Time and Pay for Annual Leave – Section 20*

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 can effectively be split into two distinct portions.

The first part in subsection (1) sets out that it is the employer who shall decide the time at which annual leave is granted to an employee. It is not however an unlimited discretion for an employer. The employer must take into account;

(a) The need of the employee to reconcile work and family responsibilities and
(b) The opportunities for rest and relaxation available to the employee. Subsection 1(i) and (ii).

The employer must consult the employee or the Trade Union (if any) representing the employee. Subsection 1 (b). This must first presuppose that the employer consults rather than dictates. The employer it would appear could not determine that all holidays would be taken in November or February. In the case of a worker with children holidays would have to be scheduled during holiday periods. The employer must also look at the opportunities for rest and relaxation. This therefore on the wording of legislation requires a positive engagement by the employer. This will always be a matter of evidence and probably records. In a unionised working environment it would be easier. Clearly in some industries such as the building industry we had the historical builders' holidays in the first two weeks of August. Factories did usually close for certain defined periods. Now this is less so. The employer must determine same not later than one month before the day on which the annual leave or the portion thereof is due to commence. Subsection 1 (c). Where and employer does not "consult" but merely "imposes" leave it will not be deemed to be Annual Leave.

This was clearly seen in the case of R & M Quarries Ltd and Ronan Galvin, DWT1224. In that case the employer did not give one months' notice to the employee. The employee submitted to the Labour Court that there were six days when the employer used the Annual Leave entitlement to pay the employee for days when there was no work available therefore leaving the employee with no pay for 6 days when

he was actually on holidays. The Court held that this was not in compliance with the Statutory provisions and found that the employer was in breach of Section 20 of the Act. An award of €1800 was made in respect of the breach.

Pay in Lieu of Holidays

ECJ Case 124/05 Federatie Nederlandse Vakbeweging –v- Staat der Nederlanden ruled that Article 7 of the Directive precluded the replacement by an allowance in lieu of untaken days of annual leave. The ECJ held it would create an incentive not to take leave or would encourage employees not to do so. In Bernard Weldeon and Stephen Poleon DWT928 the issue related to what holiday pay had or had not been taken and paid. There were no records. The employee contended he worked some of the time paid as Annual Leave. The Court determined the employee has received 20 of the 35 days due to him during his employment and awarded €1500 as compensation. In John Hetherton and Jaininne O'Reilly DWT10108 the Labour Court held that the inclusion of an element in the employee's pay to cover holidays, which may or may not be taken at some point in the future, is inconsistent with the result envisaged by the Act in the case of Kvaerner Cementation (Ireland) Limited and Martin Treacy DWT017.

The Decision in the Bernard Weldon case is certainly consistent with the Act and the ECJ decision in Case 124/05. It is hard to see how the case of Martin Treacy DWT017 is. Paying an allowance whether weekly, monthly or at the end of a leave year may create an incentive not to take holidays. Including for example a percent of weekly pay in a pay packet as being towards holidays is more likely than not to be treated by the employee as weekly pay. It may well leave the employee in a position of being unable to take holidays or certainly not able to take fully enjoy those holidays as an opportunity for rest and relaxation. The Labour Court has held it is consistent but I would disagree.

Can holidays be carried over?

The employer may grant the Annual Leave to the leave year to which it relates within 6 months of the end of the leave year. However the consent of the employer is required. Section 20 (1) (C). In Royal Liver Assurance –v- Macken [2002] 4 I.R. 427 at 433 Mr. Justice Lavin stated this was;

"… the enable flexibility so that the employer may reconcile the needs of the business with the rights of the employee".

Mr. Justice Lavin went on to point out that the express language of the Section required the consent of the employee and was:-

"… a condition precedent to the ability of the employer to extend the leave year by an additional six months".

An interesting case is the case of Wicklow Co. Counsel and Winters DWT171/2012. In that case the employee was employed on a fixed term contract which was due to expire on 1 July 2011. On 3 June 2011 the employee was told to make arrangements with regard to his outstanding annual leave entitlements. When the employment came to an end the employee still had outstanding entitlements to four days leave. Wicklow Co. Council refused to pay him cessor pay persuant to Section 23 of the Act on the basis that he had been grated his Annual Leave.

The Labour Court importantly found that contrary to subsections 1 (a) and (b) the Council had neither consulted with the claimant not later than one month before the portion of the Annual Leave concerned was due to commence nor taking into account his need to reconcile work and family responsibilities. In that case the Court determined that this was a valid claim under the Act.

<u>The calculation of Holiday pay</u>

The calculation of an employee's pay for holiday pay purposes is a combination of Section 20 of the Act and the Organisation of Working Time Act (Determination of Pay for Holidays Regulations) 1997 S.I. 475/1997.

