The Legal, Safety and Health issues for workers under the Organisation of Working Time Act

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INTRODUCTION

When I looked at the flyer for the conference I was immediately impressed with the quality of the speakers and their knowledge of safety law and practice. I then wondered why I was included as one of the speakers. I can only conclude that it is on the basis that I am bringing something slightly different to what might normally be perceived as health and safety.

The reason I say this is that when I speak to employers about health and safety invariably seem to think it is about machinery, how offices and factories are set up, safety procedures and how even office chairs and desks have to be safety compliant and checked. They are of course absolutely right. However, it comes often as a shock when they are asked - what about the Organisation of Working Time Act? The Organisation of Working Time Act is a piece of Health and Safety Legislation which comes from a European Directive.

In the talk today and in the notes I am going to deal with three particular Sections, being Section 11 of the Organisation of Working Time Act dealing with the 11 hour daily rest period, Section 12 dealing with the rest periods employees must receive during the working and Section 13 being the weekly rest period. There are a number of other provisions, for example the entitlement to four weeks Annual Leave which is also a health and safety issue. However, time is limited.

<u>Working trends</u>

I am of an age that I remember times when people referred to jobs as a 9-5 jobs. I remember the days when a mobile phone was the size and weight of a brick and had a battery life which was extremely limited. I remember the Nokia phone as revolutionary phone. I remember phones that could not take email, that you could not access the internet on and you could not take pictures on. I remember the day when people needed to have a home phone number to contact somebody and once an employee left the office it was virtually impossible to contact that employee until they came back the next day or after the weekend.

That has now all changed.

For those in management and even at a most junior level and especially those in service industries and professions the reality is that even the most junior member of staff on day one is provided with a laptop, mobile phone which will have email on it, a tablet so that when they are on public transport or on holidays or over the weekend that have the opportunity of reading up on all the business circulars, brochures and trade magazines. Employees will be encourage to be on LinkedIn, Facebook, Twitter and the full gambit of social media to promote the company or firm. This is branded "Remote Working". In effect, the reality is that we are now creating employees who work 24 hours a day, 7 days a week, 365 days a year or at least are expected to be available 24/7/365.

The issue of employees taking appropriate rest and breaks are something which is being disregarded by many employers and having to be disregarded by employees if they want to climb the corporate ladder.

The arguments put forward by employers, I might call it excuses, are issues such as being responsive to client demands, meeting clients' expectations, providing seamless services, driving the business. We have now created the whole new jargon around excessive working. Someone called it "Flexible Working". At one stage we thought of flexible working as being on flexi time. Now flexible working actually means being available 24/7/365. Later in this lecture note I will set out how this is completely illegal. Breaches of the Organisation of Working Time Act in theory can result in award of up to 2 years' salary. However, there are other issues which employers need to be aware of.

The EU in issuing the Directive in relation to working time, being the Working Time Directive specifically recognised that excessive night work which has a maximum of 40 hours of work in a week, which is where more than 50% of the time is between 12 midnight and 7 am, is particularly detrimental to health. A recent report has indicated that women working at night are more prone to cancer.

Various reports have indicated that excessive working hours and lack of rest can create stress related claims, which is in effect a Personal Injury claim against the employer. It increases the risk of an accident in the workplace. A tired employee is more inclined to make a mistake. Excessive working can result in burn out for employees. Excessive working and lack of rest periods can result in serious detrimental health effects to employees.

Where employees bring claims for breach of the Organisation of Working Time Act various excuses are put forward by employers. They run from the requirements of the business and clients to the failure of the employee to raise the issue. There are very limited circumstances where the requirement of the business can impact on an employee's rights. I will discuss these in the notes. There is no requirement for an employee to raise a grievance. It is the employer's responsibility as this is Health and Safety Legislation to ensure that the employee gets the appropriate rest and break periods.

Before dealing with the issue of the Organisation of Working Time Act, I have been asked to deal with the issue of pregnant women in the workplace from the legal perspective.

Pregnant Women in the Workplace

It is an unfortunate fact that issues with pregnant women are a constant issue which employment solicitors come across. There are many cases reported of pregnancy related dismissal. In my experience, and we are the firm of Solicitors who deal with a considerable volume of employment law, over 95% of our cases which have a pregnancy related dismissal are settled. It is an unfortunate fact that for some reason when a woman gets pregnant a significant number gets fired. This is at all levels in companies from a person working on a checkout in small grocery shop to senior executives.

However, I would like to deal with some of the issues that arise where the employee is not dismissed.

Where an employee advises an employer that they are pregnant it is absolutely imperative that the employer undertakes a health and safety assessment. That is to ascertain whether there are any risks in the workplace to the woman or her child which she is carrying because of her pregnancy.

This does mean often to a certain extend using common sense. If there are chemicals used in the workplace or there is a particularly dangerous type of operation it may be necessary to look at whether the employee should be working in that section. If the employee has to stand for long lengths of time, is it possible to have them sit or to move them to a job where they will not have to stand for the entire day.

Some of it comes down to common sense. Let us take a solicitor's office which is based over four floors and there is no lift. Let us take the example of a solicitor who is involved in litigation work involving for example corporate litigation where there seems to be huge volumes of paperwork, whose office is based on the 4th floor. The secretary is based on the ground floor. The first issue would be, is it possible for her to change with somebody else so as to be on the ground floor, rather than have her going up and down the stairs carrying heavy files. It is as simple as that. If it is not possible to change offices, then what procedures could be put in place to make sure that the employee will not have to carry heavy files up and down the stairs. Again, that is a simple issue. When the employee is down in Court, will they need any special facilities. That could be as simple as a trolley or a bag that is wheels with a handle to make it easier than having to carry a heavy file.

If a risk is recognised as being there then it is important to discuss that with the employee. If it is not possible to alleviate the risk, in those circumstances an employer is entitled to effectively lay the employee off for the period of time prior to her pregnancy where the employee would be perceived as being at risk to her health or the health of her unborn child. If that decision is made, the employer must pay the employee for one month for such lesser period up to the date of the birth whichever is the shorter.

An employee is entitled to have the statutory Maternity Leave and is entitle do take additional Maternity Leave. During the time that the employee is on Maternity Leave she continues to accrue her holiday entitlements and is entitled to be paid for all Public Holidays. At the end of the Maternity Leave the employee is entitled to additional Maternity Leave. In reality this will often mean that the employee will take their Maternity Leave, their additional Maternity Leave and their holidays and their accrued Public Holidays if the decision has been made that instead of paying for Public Holidays the employee will receive additional days holidays.

At the end of the Maternity Leave the employee is entitled to return to the job which the employee performed prior to her going on Maternity Leave unless that is not practicable. This often causes problems. An employee goes on Maternity Leave. A new employee is taken on to cover for the Maternity Leave or an existing employee takes over the departing employee's work during the period of Maternity Leave. Some employers then find that the "new" or "substitutes" employee is actually better and want to keep them in that role when the employee comes back from Maternity Leave and attempt to shift the employee to some other job. That is not acceptable. The fact that

you found somebody who can do the work better is not a ground for not allowing the employee return to the previous job she performed.

