



Holiday Pay and Overtime *

In Ireland the Labour Court has consistently held that overtime is not to be taken into account in calculating Holiday Pay. The issue is whether this is consistent with the EU Directive.

The Directive in Ireland was implemented by the Organisation of Working Time Act. There is ongoing conflict as to how Holiday Pay should be calculated. The Directive states that workers have a right to at least 4 weeks paid Annual Leave but does not state how Holiday Pay should be assessed. However, the ECJ has ruled that the Directive requires Holiday Pay to be based on “normal remuneration”. This includes payments linked intrinsically to the performance of the workers tasks. This was held in the case of Williams –v- British Airways [2011] IRLR948.

In the UK the EAT have decided that non-guaranteed overtime payments were intrinsically linked to the performance of the tasks required under the workers’ contracts of employment. Therefore the Overtime Pay must be taken into account in calculating EU Holiday Pay. This applies only to the minimum of 4 weeks and not to any other Annual Leave entitlement.

In the UK they have accepted that certain allowances relating to travel were intrinsically linked to the performance of tasks under the contract and therefore amounted to normal remuneration.

In the UK their EAT have had to consider whether the UK Law could be read in line with the EU Law or whether they were simply inconsistent. If that was the position then there would be a claim against the State. In the UK case involving British Gas being Lock –v- British Gas Trading Limited the ECJ held that commission payments must be taken into account.

In the UK case of BA –v- Williams and Bear Scotland it was decided that a worker must be paid for holidays at a rate comparable to normal remuneration received for periods worked and non-guaranteed overtime should be included in calculating Holiday Pay. In the Lock case they took the view that there was no difference in principle so far as Annual Leave pay is concerned between non-guaranteed overtime and commission.



Here in Ireland the Legislation is being changed to provide for Holiday Pay during periods of Sick Leave. However, there is no proposal at the present time to deal with the issue of overtime. Either the Irish Legislation is in compliance with the EU Legislation, in which case the existing decisions by the Labour Court are wrong, or the Legislation is not in compliance with the Directive, in which case the decisions of the Labour Court are correct under Irish Law but leave the State open to a claim. Unfortunately, neither of these situations are acceptable. If the Labour Court has not been applying the Law correctly then it is a simple matter for it to be applied correctly. Saying this, there is a very strong argument that the Labour Court is properly applying the law as it applies here in Ireland. If that position is correct then there is a significant claim against the State which is going to have to be dealt with. The alternative is whether the Labour Court can perform a linguistic acrobatic exercise to read our Legislation in line with the Directive. The Labour Court can only go so far in reading legislation in line with the Directive and cannot and do not write something which is not there.

These issues have been around for some time now. They have not been addressed by the Department of Jobs, Enterprise and Innovation.

Failure to deal with these issues is simply going to open up a bonanza for lawyers bringing High Court actions against the State where the State is going to have to pay considerable legal fees to Senior Counsel, Junior Counsel and to Solicitors. Should that happen, then there is going to be the usual outcry that lawyers have been jumping on the compensation bandwagon. Never let it be said that we do not alert potential claims against the State which can be simply avoided by the appropriate Legislation being amended. If the claims do start to run, against the State, nobody will be able to say that we did not alert the State to the problem.

It will be interesting to see how matters develop.

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