**Law Society of Ireland / Skillnet**

# Organisation of Working Time Act 1997 – Common Problems – Practical Solutions

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**Organisation of Working Time Act 1997**

**Introduction**

In looking at this paper today I had a choice. The choice was to deal with the sections you all know about possibly in greater detail or look at some of the anomalies. In addition, to look at some of the common issues and problems which arise and the practical way of dealing with these.

I thought that it might be better to deal with the anomalies and also the common issues which arise and to deal with the practical aspect of addressing these.

**The use of Internal Grievance Procedures**

This can be broken down into three distinct issues which do arise namely;

(a) The employee failing to use the internal grievance procedures;
(b) The employee using the internal grievance procedures and missing the statutory time limit; and
(c) The employer and the employee agreeing that the employee shall use the internal grievance procedure first but with the employer agreeing to an extension of time if a resolution cannot be achieved.

(a) Failure to use the internal grievance procedures.

This is regularly raised as an issue by employers and by some representatives. It should be noted that some of these representatives who complain about an employee not using an internal grievance first will often be the ones who will, when a claim is out of time, be arguing that it was out of time even where the employee has used internal grievance procedures.

The legislation in Section 41 (6) provides;

*"Subject to sub section (a) an adjudication officer shall not entertain a complaint referred to him or her under this Section if it has been presented to the Director General after the expiration of the period of six months beginning on the date of the contravention to which the complaint relates".*

Under sub-section 8

*"An adjudication officer may entertain a complaint or dispute to which this section applies, presented or referred to the Director General after the expiration of the period referred to in sub section (6) or (7) (but not later than 6 months after such expiration) as the case may be, if he or*

*she is satisfied that the failure to present the complaint or refer the dispute within that period was due to reasonable cause".*

The issue of delaying the issue of proceedings to go through internal grievance procedures has been rejected by the Labour Court on a number of occasions as coming within the reasoning as set out in Cementation Skanska –v- Carroll DWT0338. That is a case where the Labour Court considered the issue of reasonable cause stating;

*"In considering if reasonable cause exists, it is for the claimant to show that there are reasons, which both explain the delay and afford an excuse for the delay. The explanation must be reasonable, that is it must make sense, be agreeable to reason and not be irrational or absurd. In the context of which the expression reasonable cause appears in Statute it suggests an objective standard, but it must be applied to the facts and circumstances known to the claimant at the material time. The claimant's failure to present the claim within the six month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the claimant should satisfy the Court, as a matter of probability, that had those circumstances not been present he would have initiated the claim in time".*

The Labour Court has consistently ruled that utilisation of the employer's internal grievance procedure does not amount to "reasonable cause" for delaying referral of a complaint. This was held in cases of Pfizer Ireland Pharmaceuticals –v- Whelan EDA1924, Beaumont Hospital –v- Kaundaeda 1930 and SSE Renewables (Ireland) Limited –v- Tymon UDD1956.

It is also clear in the case of Brothers of Charity Services Galway –v- O'Toole EDA177 that utilising the internal procedures does not of itself extend the statutory time limit where the Labour Court stated;

*"The Court cannot accept that deploying the respondents internal procedures operates to prevent the complainant from initiating the within complaint within the statutory time limit provided under the Acts".*

Where an employee is met with an argument that they should have used the Internal Grievance Procedures the answer is quite simple. The answer is effectively twofold.

1. The first is that using the internal procedures will not have stopped the time running; and
2. Secondly there was nothing to stop the employer after the proceedings issued requesting the employee to use the internal grievance procedures; and

3. That the WRC can be requested to put a stay on proceedings pending the Internal Grievance Procedures.

In the event that when representing an employee you get a representative who wishes to push this issue strongly that the internal procedures should have been used then the case of Gunter Fub and Stadt Halle case C-429/09 is relevant. In that case the CJEU stated;

*"As the Court has already held, the worker must be regarded as the weaker party in the employment relationship, and it is therefore necessary to prevent the employer being in a position to impose upon a restriction of his rights (see to that effect Pfeiffer and Others joint cases C-397/01 to C-403/01)."*

The Court in that case went on to state;

*"On account of that position of weakness such a worker may be dissuaded from explicitly claiming his rights visa vis his employer or doing so may expose him to measures taken by the employer which are likely to affect the employment relationship in a manner detrimental to that worker".*

The Court then importantly went on to state;

*"In those circumstances, it must be held that it cannot be reasonable to require a worker who, like Mr. Fub has suffered loss or damage as a result of the infringement by his employer of his rights confirmed by Article 6 (b) of Directive 2003/88 to make a prior application to that employer in order to be entitled to reparation for that loss or damage".*

The Court then further went on to state;

*"It follows that a requirement to make such a prior application is contrary to the principles of effectiveness".*

Effectively the CJEU could not be clearer that there is no requirement for the employee to bring a prior application under any employer grievance or other procedures.