Of course this is a challenge for employers. We all recognise that but it must be remembered that under the Maternity Protection Legislation if an employee brings a claim that she has not been allowed return to the job that she was working at prior to going on Maternity Leave, provided the employee serves a notice on the employer asking as to why she has not been allowed to her existing position, the employer has a period of 14 days only in which to set out their objection to any claim that may be made by the employee. It must be remembered it does not have to be exactly the same job. It is provided that they go back to the similar job. So let us take the example of a solicitors office where one employee goes out on Maternity Leave who is a secretary. Prior to going on Maternity Leave she typed for solicitors A and B. On return from Maternity Leave she is asked to type for solicitors C and D. This would not be a material change. However, employee who was an accountant working in an accounts department managing the accounts cannot when she returns from Maternity Leave be put in charge of the payroll department. The fact that the employee may not suffer any deduction in wages or salary is not the criteria. The criteria is whether the employee has returned to the same job which is generally speaking a similar job of similar importance to that which the employee had immediately upon return. This can be important particularly when because of the length of Maternity Leave now by the time that employee comes back there could have been significant reorganisations within the organisation.

It is important to understand that any dismissal of an employee during the protective period which is effectively any time while the employee is pregnant right up and during the time where she is breastfeeding is a protected period. To dismiss an employee during those periods, it has been held by the European Court of Justice recently, that not only must the employee receive fair procedures but there must be a statement setting out the objective grounds under which an employee has been dismissed and that an employee cannot be dismissed during the protective periods particularly while on Maternity Leave. Therefore it is not possible to make an employee redundant while they are on Maternity Leave. Equally, if an employee is dismissed, it is void and the notice period, being the effective date of termination, cannot effectively commence until the employee returns from Maternity Leave and would have been entitled to return.

Any dismissal of an employee can bring claims under the Employment Equality Act of up to 2 years wages. If as a result of making a complaint about receiving inappropriate treatment while pregnant the employer takes any adverse action against the employee, the employee can bring a claim for penalisation which is unlimited jurisdiction. Where an employee is not allowed to return to her previous post after a period of Maternity Leave in addition to an Equality claim the employee can bring a claim under the Maternity Protection Act where an award for up to 26 weeks can be made.

Claims under the Safety, Health and Welfare at Work Act

This is an issue which I think it is important that I would at least mention in a talk today. Where an employee makes a complaint under the Safety, Health and Welfare at Work Act to an employer which can be as simple as – "I did not receive a Health and Safety Statement and I want one" and as a result of this any adverse action is taken against an employee then in those circumstances the employee can bring a claim for victimisation. In one unreported decision which my firm was involved in, the employee had a number of claims against the employer under various pieces of legislation including the Organisation of Working Time Act. One of the complaints that the employee raised in a grievance letter to the employer was that he had not received a Health and Safety Statement. He requested a Health and Safety Statement and stated that if he did not receive one within 14 days he intended to report the matter to the Health and Safety Authority. This grievance document was sent by my office to the employer. That evening, between 10 o'clock and 11 o'clock the employee received four telephone calls from a manager in the employer's firm wanting to talk to him about the grievance document that have been sent in. The employee made certain allegations as to what the conversations actually involved which the employer denied. The particular Rights Commissioner in what was then the Labour Relations Commission hearing the case took the view that phoning an employee at that time at night and the particular type of employee who was a driver, was most unusual and took the view that this amounted to victimising the employee for having requested a Health and Safety Statement and compensation was awarded. Not a huge award was made but it must be remembered that such a complaint is a claim of victimisation where, again, there is unlimited jurisdiction.

The Organisation of Working Time Act

When you read the blurb in various Government publications it would appear to be a relatively simple piece of legislation. Nothing could be further from the truth. In dealing with the legislation those of you who regularly represent in employment cases will know that you are not only dealing with the Act. You also have a number of Statutory Instruments. On top of that you have decisions of the Labour Court and, to a lesser extent, the High Court added onto this are EU Directives and Regulations and decisions of the European Court of Justice.

We have an Act which has to be read in line with EU Directives and Regulations. This often involves an Adjudicator or the Labour Court having to perform at best a form of legal gymnastics to be able to read the legislation to be in line with the Directive. At other times Adjudicators and the Labour Court will have a situation where the European Court of Justice has held that a particular provision of the Directive is sufficiently precise to have direct effect. In other cases an Adjudicator or Labour Court will be left in a situation that because of the differences between the Act and a Directive and a subsequent ECJ decision the potential for a Frankevic case against the State can often be a real possibility.

The Working Time Legislation is far from simple in its application.

I hope that you will find my notes and comments on the legislation useful and relevant.

Who Brings Claims?

I do not have access to all the records on how many claims are brought and by which group. However, at the last census 15.1% of the workforce was not of Irish origin. 27% of the 15.1% were UK nationals. In Working Time cases before the Labour Court over 80% and closer to 90% are non-Irish nationals in National Minimum Wage Act claims it is about 95%. That leaves two reasons either: -

(1) Non Irish nationals are more litigious, or

(2) They are more vulnerable.

That is not my position to comment upon.

I also mention this as in these notes a lot of the names of claimants will not be Irish names.

Daily Rest Period – Section 11

The provisions of Section 11 are clear and precise. In each period of 24 hours an employee is entitled to a rest period of not less than 11 hours.

There are two main exceptions. The first is Section 4 (1) relating to shift workers. The second is employments covered by S.I. No. 21 and 52 of 1998 together with S.I. 817/2004.

The provisions of S.I. 817/2004 appear effectively revoked by S.I. 36/2012. S.I. 52/1998 applies to civil protection services. In practice S.I. 21 of 1998 may be the only one colleague will usually deal with or encounter. They include services such as agriculture, tourism, security and residential institutions.

As was pointed out by the Labour Court in Flexsource Ltd and Saulius Karaliunas DWT1318:-

"The requirement for daily rest is a health and safety imperative and is an important social right derived from the law of the European Union. Section 4

(1) of the Act provide a derogation from that right. It is well settled in the law of the European Union that a derogation must be interpreted strictly see Case C-222/84 Johnson –v- Chief Constable of the RUC [1986] IRLR 263 Par 36 C447/09 Prigge –v- Deutsche Lufthansa AG, Par 72".

Therefore the Labour Court has confirmed if an employer is claiming an exemption the first matter an employer must show is that the derogation actually applies.

It is for the person seeking to rely on the exemption to show it applies. Michael O' Neill Mushrooms Limited –v- Giedra Tiatova DWT12103. In addition as was held in that case;

"This requires a positive demonstration that an equivalent rest period to the statutory 11 hour consecutive break has been made available to and availed of by the worker concerned in addition to any other breaks to which they were entitled".