Subsection (2) provides that pay in respect of an employee's Annual Leave shall

(a) be paid to the employee in advance of his or her taking the leave,
(b) At the normal weekly rate or proportionate to the normal weekly rate and
(c) Where the pay includes board or lodging or both then compensation for same at the prescribed rate must be paid.

This will be the rate, in effect, in the National Minimum Wage Act.

The normal weekly rate is determined in accordance with S.I. 475 of 1997 by subsection (4). Where the salary or wages is determined wholly by reference to a term or fixed rate or salary or any rate which does not vary the normal weekly rate of pay shall be the sum (including any regular bonus or allowance the amount of which does not vary in relation to the work done but excluding any pay for overtime) which is paid in respect of a normal weekly working hours last worked by the employee before the annual leave.

For many workers who are paid a salary or a fixed number of hours per week at a fixed rate it is relatively easy to calculate the entitlement. If the salary or wage includes any regular allowance which does not vary that is easy to calculate also. However, overtime is excluded by Regulation 3 (2). Where the pay is not calculated wholly by reference to the matters in Regulation 3 (2) it is necessary to look at the average weekly pay (including any pay for overtime, calculated either

(a) In the period of 13 weekly immediately before the Annual Leave or the cessor of employment, or
(b) If no time was working in these 13 weeks, then 13 weeks ended on the day the employee last worked before the Annual Leave. This will cover a situation where an employee had been on lay-off Regulation 3 (3) or on sick leave.

If the employee is on short time there would at first sight appear to be a difficulty for the employee getting their proper entitlements to their normal weekly wage although it is arguable that it would be the normal weekly wage not the short time wage which will apply.

<u>What happens where the employee earns commission?</u>

In Case C-539-12 which issued on 12th May in a case of Lock –v- British Gas Trading Limited the ECJ had to consider the issue of how holiday pay was calculated for a salesperson. This decision will apply to any individual who received commission.

The Working Time Directive provides that every worker has a right to paid annual leave of at least 4 weeks. In this case the employee had been employed by British Gas as a consultant. His remuneration package had two main elements. He had a basic salary and commission. The commission was payable on a monthly basis in arrears. The UK Employment Tribunal referred a case to the Court of Justice asking whether the commission which a worker would have earned during his annual leave must be taken into account in calculating his holiday pay and how must it be calculated.

In the Judgement the Court pointed out that during annul leave a worker must receive their normal remuneration. They stated that the purpose of holiday pay is to put the worker during that period of rest in a situation which, as regards the employee's salary, was comparable to periods of work.

The company argued that the objective was achieved as the employee received during his annual leave a salary including not only his basic salary but also the commission resulting from sales achieved during previous weeks. The Court rejected that argument. The Court took the view that notwithstanding the payment received by the employee during his annual leave, the financial disadvantage which, although referred, is none the less genuinely suffered by the employee during the period following leave, may deter the employee from exercising the right to annual leave.

The Court held that as the worker did not generate any commission during the period of annual leave that the consequence of this is that in the period following the annual leave the worker is only paid their basic salary. The Court therefore found that such a reduction in holiday pay is liable to deter the worker from actually exercising their right to take annual leave. They held that this was contrary to the objectives pursued by the Working Time Directive.

The Court held that it would be necessary for the worker to have their pay, during the period of annual leave, determined in such a way as to correspond to the normal remuneration received by the worker.

The issue is how is this going to operate in practice.

Possibly an example might best explain the situation.

Example

Employee A received four weeks holidays.

Employee A therefore works for 11 months in the year and has one month off. Employee A therefore ears €11,000 commission in the year.

As Employee A would normally earn €1000 commission in a month for the period of time that the employee takes holidays effectively the Court has held that the commission he would have earned during the period must be included in holiday pay.

What does this mean in practice?

This means in practice that instead of Employee A receiving commission, during the year or €11,000, Employee A will receive commission of €12,000. The reason for this is so that in the month following the leave, Employee A will not be in a position that he received no commission payment.

The result for the employee.

The result for employees who are on commission is that effectively they will receive 1-13th (as there are 52 weeks in the year) additional commission.

The result for employers is that additional commission is going to have to be paid.

Conclusion

This decision only issued on 22nd May.

Employers who pay commission need to review this decision immediately. Failure to do so could result in claims being brought to Court. It could be extremely expensive for them.

This Court decision will affect not only sales persons but anybody who earns commission. The practical implementation of this decision in Ireland will have to await a decision from the Labour Court. In the meantime, employers need to be careful and take advice about the effect of this decision.

