

This is an extract from a seminar paper given by Richard Grogan of this firm to The Southern Law Association on 30th November 2018.

Public Holidays – Section 21 and Section 22

In reading Sections 21 and 22 it is also necessary to consider Statutory Instrument 475 of 1997 being the Organisation of Working Time (Determination) of Pay for Holidays (Regulations) 1997

One issue which did in the past come up is that an employee would claim for Bank Holidays. There is no entitlement in the Act to a Bank Holiday only to Public Holidays.

While it may still appear in the body of the complaint the heading in the new form is Public Holidays which cures this issue for claimants. The use of the word “Bank Holiday” as opposed to “Public Holidays” has been used in the past to defeat claims.

There are currently 9 Public Holidays. They are set out in the Second Schedule of the Act. Good Friday is a Bank Holiday. It is not a Public Holiday.

What are the entitlements of an employee?

An employee is entitled to whichever one of the following the employer determines;

- (a) A paid day off on that day
- (b) A paid day off within a month of that day
- (c) An additional day of annual leave
- (d) An additional day’s pay / Section 21 (1).

It should be noted that if the day on which the Public Holiday is a day on which the employee would be entitled to paid day off then subsection (1) is read as if (a) was omitted.

This can be relevant in a number of situations. Unlike the issue of Annual leave there is no requirement to consult with the employee.

For employees who work up to the 48-hour maximum they will at times need to be sent home on full pay to bring their average down.

If the Public Holiday falls on one of those days then they are already on a paid day off so options (b) (c) or (d) have to be decided upon.

For many office workers if a Public Holiday falls on a Saturday or Sunday they will get the following Monday off. In Revenue Commissioners and Gerard Doyle DWT0625 the Labour Court held;

“... the Court is satisfied that the employer may determine when the benefit will be provided. Where the Public Holiday falls on a Saturday or Sunday, Mondays are usually selected as the days when employees, who are otherwise off on those days, will benefit from the holiday entitlement”.

The reason for this is that subsection (6) provides that subsection (1) applies to a day on which the employee is not required to work.

This makes logical sense. Otherwise employees would not need to be paid for a Public Holiday other than a day on which the employee was required to work.

In the absence of contractual provisions an employee may not later than 21 days before a Public Holiday request an employer to make a determination under section 20 (1) and to notify the employee within 14 days of the Public Holiday (subsection 2). If the employer fails to do so the employee is entitled to a paid day off on that day. Where an employee issues a request under Section 21 (2) an employer needs to elect otherwise the employee is entitled to the paid day off on that day. This was held in the case of E Smith School t/a The High School and Sean McDonnell DWT1411. The employee was a Supervisor. The employee was told he had no entitlement to Public Holidays and the employee accepted this. On a Public Holiday the school was closed and the employee had a day off but was not paid. This omission was rectified subsequently.

In this case the Labour Court quoted the case of Royal Liver Assurance –v- Macken [2002] 4 I.R. 427 where Lavin J stated;

“The requisite infringement for the purposes of Section 21 (1) would arise in contexts where the employer has failed to elect between the various entitlements of an employee under Section 21 (1), where the employer fails to give a paid day off on the Public Holiday or an additional day pay, as the case may be. In each case it seems the infringement would arise on the date of the Public Holiday itself”.

The Court held that the Act had been infringed as the employee had not been paid at the time despite the fact that the issue had been rectified by the employer subsequently. Compensation of €1500 was awarded.

The position where an employee is not required to work on a Public Holiday

The leading case on this issue is Thermo King and Pat Kenny DWT0611. The background is probably relevant in explaining this provision. The employee was on certified sick leave. During his sick leave there were four Public Holidays. During the certified sick leave, the employee was entitled to his full pay under a collective agreement. The Adjudicator held that only two options were practicable namely an additional day’s annual leave or an additional day’s pay. The Labour Court held that it was clear that the days in question were part of his entitlement to sick pay under a collective agreement and were offset against the total entitlement. The Labour Court held that in such circumstances they could not be treated as also discharging the statutory obligation. The Labour Court the circumstances came within subsection (1) and (6) where the Court stated;

“The clear import of these provisions is that where an employee is otherwise entitled to a paid day off on a day which is a Public Holiday the granting of that day off with pay cannot subsume the employee’s statutory entitlement in respect of the Public Holiday”.