That case DWT12103 is also interesting in that the Labour Court held;

“They must also demonstrate that the equivalent break has been provided to the employee at the first available opportunity to do so”.

An employer seeking to rely on exemption has the burden of proof. A detailed overview can be seen in the case of Harbour House Limited and

Jurska DWT0811 of 2008. Equally following HSE National Ambulance Services –and- David O’ Connor DWT71484 23 September 2014;

“Objective reasons must be assessed in the context of each individual circumstance which arises”.

In that case there were standing rules which the Court held could not be sufficient.

Shift Work

At times when there is a change of shift an employee may not receive the full 11 hours. In Marchford Ltd –v- Olejarz DWT1180 the Court held that the failure of the employee to receive the 11 hour rest period arose as a result of a change of shift.

The Court held;

“Section 6 stipulates that where these exemptions are allowed compensatory rest must be provided”.

The Court pointed out that S.I. 44 of 1998 provided guidance. Regulation 3.2 states that;

“Equivalent compensatory rest should be provided as soon as possible after the statutory rest has been missed”. Word underlined by the writer.

The word is “possible” not “practicable” which appears to require a proactive approach by an employer.

The validity of a complaint under section 11 will often depend on whether the exemption provided for in Section 4 (1) applies. The Act does not

define “shift work”. However, Article 2.6 of Directive 2003/88/EC does as follows;

“Shift work means any method of organising work in shifts whereby workers succeed each other at the same work stations according to a certain pattern including a rotating pattern and which may be continuous or discontinuous, entailing the need for workers to work at different times over a given period of days or weeks”.

By virtue of Section 2 (2) of the Act where a word or expression is also used in the Directive it has the same meaning in the Act as it has in the Directive.

It therefore would appear there must be a pattern of work by the employee. It should be noted it is a pattern of work by the employee, not by the employer. In Flexsource –v- Karaliunas DWT1318 the Labour Court stated;

“An essential feature of shift work, as so defined is that the workers attend to work according to a certain pattern over a given period of days or weeks. In this case the respondent had a pattern of work involving morning work and afternoon / evening work. However, the claimant did not work according to any particular pattern”.

In this case the Labour Court held the employee worked “as and when he was required”.

The Labour Court held the exemption did not apply.

The fact that an employee accepts a period of work is not relevant. The employer is obliged to;

“Ensure that his employees obtain the requisite rest period”.

<u>Claiming an exemption</u>

The most usual exemption is under S.I. 21 of 1998 being the Organisation of Working Time (General Exemptions) Regulations 1998. The Schedule to the Regulations sets out the industries which are subject to the exemption. It is not however absolute. There are conditions which must be complied with to avail of the exemption. See Tifco Limited –v- Smietana DWT11124 and Monkland Oysters Hotels Limited –v- Smith DWT1074/10. The Court held in Tifco;

“However, the exemption provided in S.I. 21/1998 in not absolute. It only applies if the employer complies with the provisions of Regulations 5 of the Statutory Instrument”.

That statement of the Court reflects Regulation 3 of S.I. 21 of 1998 specifically Regulation 3(1) and 3(3);

“(1) without prejudice Regulations 4 and 5 of these Regulations are subject to the subsequent provisions of this Regulation, each of the activities specified in the Schedule of these Regulations is hereby exempted from the application of Sections 11, 12,13 and 16 of the Act”

“(3) The exemption shall not apply as respect a particular employee, if and for so long as the employer does not comply with Regulation 5 of these Regulations in relation to him or her”

Regulation 4 provides as regards to the exemption from Sections 11, 12 and 13 the employer must ensure the employee receives a rest period which is “equivalent”

Regulation 5 provides that where the exemption applies the employer where the work period exceeds 6 hours that the employer must provide a rest period/break of;

“Such duration as the employer determines”

In making a determination the employer must have “due regard to the need to protect and secure the health, safety and comfort of the employee” Regulation 5 (2).

This would appear to require a positive determination of a break or rest period and it must be “equivalent” the burden of proof appears to be on the employer. In Durban House Bed and Breakfast -and- Serika DWT1233 the Court stated;

“The respondent made no submission to the Court to the effect that he “ensured” that the employee had available to him a rest period that, in all the circumstances, could reasonably be regarded as equivalent to the first mentioned period”

In Marchford Ltd –v-Olejarz DTW1180 the Court stated;

"S.I. No 44 of 1998, the Code of Practice on Compensatory Rest, provides guidance as to what may be an appropriate rest period"

The Court in that case went on to state;

"Regulation 3.2 of S.I. 44 of 1998 said the equivalent compensatory rest should be giving as soon as possible after the statutory rest has been missed"

The exception requires;

"…a positive demonstration that the equivalent rest period to the statutory 11 hour consecutive break has been made available to the employee and availed of by the employee concerned in addition to any other break to which they were entitled" Michael O'Neill Mushrooms Ltd –v- Giedra Tiatova DWT12103. (Portion underlined by the writer) In the case of Noonan Services Group Ltd –v- Saygina DWT1052013 a similar view was taking by the Court.

For the purpose of an employer being able to rely on the exemption the Court must determine if the employer was compliant with the provisions of Regulations 4 and 5 of S.I. 21 of 1998 before determining the extent of which the employer can rely on the exemptions. Compliance with Regulation 5 is a condition precedent on relying on the exemption Trinity Lodge ltd –and- Mirela Catarama DWT1474.

Exceptional circumstances

In exceptional circumstances or in an emergency an employer by virtue of Section 5 of the Act is exempted from Sections 11, 12, 13, 16 and 17.

In Nurendale Ltd trading as Panda Waste –v- Suvac DWT19/2014 the employer contended that as a result of a fire they had a complete defence. The Court rejected the argument indicating there must be;

"A closed temporal nexus between the accident and the work in question"

The Court importantly rejected the argument of "the exigencies of the business" and "the broader social implications of the plant's operation", as

coming within the exemption of Section 5. A similar view taken in HSE National Ambulance Service –and- David O'Connor DWT 1484 in which the Labour Court stated;

"Inconvenience or losses or costs to the service do not amount to objective justifications".

The Labour Court comments on Section 11.

The Court in Masterville Ltd –v- Ketis DWT12134 held that the legislation is in place to protect the health and safety of workers. The Court in that case held;

"…that where driving vehicles in a public place is concerned there is an additional requirement on an employer to ensure that workers in charge of such vehicles are properly rested and fit to drive".

The Court went on to say;

"Access to daily rest breaks is an important element of this obligation to workers and the general public and is viewed in that context by the Court"

In Primark Ltd –v- Preciado DTW1084 the Court determined that despite been aware of the possibilities of the employee not been able to take her breaks the employer failed to;

"Make any arrangements to adjust the finish and start times to accommodate this reality"

Clearly the law requires the employer to take a positive action to ensure compliance with the provisions of Section 11.