(b) Where the employee does not lodge the complaint in time.

For the very same reasons as to why an employee cannot and should not be subject to any argument that the employee should have used the internal grievance procedures. Where an employee decides to do so then the rationale of the Labour Court as regards an extension of time clearly sets out that using the internal grievance procedures is not a reason for getting an extension of time.

(c) Where the employer encourages the employee to use the internal grievance procedures.

There will be times for various reasons why an employer will want the employee to use the Internal Grievance Procedures in advance of bringing any claim to the WRC.

These can be;

(a) Reputational Risk to the employer;
(b) A desire in larger organisations not to have the complaints become an issue for other employees;
(c) A genuine desire to resolve the issues without going to the WRC.

Because of the time limits set out in Section 41 (6) (8) an employee needs to be extremely careful in agreeing not to issue the proceedings.

Provided the claim is not going to become statute barred under Section 41 (8) where there is no power for an Adjudication Officer or the Labour Court on appeal to extend time the employee in such circumstances may in our view agree to do so provided that the employee receives a clear undertaking by way of open correspondence from the employer or their representative that the time limits in Section 41 will not be pleaded against the employee.

It would be our view that where an employee relies on such a representation then following the reasoning of the Labour Court in Cementation Skanka –v- Carroll DWT0338 which I have referred to previously the reason in those circumstances for the delay will be explained. They would afford an excuse. That explanation would be reasonable in that it is always more beneficial that parties would try to resolve issues than go to litigation and the employee will have relied upon reasonable cause being the employers representation.

**Claims against a company where there is a Winding Up Order or a provisional Liquidator appointed.**

There is a problem where there is a company where a Winding Up Order has been made, a provisional Liquidator has been appointed or a resolution for a voluntary winding up has been passed. Section 678 (1) of the Companies Act 2014 provides that in such circumstances no action shall be proceeded with or commenced against the company except by leave of the High Court and subject to such terms as the Court may impose. The non-application of sub section (1) only applies to proceedings before the Employment Appeals Tribunal which is now effectively no longer in existence except for existing cases. Section 678 (2) is clear on this point.

The Workplace Relations Act, 2015 is defective in this respect.

Where a claim has been brought under the Organisation of Working Time Act which is an Act which derives from the Directive being Directive 2003/88/EC. There is an argument that under Article 47 of the Charter of Fundamental Rights of the European Union that;

*"Everyone whose rights and freedoms guaranteed by the law of the Union or violated has a right to an effective remedy before a Tribunal in compliance with the conditions laid down in this article".*

It may be arguable that following the case of Max Planck –v- Gesellschaft Zur Forderung der Wissenschaften e.V –v- Tetsuji Shimizu C-684/16 that in the event that it is impossible to interpret our national legislation in a manner consistent with Directive 2003/88 and Article 41 of the Charter of Fundamental Rights it follows from the latter provisions that a National Court hearing a dispute between a worker and his former employer who is a private individual must dis-apply the National Legislation".

However, that is one that will have to be ruled on by the Labour Court at some stage and possibly the High Court itself. It is a defect in the Legislation that does need to be addressed and it is one colleagues acting for employees need to be aware of.

**Frivolous and Vexatious claims**

It is now becoming extremely common that submissions are appearing from employers claiming that the complaint is "frivolous and vexatious".

This defence appears to be a standard defence which applies in some cases where you see the entire kitchen sink being thrown at the employee and I will be dealing with some of these later in this paper. For the present it may be appropriate to deal with this particular issue.

While the issue has arisen in the past I am dealing with the issue where an Adjudication Officer or the Labour Court does not find that the claims are frivolous and vexatious.

There is no decision of the Labour Court per se which refers to this. There are decision in the Labour Court where the Labour Court has rejected the employers defence and where this has been a factor in setting compensation. However, the issue in relation to a defence of frivolous and vexatious is one which has been raised recently by us in the WRC and where a decision is awaited.

