the hours worked. The Union disagreed with this. The Union contended that they effectively only received two weeks paid holidays per year. The Labour Court rejected the claim. The Court said that the entitlement to annual leave must correspond to the amount of time

which the employee would normally be required to work in each work cycle. In this case the employees were required to work 12 hour days or 168 hours over each four week period. On that basis their entitlement had been correctly calculated. It is however noteworthy that in the case of Tithe Saoirse Chleire Teo and Noel O'Driscoll DWT1170 the Labour Court in a case where the employees worked 2 weeks on and 2 weeks off stated;

"The term paid annual leave is not defined in the Act or in the Directive. It is however, a term of common usage in industrial relations and is well understood as meaning a period of rest and relaxation during which a worker is paid his or her normal wages without any obligation to work or provide any service to the employer. In the Courts view what is required by Article 7 of the Directive and by the Act is not only that workers received the requisite leave but that they be unconditionally and automatically be paid their normal weekly rate specifically in respect of that leave".

In that case the employees, unlike in the previous case referred to, did not receive any payment from the employer specifically in respect of holidays. Compensation in respect of €3000 was awarded.

It would appear that if the employer had during the year on two occasions stated that a portion of each monthly salary was holiday pay i.e. two weeks at a time then the employees may well not have had a claim.

These two cases highlight the importance of employers structuring matters correctly and ensuring that appropriate communications are made to employees as regards their entitlements. If the employer does it correctly as in the Irish Ferries Case the employer wins. If the employer does not do it correctly then the employer loses. It may be said that this sounds incredible. The converse is that if the employer structures matters properly they can get away with paying the

employees who do this type of week on week off work effectively two weeks paid leave a year instead of four weeks paid leave in a year. It is in effect a structuring of matters to limit the amount of holidays pay an employer has to pay. If they do it right they get away with it. That's the law.

What happens where an employee's holiday includes a Public Holiday?

When an employee's holiday includes a Public Holiday that Public Holiday would have to be separately paid for. However, in calculating the period of 2 weeks unbroken leave subsection (4) confirms a Public Holidays would be taken into account.

For example an employee who goes on holidays starting on a Bank Holiday Monday in August and returns to work two weeks later will have obtained 9 days Annual Leave and 1 Public Holiday but for calculating the two weeks uninterrupted leave entitlement they will have received two weeks unbroken leave.

Can an employee receive either days or hours off instead of weeks?

The legislation refers to four working weeks in a leave year. Two of them must be uninterrupted subject to certain exemptions and exceptions referred to previously. It would therefore appear, that from a strict wording of the Act it is a working week that the employee must receive off not individual days. However, following the reasoning in Fanning Limited Case DWT1344 it may well be possible to argue that where the employer and the employee agree that days will be taken, provided that the employee receives the full two weeks uninterrupted leave the balance can be taken by way of days. However, I am not sure this is the law. Such an argument, if made, will be unpopular with Rights Commissioners and the Labour Court. Saying this, it may well be the law that Annual Leave has to be calculated as a "week" not "days".

What is the position of employees on sick leave?

In the case of workers on sick leave there are a number of cases currently before the Labour Court. The Irish legislation is clearly at variance with the ECJ ruling on Article 7. The Minister for Jobs, Enterprise and Innovation has been aware of this.

The European Court of Justice ("ECJ") has ruled on a workers' entitlement to be paid for annual leave / holidays while on sick leave.

There are two important European Court decisions on this being case C-350/06 and C-520/06 both which are commonly called the Stringer case. These decisions of the ECJ have huge significance for employers and employees throughout Europe.

The Findings of the Court

The ECJ held that a workers annual leave / holiday entitlement continue during periods of sick leave.

- A workers' entitlement to have worked during the leave year in question is not necessary to obtain such rights.
- A workers annual leave / holiday entitlement in a given year may not lapse at the end of the leave year or any carry over period due to the workers' inability to work.
- The maximum period of leave which a worker on sick leave can obtain is limited to 18 months. Therefore the maximum leave which can an accrue is 6 weeks being four weeks for each Annual Leave year and two weeks for the six month period.
- Where a workers does not return to work prior to his / her employment being terminated (whether by the employer or by the employee) the worker is entitled to payment in lieu of the outstanding Annual Leave / Holiday Leave entitlement not taken during the period of his or her sick leave.

There is an argument that Irish law currently does not comply with the rulings of the ECJ. The Organisation of Working Time Act 1997 requires the worker to actually have worked in order to obtain the Annual Leave / Holiday Leave entitlements.

If the Irish law is not compliant with the ECJ ruling. Then employers will have no liability. This does not mean that the worker will lose their rights. The worker will be entitled to sue the Irish State for the loss. It would appear that any worker, whether or not they have brought a claim before the Rights Commission Service or the Labour Court and whether or not they have complained to their employer will be entitled to bring a claim if it has arisen in the last six years and possibly back to when the Act came into force. This could be a substantial cost to the Irish State.

If the Irish legislation is in compliance with the ECJ ruling, which is questionable to say the least, then employers will have a liability. Even if employers at the present time do not have a liability employers need to deal with workers' who are on long term sick leave rather than allowing them to remain on the books indefinitely as such workers' will become entitled to Annual Leave / Holiday entitlements in respect of the entire period that he or she was out sick. Immediately the Organisation of Working Time Act is amended as it was at Report Stage of the Workplace Relations Bill ("the Bill"). on 12 November 2014 a claim for annual leave covering 15 months being 5 weeks paid Annual Leave will arise.

Questions will arise as to what the effect of the ECJ ruling is. The ECJ ruling only applies to the four week mandatory Annual Leave / Holiday entitlement which workers' are entitled to obtain. Additional Annual Leave over and above the Statutory Minimum will not be affected by the ECJ ruling.

The office of Richard Grogan & Associates has made a written submission to the Minister of Jobs Enterprise and Innovation the last time being 27th March 2014 as did ELAI. Where there is a clear and definitive ECJ ruling the State is obliged to bring in the legislation to implement same. I do not claim either I or ELAI moved the Minister to act. I have a suspicion the impending prosecution notified by the EU Commission may have been a factor.

For employees who believe that they may have a claim it is important that that the claim issues as soon as practicable as it is likely that the State may attempt to minimise exposure by limiting claim periods.

Is it possible to pay the employee their holiday pay weekly or monthly?

The Labour Court has held in Mikoinan and Motovilova DWT54/2007 and P.B. Cygon Limited and Kowalik DWT34/2010 it is not permissible to pay an employee an "allowance" in lieu of holiday pay. However, there is nothing to stop an employer in a contract providing;

"You shall be paid an additional 8% of your wages / salary as a payment of your holiday pay weekly".

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