There are certain difficulties for an employer seeking to rely on an exemption. If an employer seeks to rely on an exemption and is not successful then the employer runs the risk that the employee can counter in any claim that the employer was aware that the employee was not receiving their entitlement. The employee can argue that the employer cannot plead ignorance of the law as the employer would have been aware of the breach but was seeking to rely on exemption which did not actually apply.

The employee can therefore argue that the breach was not an omission but rather a commission by the employer and that therefore the level of compensation should take into account that the employer made a determination not to provide the relevant rest period.

Rest Intervals at Work – Section 12

This Section covers what is commonly referred to as "breaks". The Section implements Article 4 of the Directive.

In Tesco Ireland Limited and Kazilas DWT15139 the Labour Court stated "The Court notes that the provision of adequate breaks is an important safety and health matter that is protected by law for good reason. It ensures that workers are not excessively fatigued at work and have adequate opportunity to recover during a shift. Accordingly the Court takes a serious view of infringements of the Act…..".

The Section provides that a worker shall be entitled to a rest period of at least 15 minutes after 4.5 hours of work or 30 minutes after 6 hours work. The 30 minute break may include the 15 minute break.

This sometimes leads to confusion.

Example

Employee A starts work at 8am. The employer has a choice.

A Provide a 15 minute break at 12.30pm and a further 15 minute break at 2.15, or;

B Provide a 30 minute break at 2pm.

There is an argument that the rest interval at 12.30 pm must in fact be 30 minutes and then later in the day at 6 pm a further 15 minutes.

A rest interval at the end of a working day will not satisfy the requirements.

Section 12 (4)

The Minister may set out longer rest intervals not to exceed one hour. This the Minister has done in S.I. 57/1998 where a shop worker's hours include the hours between 11.30am and 2.30pm the worker is entitled to a one hour rest interval. In addition, the rest interval must be between those hours.

Regulation 3

The Regulations do not apply to so much of premises as is used as a hotel for the preparation of food or catering in respect of food or drink to "any person" or to premises with a liquor licence. A barber or hairdresser or department store worker has the rights to the one hour rest interval.

A person working in the restaurant serving or preparing food would not have this right. Certain workers covered by the General Exemption Regulations are not entitled to these breaks but are entitled to compensatory breaks. This will be dealt with later in this section.

An issue which regularly arises in cases under Section 12 is that the employee had the opportunity to take a rest interval at work and this complies with the employers obligations.

The question of whether the Working Time Directive from which the Act of 1997 is derived, imposes an obligation to provide workers with the opportunity to take rest and break periods or places a positive obligation on an employer to ensure that the breaks are actually taken was considered in the ECJ case of Commission –v- United Kingdom C-484/04. In that case Advocate General Kokott stated;

"It is for the employer actively to see to it that an atmosphere is created in the firm in which the minimum rest periods prescribed by Community Law are also effectively observed. There is no doubt that this first presupposes that within the organisation of the firm appropriate work and rest periods are actually scheduled. In addition, it must, however, be a matter of course within a business, in practice as well, that the workers' rights to rest periods not only exist on paper but can effectively be observed. In particular no de facto pressure should arise which may deter workers from actually taking their rest periods".

In the full ECJ Decision was stated;

"Workers must actually benefit from the daily and weekly rest periods provided for by Articles 3 and 5 of the Directive. These provisions impose clear and precise obligations on the Members States as to the results to be achieved by such entitlements. A Member State which, in the national measures implementing the Directive provides that the workers are entitled to certain rights to rest but which, in the guidelines for employers and workers, on the implementation of those rights, indicate that the employer is nevertheless not required to ensure that the workers actually exercise such rights, does not guarantee compliance with the minimum requirements laid down by Article 3 and 5 or the essential objectives of the Directive which is to secure effective protection of the safety and health of employee's by allowing them to enjoy the minimum periods of rest to which they are entitled".

The European decision is emphatic. The reasoning of the European Court was approved in many cases. One of these was the case of Nolan Transport and Antanas DWT1117 where it was stated;

"It is to be assumed that the State intended to fulfil its obligations under Community Law in line with that assumption the Act must be interpreted as imposing a positive duty on employer's to ensure that not only are opportunities available to take appropriate rest but that the minimum rest periods are actually observed".

The reason for quoting so extensively from the European Court Decisions and from the Labour Court on this point is that the defence that the employee had the opportunity to take a rest interval is trotted out with such regularity that some believe that if it is stated often enough somebody might actually believe it. The second alternative is that it is a defence run out by those who believe the ECJ was wrong. As the ECJ is the highest Court that argument needs to be debunked.

It is therefore probably worth giving other cases where the Court dealt with this issue. In the case of The Tribune Printing & Publishing Group –v- Geographical Print & Media Union [2004] ELR 222 the Labour Court held that the employer was under a positive duty to ensure the employees receive their breaks when it stated;

"Merely stating that employees could take rest breaks if they wished and not putting in place proper procedures to ensure that the employee received those breaks thus protecting his health and safety, does not discharge that duty".

In Tifco Limited –and- Smietana DTW11124 the Labour Court stated;

"the Court is satisfied that it is the duty of the employer to ensure breaks are taken and there are systems in place to ensure that scheduled breaks can be, and in fact are, availed of by the workers".

The obligation on employers is not only to ensure a system is in place where breaks are actually scheduled, the employer must make sure that those breaks are availed of by the workers. In addition, the employer must maintain records of same.

In Nurendale Trading as Panda Waste –and- Suvac DWT19/2014 the Labour Court held there was an obligation on an employer to maintain records of working time and breaks. The Labour Court held that the obligation could not be transferred by contract or otherwise to an employee to relieve the employer from maintaining those records. A similar approach was taken in Monkland Oyster Hotels Limited Trading as Athlone Spring Hotel Limited – and- Michelle Smith. In that case he worker contended she did take short smoke breaks on most days but did not receive breaks or compensatory breaks. In that case there was no system in place for staff to take or record breaks. The employee contended she had been told generally she should take breaks but was never told to go on a break or advised of the time at which to do so. The employer contended that it "ensured the provision of breaks were available for the employee".

They contended that an onus on the employee to take her daily breaks – as evidenced in the employees contract of employment".

The employer also contended that there was a meeting between the HR Manager and the Head Chef whereby he confirms that the employee at all times received her daily breaks and what is more on occasions left her post to take additional breaks.

The Labour Court held that there had been a breach and awarded €5000. The case is interesting in that the employer was a hotel and could therefore avail of the exemption in S.I. 21/1998.

Some employers will attempt to shift the obligation to the employee. One method is to use the NERA OWT1 Form. The second is to put some statement at the end of a weekly time sheet requiring an employee to notify the employer if they have not received their breaks.

In Eupreida Trading as Dingle Skellig Hotels and Peninsula –and- Martin O Connor DWT13146 the employer contended that a message written at the bottom of each weekly roster outlining the statutory break entitlements and stating that if the worker had not received their breaks each day he/she should contact their manager was rejected by the Labour Court as;

"The Court is satisfied that in the main such breaks were taken by the complainant, however, this was not a satisfactory method of recording due to discrepancies identified". A sum of €1500 was awarded.