The issue of frivolous and vexatious and how it can impact on an award did arise in the case of Michael Doyle –v- Marie Donovan in relation to aggravated damages reference 2020 IEHC11.

In that case at paragraph 41 the case of the Supreme Court in Swaine –v- Commissioners of Public Works 2003 IESC30 was quoted and set out the issue of aggravated damages and in particular the judgement which referred to;

*"Conduct of the wrong doer and/or his representative in the defence of a claim of the wronged plaintiff up to and including the trial of the action".*

It went on to state;

*"Furthermore the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances be in part or recognition of the added hurt or insult to the plaintiff who has been wronged and in part also a recognition of the cavalier and outrageous conduct of the defendant.*

In that particular case aggravated damages were not awarded as the defendant had admitted liability before the hearing and further had not given any evidence to claim that the plaintiff had deliberately caused the collision. A defence had been put in to that extent but liability was admitted prior to the hearing.

In a claim under any of the Sections protected by the Directive being Sections 11, 12, 13, 15, 16, 19, 20, 23, 26 then in those circumstances putting forward such a defence may be one where the employee is entitled to claim aggravated compensation.

In case ADJ/00012100 the Adjudication Officer set out the definition of what is frivolous and vexatious. The case of Farley –v- Ireland & Others 1997 IESC60 is one where Mr. Justice Barron in the Supreme Court stated;

*"So far as the legality of matters is concerned frivolous and vexatious are legal terms. They are not pejorative in the sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case".*

Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious.

In Fay –v- Tegral Pipes Limited and Others 2005 2IR261 the Supreme Court restated the principles where Mr. Justice McCracken delivered the Judgement stating;

*"The real purpose of the Courts inherent jurisdiction to dismiss frivolous and vexatious claims was firstly to ensure that the Courts would be used only for the resolution for genuine disputes and not for lost causes. Secondly, that parties should not be required to defend proceedings which could not succeed."*

Where a defence of frivolous and vexatious is raised then it has to be presumed that whether it is raised by the employer themselves or by their representatives that the representatives are acting on behalf of the employer. The High Court judgement is clear on this point.

Where the defence is raised then the damages in many cases will have to give recognition for the added hurt or insult to the complainant who has brought a case. The case of Von Colson and Kamann case C-14/83 set out that sanctions must be;

*"Effective, dissuasive and proportionate".*

In looking at compensation it would be my view that where an employer puts in a defence that a claim is frivolous and vexatious then in those circumstances applying the Von Colson and Kamann principles to be persuasive of an employer going forward the compensation is one which must take into account that defence if it is found not to be correct.

The reason for this is that where an employer claims that a claim is frivolous and vexatious this is a serious allegation levelled against any complainant. It is the employer saying that the employee has no reasonable chance of succeeding. It is effectively saying that this is not a genuine dispute and that it is a lost cause. That is an extremely serious allegation to make. It is not a defence to say that this is simply a standard defence or that it is throw away statement.

Where it is put in by an employer and subsequently found not to be the position then this is an issue which we see is likely to be raised as an issue to be taken into account in setting compensation.

**Never mind the Quality – Feel the Width**

It has been said about me in the past that I am never one to issue a single claim when 14 will do.

We have adapted this for 2020 and at the present time we have got up to 247 individual claims under the Organisation of Working Time Act for a single employee.

You might wonder why this would be done. When you look at decisions from the WRC, in particular, our experience has been that even where there have been multiple breaches of various Sections over a period of time Adjudication Officers have failed to set out the number of breaches and have simply given a global level of compensation.

We have had cases recently particularly for senior executives and at the other end truck drivers under SI36/2012 which relates to the trucking industry where you can have effectively breaches of Sections 11 being the 11 hour rest period. Section 12 being the entitlement to breaks during the day. Section 13 concerning the weekly rest period. Additionally Section 15 and Section 17 must be complied with.

Where you have these on effectively a daily basis then each and every breach is in my view a breach of the Act. If you take the position of a senior executive you are probably dealing with under Section 11, 4 days a week by 26 weeks which is 104 claims. When you take Section 12 and there is the issue of the rest period after 4.5 and 6 hours there are possibly two separate breaches which will amount to a minimum of 130 and possibly 260 individual breaches. Section 17 can again be a further 104 claims. Under Section 15 being a four month period of time if you take a claim which would have gone in on 1 January you might think that the reference period would be September to December. You would be right in part. But there are other reference periods there aswell being the periods August to November, July to October., June to September and there are others because to work out the four months averaging you will be dealing with calculating it at the end of the four month period so it is a four month period ending within six months of the claim being lodged so you would also have the periods May to August, April to July and March to June.