A similar approach was taken in An Post and Glenn King DWT072.

In HSE West and Alison Mehan DWT0884 the HSE on appeal contended the decision in Thermo King should not apply to them as retrospectively they had decided to treat the payment which the employee received for the day in question as being in respect of her statutory entitlement rather than under the sick pay scheme. The Labour Court rejected this and affirmed the Adjudicator's decision of an additional days annual leave or an additional days pay to be implemented within 6 weeks. The decision in HSE West and Fiona Dermody DWT1044 is very similar.

Where the sick pay scheme which operates provides that the entitlement to Public Holidays is neither subsumed nor offset by the occurrence of a Public Holiday during a period of sick leave there will be no claim. Lufthansa Technic Airmotive Ireland and Ulick Daly DWT091 and Leitrim County Council and Alan Martin DWT0914.

This issue arises in cases involving sick pay schemes. When devising a sick pay scheme, which is a paid sick pay scheme it is important to provide that where a Public Holiday falls on a day during the Sick Leave that two provisions operate namely;

- (a) That the employee receives an extra days annual leave, or
- (b) That the employee is paid for the Public Holiday and the leave period is extended by any period covered by a Public Holiday.

The position of Part-Time Workers

This issue was considered in Revenue Commissioners and Gerard Doyle DWT0625. The employee was on a contract for 80% of the time of a full-time worker but was not required and in fact prohibited from working on a Monday and on a Friday afternoon.

The Labour Court referred to Regulation 5 (2) which provides that where the employee does not normally work on that day that the appropriate rate is 1/5 of a week's pay. The Labour Court held that Regulation 3 (2) would apply and Regulation 5 (1) (a) would apply which would be the employees' normal daily hours last worked prior to the Public Holiday.

The Court pointed out that there is no definition of “normal daily hours”. The Court considered what it could mean when they stated;

“The term “normal” daily hours can have many shades of meaning. In the context in which it is used in the Regulations it can mean the hours routinely or regularly worked on a particular day or it can mean the hours worked on a day to which no special or particular arrangements can apply. It can also mean the normal hours worked by the employee and averaged over a period of time. The Court is satisfied however that what appears not to be open on the language of the statutory provision is the interpretation which would fix an employee’s entitlement in respect of a Public Holiday by reference to the daily rate to which he or she would have been entitled had they worked on that day.

Having examined his contractual working pattern the Court is satisfied that in this case special arrangements applies to the Complainant which results in his working week being 80% of the working time of a full-time member being spread over 5 days, and therefore the hours worked on Mondays and Fridays cannot be regarded as his normal daily hours.

The Court is assisted in this conclusion by the terms used in Regulation 5 (1) (b) which state;

- (b) In any other case, the relevant rate in respect of that Public Holiday shall be the sum that is equal to the average daily pay (excluding any pay for overtime) of the employee calculated over.
 - (i) A period of 13 weeks immediately before that Public Holiday, or,
 - (ii) If no time was worked by the employee during that period, the period of 13 weeks ending on the day on which was last worked by the employee before that Public Holiday.

Section 5 (1) (b) clearly provide for the calculation of “average daily pay excluding overtime pay” calculated over a set period. This averaging provision is in line with that provided in subsection 1 (a).

The Court is furthermore satisfied that Regulation 5 (2) and Regulation 6 “relevant rate for certain categories of job sharers similarly provides methods for calculating an “average daily rate”. Therefore, the Court is satisfied that a calculation of the complainant’s rate of pay for the purposes of his Public Holiday in respect of Public Holidays which fall on Mondays and Fridays should be the average daily rate, based on his contracted working arrangements, i.e. 1/5 of his weekly rate of pay equals 6.5 hours. However, since the complainant already works for part of that day and is therefore already on paid time off for that part of the day the Court interprets this to mean that he is therefore entitled to be paid an extra 2.56 hours for such Public Holiday on the basis that he is already paid 4 hours on those days.”