It would appear therefore that where the employer provides for breaks in a contract but does not specifically ensure breaks are taken the employer has not discharged the onus of compliance. There is a positive duty on employers to ensure the breaks are in fact taken. Even getting the employee to sign each week confirming they received their entitlements may not be enough. Saying this, the Labour Court has appeared to take cognisance that during a period prior to the complaint the employee had raised no complaint and has taken this into account. This is evidenced in the case of Noonan Services Group Limited –and- Andrius Stasaitis DWT13121. However following the High Court decision in Stobart (Ireland) Driver Services Limited and Keith Carroll [2013] IHC581 which while dealing with the Safety Health and Welfare at Work Act 2005 held that it is "not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made". There is in addition nothing in the legislation which requires an employee to raise a grievance before bringing a claim.

In dealing with such cases the Labour Court will consistently hold that the period to which the complaint relates is a period of six months. What breach may have occurred prior to that period of six months will not be looked at by the Court. It is now becoming common that employers will contend that prior to the complaint being made that no grievance had been raised by an employee. This will invariably mean going back further than six months. It is one thing for the employer to contend that no grievance was raised in the six month period prior to the complaint being raised. If however, the

employer wishes to go back outside of the six month period that there is an argument that the employee should be allowed also to go back and look at the actions of the employer in the preceding period. It must be noted that in the majority of cases where this argument arises that no complaint had been made or grievance raised by the employee there will invariable not be documentation in place advising the employee of their entitlements under Section 11, 12 and 13 of the Organisation of Working Time Act as required by Statutory Instrument 49 /1998 nor records. The argument in relation to no grievance having been made, which had been taken account of by the Labour Court is in my view an incorrect reading of the legislation. There is no requirement to raise a grievance as the law places the obligation on the employer to ensure compliance in practice.

The argument which is often raised in tandem is that the employee did not raise the complaint at the first available opportunity. An interesting case on this issue is the High Court decision of Mr. Justice Hogan in the case of Michael Browne and Iarnrod Eireann / Irish Rail (No. 2) delivered on 5th March 2014 reference [2014] IHC117.

That case related to a breach of contract. His Honour stated;

"In these circumstances, in can hardly be a surprise that Mr. Browne elected to carry on working despite his most profound misgivings. This may thus be regarded as another example where, in the words of Lord Reid, in White and Carter, by refusing cooperation… the party in breach, "can compel the innocent party to restrict his claim to damages".

The employer is invariably in the dominant position. The issue has to be asked is whether there was a robust system in place for grievances to be dealt with properly and independently. In my view, the issue of whether a
complaint or grievance was raised with an employer at any time during the employment is an irrelevant factor particularly where the breach complained of is one covered by the Directive.

<u>What is a rest period?</u>

It may sound, at first sight, unusual that this question is asked. However the issue of what is or is not a rest period is often raised. The first issue which is often raised is that the employee received "smoke breaks" of 5-10

minutes. It could be claimed that there was a number of these during the day. This argument regularly arises. A rest interval of less than 15 minutes is not a rest interval and must be disregarded for the purposes of the Act. The determination of what is a rest period means it is necessary for it to be distinguished with working time.

Section 2 (1) of the Act contains the following definition

"Rest period" means any time that is not working time.

"Working Time" means any time that the employee is

(a) At his or her place of work or at his or her employer's disposal and
(b) Carrying on or performing the activities or duties of his or her work

and shall be construed accordingly.

Article 2 of the Directive contains the following definition.

1. Working Time shall mean any period during which the worker is working, at the employer's disposal and carrying out his activities or duties, in accordance with national law and/ or practice.

2. Rest period shall mean any period which is not working time;

In ISS Ireland Limited and Vyara Gfencheva DWT1157 the Labour Court had to consider a situation where employees moved between locations. The employees had sufficient time to get to the next location but no longer. The employer contended that the period travelling between locations was a rest period.

The Labour Court in this case reviewed a number of ECJ Decision including Case C-300-98 SIMPA Case. In this case Doctors were required to be at a medical centre and available to perform work if required. The ECJ held that this was working time. Similarly, in Case C-151-02 Jaeger the Doctors were provided with a room in which they could sleep. Again, the ECJ held that this was working Time as the ECJ at paragraph 95 stated;

"In order to be able to rest effectively the worker must be able to remove himself from his working environment…"

The Labour Court held;

1. The time during which a person is working, at the employer's disposal and carrying out his or her duties is working time.

2. Time during which a person is at a place designed by his/her employer, and is required to undertake his/her activities or duties if directed to do so by the employer, is working time.

3. The notion of working time and that of rest periods are mutually exclusive.

4. A period of rest is a period which is not working time during which a worker can relax and dispel the fatigue caused by the performance of his/her duties.

The ECJ has in Case C-14/04 Dellas ruled that there is no "intermediary category" between "working time" and "rest periods".

The issue then arises is whether a person is at "rest" if that person can be interrupted. The answer would appear to be an emphatic "No". The issue arose in a number of cases involving Stobart (Ireland) Driver Services Limited DWT1438, 1437 and 1464. The drivers had to make one or more phone calls during a break and there was a contractual obligation to do so. The Labour Court held that the time was not "absolutely at the employees disposal" and the requirement to make the call meant the employee was at the employers disposal. While the case concerned Section 13 a similar approach would apply to section 12. Therefore if the employee has to be "available" it is not a rest period. The common issue which currently arises is that an employee must be available to return to work. That mere availability would undermine the argument that it is a "rest period". An argument which often arises is that the rest period exceeded the Statutory period but with the employee arguing the employee could not know when it would end.

In JP Gallagher –v- Alpha Catering Services Limited [2004] EWCA CIV 1557 the UK Court of Appeal held that the employee must know at the start of a rest period that it is such and which "the worker can use as he pleases". It would therefore appear that an employee may not know when a rest interval may start but must know when it will finish. Sending a worker on a rest period and not telling them what length of time that rest period is will not be a rest period. If an employer says to an employee to go on a rest period and to take 30 minutes but after that the employee does not need to come back

to the office or the workplace until they are called then that is a 30 minute rest period.

Anything after 30 minutes is time that the employee is at the employers control as the employee can be called back at any stage and is therefore "working time".

If an employer tells an employee go on your break now and I will call you when you are to come back that is not a break at all even if it exceeds 30 minutes as the employee is not free to dispose of the time as they wish.

There are exemptions from the requirements to provide rest intervals. S.I.21 of 1998 exempts certain workers from the requirements of Sections 11, 12, 13 and 16. Where an employee is not entitled by reason of the exemption to the rest period and break referred to in Sections 11. 12 and 13 of the Act, equivalent rest or break periods must be provided.