The press release relating to this decision is available on http://cusia.europa.eu/jcms/upload/doc/application/pdf/2012-ot/cp14007en.pdf

The ECJ decision mirrors an earlier decision by the Labour Court in Hidden Hearings Limited and Smart DWT0516. That case in 2005 in Ireland which was some nine years before the decision of the ECJ also dealt with the issue of commission. In that case the Labour Court stated;

"It is difficult to envisage how these objectives could be fulfilled if a worker could be made to suffer a significant reduction in his or her income while on holiday". That was a particularly difficult case in that if the Labour Court had not found in favour of the employee the employee would have been receiving, during holidays, a sum less than the National Minimum Wage.

There is a view that the decision of the ECJ goes further than that of the Labour Court and opens up the potential of overtime being included. The Labour Court has determined that pay is to be determined in accordance with Regulation (3) . However, the ECJ Decision appears to effectively require the "commission" to be parked until the employee returns from holiday but during his holiday receive an amount equivalent to the commission. The Labour Court decision in Hidden Hearings Limited did not go as far as that of the ECJ. It will be interesting to see how this jurisprudence develops.

What happens when the employee is not paid the correct rate of pay?

In MCM Security Ltd and Power DWT95/2008, the Labour Court held that overtime is not payable in calculating either annual leave or public holidays. The employees were employed in the Security Industry covered by an ERO which required regular rostered overtime to be included in holiday pay. The claimants claimed that by virtue of Section 44 Industrial relations Act 1946 they had a contractual right to the inclusion of regular rostered overtime. The Labour Court rejected the claim on the basis that regulation 3 (2) and Regulation 5 (1) did not provide for same. A similar approach was taken in O'Brien and Kulajevs DWT92/2010 and Malone and Barczak DWT162/2010.

However, this basis of reading the legislation changed in the case of Comerford Developments (Ireland) Limited and Robertas Preiksaitis DWT1247. In that case a different argument was put forward. This was that in reading Regulation 3 (2) and 5 (1) these has to be read in the light of Regulation 2. The legislation is set out at length in the decision. Saying this, the basis proposition is that Regulation 2 refers to;

"… a sum liable to be paid…".

The contract for the employee provided for €11.45 per hour. The REA for the Construction Industry for him was €16.37.

The Labour Court held that the reference to the "sum paid" must be read in the context of Regulation 2 and to Section 30 (2) of the Industrial Relations Act 1946. The Labour Court held the employee was entitled to be paid a sum of €16.37 per hour for holidays and public holidays. This decision issued in 2012.

I mentioned this case specifically and for some reason it is not referred to Kerr's Irish Employment Law which is the "gospel" for all employment lawyers.

Overtime

The Labour Court has held in MCM Security Limited and Power DWT95/2008 that even where an employee is contractually required to work overtime failure to include such overtime in holiday pay cannot give rise to a complaint under the Act. The issue however is whether the Lock Decision of the ECJ, referred to previously, can be interpreted as applying to overtime.

Assuming the Labour Court is correct the following structure would appear to enable an employer to pay €50 per week as holiday pay or €10 per day for a public holiday not worked. Even where an employee would normally work 40 hours a week and earn €400 per week. This structure will be;

(1) The contract provides for the employee working from 9am to 10am five days a week.
(2) The contract further provides the employee will be available to do overtime every day from 11am to 1pm and from 2pm to 6pm
(3) The contract provides for a flat rate of pay of €10 per hour.
(4) The contract provides the employee will not normally be required to work on a Public Holiday.

The requirement to be available to work and the obligation to do so create a contractual entitlement to 8 hours per day, 5 days a week, being €400 a week. As 7 hours per day are described as "overtime" then for Public Holidays the rate of pay will be €10 per day and for holidays €50 per week.

The "overtime" is regular. It is daily. It is rostered. It is a contractual provision. Effectively it is a disguised form of normal working hours. When an employee is contractually obliged to do overtime and the employer contractually obliged to provide it then it is possible the Labour Court may revisit this issue. The example given may be extreme but I can envisage a variation which will be less extreme but would clearly reduce the liability of an employer to pay Holiday Pay or pay Public Holidays at the "real" rate of pay. .

Overtime historically was not contractual. It was a “perk” which employees sought and which employers gave as a perk. It was something which may be regular but was rarely if ever guaranteed. It was or variable length. The working environment has changed. Now overtime is becoming a contractual obligation. It is often no longer voluntary. The term overtime is not defined in the legislation. In a number of Industrial Relations Act claim the Labour Court has recommended that regular rostered overtime would be paid as paid of holiday pay. The Labour Court is in a unique situation in that it has a unique understanding of the workings of business because of its structure. It draws members from both sides of industry. It is not difficult to conceive that the Labour Court would be well able to determine what constitutes what could be termed as normal overtime and what is effectively normal working time but which is described as overtime.

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