On this basis the employee was going to be paid 8.12 hours for a Public Holiday which would have been more than the pay the employee would have received on a normal day that he worked. This is a vagrancy of the legislation.

Job Sharers

Regulation 6 provides that where there are job sharers who work half the time required to be worked by a whole-time employee of the employer the rate of pay will be 1/10th of the sum that is paid in respect of the last two weeks of normal working hours worked by the employee before the Public Holiday.

Now, when this is considered with the decision in Revenue Commissioners and Gerard Doyle, discussed previously, there are significant benefits in monetary terms for the employer having job sharers rather than part time workers.

Lay-off Provisions

Because of the way the provisions of Section 21 and 22 are structured along with the Regulations where an employee is on lay-off the provisions relating Regulation 5 (1) (b) will ensure that the employee will receive a payment for a Public Holiday during the first 13 weeks of any lay-off where it occurs.

Special Entitlements to Public Holidays

In the Third Schedule of the Act there are four provisions sometimes overlooked covering Section 21 (5);

- (1) Where an employee has had an occupational accident, Public Holidays must be paid for 52 weeks from the date when the employee has been absent on sick leave
- (2) For Public Holidays which fall within 26 weeks by reason of an injury sustained by the employee in an accident or by reason of a disease from which the employee suffers these must also be paid. Therefore, an employee who is involved in for example a car accident would be able to receive this entitlement. It would also cover an employee who was injured as a result of being involved in a sporting accident which might have nothing whatsoever to do with their employment.
- (3) Where the Public Holiday falls within 13 weeks of a period during which the employee has not been provided with work. This would include a lay-off situation.
- (4) An absence due to a strike in the business or industry.

If an employee is absent for any other reason such as absenteeism then by virtue of Section 21 (5) the employee will not have an entitlement. In addition, if an employee does not come within the provisions of the third schedule equally there will be no entitlement.

Overtime

In MCM Security Limited and Tom Power DWT0895 the Labour Court reviewed Regulation 3 (2) and Regulation 5 (1) and stated;

“It is clear from the wording of both Regulation 3 (2) and Regulation 5 (1) that payment in respect of overtime is not reckonable in the calculation of pay for ... Public Holidays”.

A contrary view was taken by the Labour Court in Headway Security Services Limited and Peter Finn DWT 1579 where overtime was taken into account to calculate the entitlement.

TUPE Transfers

Where there is a transfer under the Transfer of Undertaking Regulations then the transferee assumes full responsibility for any breach which occurred prior to the transfer. This was confirmed in the case of Top Security Limited and Group of Workers DWT071.

Rate of Pay

While claims under Section 21 and Section 22 are not Directive provisions. The Labour Court in such cases as Cheshire Ireland and Gallagher DWT1675 have held that the clear import of Sections 21 and 22 and SI 475/1997 is that to ensure that during Public Holidays an employee receives “no less and no more” than he or she would receive if he or she had been working. The Labour Court relied on the reasoning of the CJEU in case C-155/10 Williams -v- British Airways, Case C-539/12 Lock -v- British Gas Trading Limited and the principles applied in Hidden Hearings Limited and Smart [2005] 16ELR367 by the High Court.

Conclusion

The issue of Public Holidays and the pay for same is invariably one of a mixture of fact and law. The difficulty for practitioners is sometimes aligning the facts to the law or the law to the facts. The difficulties are particularly compounded when there is a divergence due to lack of contractual documentation, and /or records, as to what is the normal working time. The Regulations were drafted in different business times with different business models. There is a strong argument the Regulations need to be reviewed to mirror the reality of current relationships and the manner in which businesses operate. However, that discussion is outside of the scope of this seminar which is to deal with the law as we have to bring and defend claims under.

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