The exemption in Regulation 3 is conditional on Regulation 5 being complied with. Regulation 5 provides that the employer shall not require a worker to whom the exemption applies to work for a period of more than 6 hours without allowing him or her a break of such duration as the employer determines. In doing so, the employer should have regard to the Organisation of Working Time (Code of Practice on Compensatory Rest and Related Matters) (Declaration Order) 1998 S.I. 44/1988.

The Labour Court appears to have taken a contradictory view of such exemptions. In Michael O Neill Mushrooms Limited –v- Tiatova DWT103/2012. The Labour Court held that this required a positive demonstration that an equivalent rest period to the statutory rest period had been made available to and availed of by the worker concerned. However, in Noonan Services Group Limited and Stasaitis DWT13121 the employer argued that the respondent did not specifically determine any period to be regarded as a break. The respondent argued that the complainant was provided with kitchen facilities in the Security Hut in which he worked and there was substantial periods of inactivity during which breaks could be taken. The Labour Court held that as a matter of probability the claimant was told he could take breaks during periods of inactivity during his shift. The decision of the Labour Court was upheld by Kearns P [2014] IEHC199. The Labour Court decision referred to disputes being avoided by a suitably worded notice advising security guards of the obligation to take a break. This would be in line with the case of Hughes –v- The Corps of

Commissionaires Management Limited UK EAT / 0173/10/SM where the complainant was a security guard who worked a 12 hour shift on his own. The Tribunal came to the conclusion that, on the facts, the employer had afforded the claimant with appropriate protection in order to safeguard his health and safety. They took account in particular of the fact that he was afforded breaks and that although he was on call during them and could be called he was allowed to start his break again.

The Tribunal held the employee was afforded rest but it did not have the features of a "Gallagher" rest period. The EAT on appeal however held that while the employee might have the break interrupted he was allowed to decide when to start his break and if interrupted to start his break again. The decision of the UK EAT appears to make perfect sense where the employer has clear and precise rules relating to compensatory rest. In the case of Noonan Services Group Limited and Staitis the Labour Court held that it was "probable" such rules applied even though there were no actual rules of the employer stating this.

Saying this, following the advice set out by the Labour Court and the rationale in Michael O Neill Mushrooms Limited and Tiatova, referred to previously, it is far more advisable for employers to be able to demonstrate equivalent rest periods being available.

Section 12 claims by employees are almost invariably ones which will be the subject of disputes because of the lack of records of such breaks. In addition, they usually arise because of a lack of clear and precise rules in the employment related to breaks. Section 12 claims relate to fairly minimal rest periods. An employee who commences work at 7am and receives a rest period of 30 minutes at 1pm and then works on until 6pm and received a 15 minute break can then work on until 7.30pm. That employee will have received their full entitlements. Effectively in any period of less than 12 hours working the full entitlement of the employee is to a 45 minute rest interval.

There are special rules for some categories of workers such as drivers and they will be dealt with separately.

The Burden of Proof in Section 12 Cases

Section 25 of the Act sets out the requirement that in the absence of records the Burden of Proof rests on the employer. The issue was dealt with at length as to the proof and the burden of proof as it applies in the case of ISS Ireland Limited and Vyara Gfencheva where the Court stated;

"The normal rule in civil proceedings is that the person bringing proceedings bears the burden of proving every element of the wrong on which their claim is founded. It is also the normal rule that the part who bears the legal burden of proof also bears the evidential burden. The effect of S.25(4) of the Act is to shift the burden to the Respondent in cases where records in the statutory form were not maintained. Thus a form of rebuttable presumption of non-compliance arises in such cases.

The burden of proof must be applied in a way that confirms to the requirements of natural justice and the right of the respondent to mount a defence. This suggests, at a minimum, the respondent must know, with reasonability clarity, what it is expected to rebut.

The burden on the respondent of proving compliance with the Act arises in proceedings in which a complaint of non-compliance is made. It is clear from S.27 (2) of the Act that the jurisdiction of the Adjudicator is invoked by an aggrieved worker or his/her Trade Union by presenting a complaint to an Adjudicator that his/her employer has contravened a relevant provision of the Act in relation to him/her. The subsection goes on to provide that where a complaint was made the Adjudicator shall give the parties an opportunity to be heard and to present to the Adjudicator any evidence relevant to the complaint. This suggests that the evidential burden is on the claimant to produce such evidence as it available to support a stateable case of non-compliance with a relevant provision of the Act. It seems to the Court, that, as a matter of basic fairness, the claimant should be required to do so with sufficient particularity and to allow the respondent to know, in broad terms, the nature of the complaint and the case that they are expected to meet.

As was pointed out by Lord Devlin in Bratty –v- Attorney General for Northern Ireland [1963] A.C. 386 an evidential burden is satisfied where the evidence adduced is sufficient to suggest "a reasonable possibility".

The respondent should then be called upon to put the records required by S.25 (1) of the Act in evidence showing compliance with the relevance

provision in issue. If records in the prescribed form are produced, and show compliance on their face, the legal burden will be on the claimant to satisfy the Adjudicator, or the Court on appeal, that the records are not to be accepted as evidence of compliance. Thus the claimant will bear both the evidential and legal burden of proving on the balance of probabilities under the Act were contravened in the manner alleged. If the claimant fails to discharge that burden he or she cannot succeed. Where records in the prescribed form are not produced and the claimant has satisfied the evidential burden which he or she bares it will be for the Respondent to establish on credible evidence that the relevant provisions were complied with in relation to the claimant. The respondent will thus be required to carry the full legal burden of proving on the balance of probabilities, that the Act was not contravened in the manner alleged by the claimant. If the respondent fails to discharge that burden the claimant will succeed".

A very similar approach was taken by the Labour Court in Nolan Transport and Antanas referred to previously. However in Blue Thunder Fast Food Limited and Oleniacz DWT15124 the Court stated "It is accepted that the respondent failed to maintain records in the statutory form. Consequently in accordance with S. 25 (4) of the Act, the onus is on the respondent to prove that the Act was complied with in respect of matters put in issue by the claimant. The standard of proof is that of the balance of probabilities. That is that the respondent must show, on cogent evidence, that it is more probable than not that it complied with its statutory duty in relation to these matters. It also means that if the probabilities are equal the burden of proof borne by the respondent will not be discharged (see Miller –v- Minister for Pensions [1947] 2 ALL E.R. 372) see also ERAC Ireland Limited and Eddie Murphy DWT1583 where a sum of €8000 was awarded.

It is now common for representatives of employers to raise the argument that the employee must be in a position to provide dates on which the employee did not receive their entitlement. This argument goes far further than the test set out by the Labour Court and the Act. For that argument to succeed it would first presuppose that the employer had notified the employee of all entitlements and that the employee was effectively walking around with a clocking system themselves. The employee need only set out the claim in the broadest terms. The issue of how far the employee has to go in setting out their claim has yet to be fully determined by the Court. It would appear to me to be sufficient if the employee is able to say that they did not get their 30 minute break within 6 hours of starting work on a regular or irregular basis or that they did not get 15 minute or 30 minute

breaks at any time during most days or on occasions. Giving particulars of the claim does not mean the employee is required to give times and dates.

Where an employee has elected to put in a request under the Data Protection Act and it has been held by the European Court of Justice that working time records are data then if those records are furnished clearly the employee will have to go further than simply making broad statements. Where the employee makes broad statements then it is a matter for the employer to put the records into evidence if they have not already been provided or requested. Where those records are put in place and they are not in the prescribed form, or there are no records, then the legal and evidential burden will pass to the employer.

The form of records which must be maintained

S.I. No. 473/2001 in Regulation 3 sets out the form of records which must be maintained under Section 25 of the Act. These records must set out;

(a) The name and address of each employee and their PPS number.

(b) A copy of their statement under the Terms of Employment (Information) Act 1994 and S.I. 49/1998.

(c) The days and total hours worked in each week by each employee, any days and hours of leave in each week granted b way of annual leave or as a public holiday and any additional days pay referred to in Section 21 in each week to each employee concerned.

(d) A copy of the written record of notifications issued under Section 17.

This is quite an extensive list but those Regulations have now been in place for 13 years.

Where there is no clocking in facilities in place then an OWT1 Form or a form similar to it should be used.

There are exemptions from Section 25. The exemption applies where the employer has electronic record keeping facilities. This would include flexitime or clocking in facilities.

Employers who have a manual record and have agreed with the employee that the employee will complete the OWT1 Form and will present the completed form to the employer for counter signature and retention. This exemption only applies to an employer if he or she complies with three conditions namely;

1. The employer notifies the employee of Sections 11, 12 and 13 of the Act. Exemptions also apply where there is a collective agreement, an Employment Regulation Order or a Collective Agreement registered.

2. The employer notifies in writing each employee of the procedures which the employee may notify the employer of in respect of any rest or break period referred to in Sections 11, 12 and 13 of the Act to which the employee is entitled and was not able to avail himself or herself of, and

3. The employer keeps a record of having notifying each employee of the matter set out at 1 above, records of matters 1, 2 and 3.

What happens where there are no records?

Where there are no records the evidential burden and the legal burden rests on the employer. In the case of a factory where there is a production line it is usual that a production line will cease on regular occasions for rest and break periods. That will be a form of evidence. In the case of an office it would be that there is a procedure in place that individuals take a break at lunch time when an office will be closed for a period of time.

Because of the way businesses now work, which is effectively the 24/7/365 that form of evidence is becoming less available. The normal evidence which is given is that the employer will contend that everybody took breaks or will bring in a work colleague to say that the saw the employee take breaks. That is never going to be sufficient. Where the employer bears the evidential and legal burden then there is an entitlement to the employee to request the employer to produce evidence of the exact start and finishing time of each break. It is highly advisable that employers have in place procedures for recording individuals signing in and signing out for their rest periods. It is advisable that the procedures are in place with scheduled rest periods and that managers and those responsible for the workplace are advised to ensure that those reporting to them obtain their proper rest intervals.

As a matter of practice claims under Section 12 are probably one of the most difficult for both employers and employees and ones where the greatest length of time is taken up in examining whether individual receive their entitlements. These problems invariably arise where there are incomplete or improper recording procedures in place in the workplace coupled with failure to notify employees of their entitlements.

On –call time may be working time.

In a UK EAT case of Truslove and Another –v- Scottish Ambulance Service UK EAT /0053/13/JW the claimants were ambulance paramedics. The claimant sometimes worked on-call night shift duties away from their home base station. On such occasion they were required to take accommodation within a three mile radius of the ambulance station. This is where they were to park the ambulance.

They were required to meet a target time of three minutes within which to respond to a call. The claimants claimed that time spent on call counted as working time and so they were entitled to rest periods according to the Working Time Regulations.

The Employment Tribunal in the UK dismissed their claim. The UK Employment Tribunal decided that the claimants in this case were not confined to unspecific location and therefore were at rest during the periods they spent on call. The case was appealed to the UK EAT.

The UK EAT allowed the appeal. The UK EAT held that it was clear that the time of the claimants was not their own while on duty. They held that the central question as whether the employees were on the facts required to be present at a place determined by their employer. They held that they had to be where they were within narrow limits. They could not be at home.

Therefore they could not enjoy the quality of rest that they were entitled to under the UK Working Time Regulations which are similar to ours. In Particular the UK EAT looked at the case of Landeshaupsadet Kiel –v- Jaever [2004] ICR 1528.

This case may well be interesting for the principles which it sets out.

The reasoning is a reasonable approach to the issue of rest periods.

Conclusion

The issue of rest intervals at work is for some reason the most contentious of all claims and disputes. The disputes arise because of lack of records. There is a legal requirement to maintain such records. In the UK employers invariably do because of the actions of the regulatory authorities. In Ireland even when the Labour Court determines records have not been kept NERA are less than proactive in pursuing compliance.

Section 13 – Weekly Rest Period's

Section 13 implements Article 5 of the Directive.

The Section requires an employee to receive, in each period of seven days, a rest period of 24 hours. The rest period of 24 hours must be preceded by a daily rest period of 11 hours.

For example an employee who finishes work on Saturday at 1pm should not recommence work until midnight on Sunday.

An employer by virtue of Section 13 (2) instead of providing the rest period in a seven day period may provide two rest periods of 24 hours each. However, this does not mean it should be preceded by two periods of 11 hours, if granted as a 48 hour period. If however it is two non-consecutive 24 hour periods the daily rest period must be granted.

There are exemptions in Section 13 (4). The 24 hour period preceded by the 11 hour period does not apply in cases were due to the technical nature and how the work is organised or an objective reason would justify the exemption applying. It is difficult to envisage circumstances where this exemption would apply. Saying this there are exceptions for activities covered in S.I. 21 and 52 of 1998 and S.I. 817 of 2004 under Section 13 (6).

The Act in Section 13 (5) provided that the rest day period of 24 hours shall be a Sunday. This Sunday rest does not apply where the employee's contract of employment provides for Sunday work.

In Laois County Council –and- Paul Delaney DWT1383 the contract for the employee provided, that as a water and sewerage caretaker, he should attend at work 7 days a week. The employee made a complaint. The

Adjudicator accepted the employee could claim the benefit S.I. 21 of 1998. The relevant Regulation is Regulation 4. However the Adjudicator held that the employer had failed to provide compensatory rest and required the employer to pay €5000. The award was paid but still went on appeal. The employee's hours of work had been altered. The matter went on appeal with the employer contending that they had complied with the decision of the Adjudicator. The issue on appeal was whether the Respondent had complied with the decision of the Adjudicator. This in turn raised the question of whether the Claimants revised attendance patterns complied with Regulation 4 S.I. 21/1998.

The Court found that the claimant finished work at 2.30pm on Friday. He recommenced work at 8am on the following Saturday. The Court held that he had a rest period of 17.5 hours. He finished work at 11am on Saturday and recommenced work at 11 am on Sunday. The Court held that he therefore had a rest period of 24 hours.

The employee had contended that the rest period of 24 hours should be preceded by rest period of 11 hours as is required by Section 13 (2) of the Act. It was accepted by the Court that the employer was exempted from the requirements of Section 13. The question was whether he was provided with a rest period and breaks that in all the circumstances can reasonably regarded as equivalent as a rest period and breaks to which he would otherwise be entitled. The Court held;

"In this context, all of the circumstances includes the exigencies of the job that the claimant is employed to perform. He obtains a rest period of 17.5 hours between finishing work on Friday and recommencing work on Sunday. He works for 3 hours and then has a rest period of 24 hours. In the Court's view this pattern can, in all the circumstances, reasonably be regarded as equivalent to the rest period normally required by Section 13 (2) of the Act".

This case is interesting in that the Labour Court not only looked at the exemption but also looked at the exigencies of the job which the employee was employed to do to ascertain whether the employer had complied with the requirement of providing compensatory rest. The decision would appear to place a high bar on employers to show that compensatory rest had been provided.

The provisions relating to the 24 hour rest period are covered by the Directive in Article 5. There is an obligation on employers to ensure the employee takes this rest Case C – 484/04 Commission –v- United Kingdom.

Two very interesting decisions of the Labour Court on the issue are Stobart (Ireland) Driver Services Ltd –and- Seven Workers DWT1437/2014 and Stobart (Ireland) Driver Services Ltd –and- David Burke and Others DTW1464/2014.

In both these cases there was no argument that the employees did not receive the period of 35 hours. However the employees, in both cases, were required to phone during the second "rest period" to get their shift starting times. In DTW1437/12 there is a very extensive determination of the law on this issue.

The Labour Court in that case held that the purpose of the Act in the relevant parts was to provide for the implementation of Directive 1993/104/ECC of the 23 of November 1983. The Court referred to Section 2 of the Act which defined the rest period in the following terms;

"Rest period's means any time that is not working time"

The Court pointed out that the definition of working time is;

"Working time means any time the employee is

(a) At his or her place of work or at his or her employers disposal; and,

(b) Carrying on or performing the activities or duties of his or her work, and,

"Work shall be construed accordingly"

The Court in that case set out the provisions of Section 13 and Article 5 of the Directive.

The Court pointed out;

"Words or phrases in the Act have the same meaning as words or phrases in the Directive unless the contrary is indicated"

The Court stated that there was no question but that the individuals received 35 hours between the shifts. However the Court held;

"The question maybe more precisely rephrased in the following terms: "Does a requirement to telephone the employer during a rest period bring the employee within the definition of "working times" and/or does it amount to an interruption the weekly rest period"

The Court held that in order to bring an employee within the definition of working time the employee must "be at his or her place of work or at his or her employer's disposal and be carrying out or performing the activities or duties of his or her works.

The Court held;

"It is common case that the claimants are under an obligation to make the phone call to the employer while on a weekly rest period"

The Court went on to state;

"It is clear therefore that the claimants were performing the activities or duties of his or her work…"

The Court went on to find therefore that the statutory requirements to qualify as working time were met.

The second question which the Court had to raise was whether the employees;

"… are at their place of work. The answer to this question is more difficult as their place of work is not easily identified. It maybe the company, the depot or the truck to which they are assigned or any place they are require to deliver or to collect from by their employer in the course of their employment"

The Court however went on to state;

"However the requirement is to be at one's place of work is one of two alternative requirements in the Statue. It appears from a plain reading of the Section that it is sufficient that one be either at one's place of work or at one's employer's disposal. It appears as a Court that these must be read as

alternatives either of which meets the statutory of requirements to comply with the test of working time.

The Court went on to hold the mandatory requirement to make the phone call brought the employees into the category of working time.

In DWT1464 the Court restated this view.

It would therefore appear that any interruption of the rest period in effect causes a break in the rest period entitling the employee to issue a claim.

Because of the way that work is currently organised now particular for those working on shifts, and, those paid on an hourly rate it is becoming common for an employer to require an employee to phone in to get their shift time starts. This leaves the employer open to a claim under Section 13. There may also be subsequent claims also under Sections 11 and 17 as regards notification of start times. It is sufficient to state that employer's need to be extremely careful in requiring employees to phone in to get shift times. The writer is not aware of any situation where an employee has to check their mobile whereby they will be notified by text or their start times.

It would appear to the writer that if such a procedure occurs while an employee is on a rest period under Section 13 and has to check their mobile phone for a text from their employer this may equally come within the reasoning of the Court in the Stobart cases referred to previously.

There is a recent ECJ case which may have turned over legislation upside down. Without going into it the effect is that an employee receives a 35 hour rest period every 7 days. The reasoning in this case where there is as yet only an Advocate General's opinion is that it is 35 hours in every 7 days. So an employee could get a 35 hour rest interval then work 14 further days and get the next 35 hours. Our legislation envisages it that it is a 35 hour rest period every 7 days so often 7 days an employee must get 35 hours. It is a subtle nuance but could be important.

CONCLUSION

I would like to thank you for having invited me to speak here today. I have the greatest admiration for those who work in the area health and safety. There is often a view that health and safety is a cost to an employer. I do not agree with that view. I am of the view that health and safety in the workplace which reduces absences due to illnesses caused by bad working practices, which reduces absences due to accidents, which reduces interruptions to production due to accidents where a line may need to be closed down while there is an investigation, which reduces time spent dealing with legal claims for Personal Injury due to an accident in the workplace, which reduces the time and cost of defending employment cases resulting from breaches of the Organisation of Working Time Act or any of the associated Acts, Regulations and Statutory Instruments or all matters which actually in real terms add to the bottom line and are of benefit to the employer rather than a cost. I also believe that an employer who is known to be safety conscious creates a more positive working environment and helps create and retain a workforce and, as we all know replacing a key personnel is a significant cost to employers.

Because we deal with Personal Injury work also we regularly see the significant level of legal knowledge which those dealing with health and safety must deal with. While we have Health and Safety Legislation, there is a myriad of Statutory Instruments, and often on top of that further Statutory Instruments partly amending other Statutory Instruments. While we have effectively consolidated Health and Safety Legislation, we do not have consolidated Regulations to assist those in advising on health and safety keeping up to do date at all times with all developments. In the area of employment law we have a little over 700 pieces of legislation whether Act, Statutory Instruments or Regulations which we have to deal with. The complexity of Health and Safety Legislation which does include a lot of straight Employment Legislation does create a unnecessary level of complexity, lack of clarity and unfortunately additional cost for employers because of the time those practicing in health and safety and associated areas of health and safety have to take in trying to keep up with legislation which is not consolidated.

On a personal note I would like to finish by, again, thanking you for having invited me here today and I am honoured and humbled by the

fact that the IOSH Southern Branch decided to ask me to speak. I do hope you found the seminar notes and the talk today helpful.

14 February 2018