It may be argued that these are overlapping claims but they are not. They may cover in part the same reference period but they will not cover in whole the same reference period.

While SI 36/2012 (as amended) which relates to the trucking industry is slightly different that is a statutory instrument where equally there are opportunities.

The issue in relation to issuing multiple claims is quite simple. It is relating to the issue of setting compensation. The WRC in particular has been slow and when I say the word slow I am not aware of any single decision, where the Adjudication Officer has set out the number of breaches within a reference period. The Labour Court has. Therefore the purposes of having the WRC address this issue it appears to me that it is necessary and useful at times to issue the multiple claims under this Act.

If it becomes the practice of the WRC to list the number of breaches so that it is clear in setting compensation that the number that you can divide the compensation into the number of breaches to ascertain how much has actually been awarded for each breach. It may not be necessary to issue these multiple claims.

I would say that the first time this was done I was met with a statement from an Adjudication officer that issuing claims on a day by day basis was an abuse of the process. My response was relatively short. It was that where there is a breach of a fundamental right which in that particular case related to SI36/2012 but the same argument would apply in relation to the Organisation of Working Time as regards Section 11, 12, 15 and 16 that these are fundamental rights and that the Directive provides for any breach being a breach of a fundamental right. I would add that I added in that the Adjudication Officer had made a statement where there would be perceived bias. I quickly stated that this was a perception and that that was all that

was needed and that in those circumstances the Adjudication Officer should recuse themselves. They did. The case did go on for hearing before a different Adjudication Officer and settled after about an hour after the hearing started.

**That the employee has not suffered any detriment**

This is another one of these classic defences which is raised. There are two decision sunder the Terms of Employment (Information) Act which very clearly sets out the approach of the Labour Court on this issue which would apply as much to the Organisation of Working Time Act as to the Act the cases were brought under.

The first is TED19/14 being a case of Manno Foods (Dungarvan) Limited trading as Domino's Pizza and Zygala where the Court in that case stated;

*"It is well established in the determinations of this Court that it is not necessary for a complainant under the Act to demonstrate he or she suffered a detriment arising from the employer's noncompliance with the Act in order to secure compensation".*

A similar approach was taken in case TED19/19 being Beachfield Private Home Care Limited and Hayes Kelly where the Court stated;

*"It is well established in the determinations of this Court that it is not necessary for a complainant under the 1894 Act to demonstrate that he or she suffered a detriment as a consequence of the respondent's failure to comply with his obligations…."*.

In setting compensation the Labour Courts determinations are clear that the principles in Von Colson and Kamann which were set out in this paper previously is the basis on setting compensation where a claim is brought under a provision which is covered by the Directive.

Where a claim is not brought under one of the Directive provisions such as Section 17 then the legislation provides for compensation up to two years wages. In those circumstances there appears to be no requirement on the WRC or the Labour Court to set compensation which is to be persuasive of an employer going forward being compliant with the legislation. However, as the legislature has set the compensation at the same level on non-Directive provisions as it has for Directive provisions there is an argument that the same principles as apply in Von Colson and Kamann which apply to Directive provisions would apply to non-Directive provisions.

**Be very careful of decisions**

You may wonder why I would say this.

This more applies to those decisions which you may be thinking of appealing where a claim is dismissed by an Adjudication Officer.

There is clearly an issue with pro forma decisions in the WRC which some Adjudication Officers are working off.

The relevant Section to be aware of is Section 27 (3) and I think it is useful to set it out in full;

*"A decision of an Adjudication Officer under Section 41 of the Workplace Relations Act 2015 in relation to a complaint of a contravention of a relevant provision shall do one or more or the following, namely*

*(a) Declare that the complaint was or, as the case may be, was not well founded.*
*(b) Require the employer to comply with the relevant provision,*
*(c) Require the employer to pay to the employee compensation of such amount (if any) as is just and equitable having regard to all the circumstances, but not exceeding two years remuneration in respect of the employees employment."*

Where an Adjudication Officer makes a decision in favour of an employee and awards compensation then that will come under Section 27 (3)( c).

The problem arises where the Adjudication Officer finds against the employee.

There have been cases where the Adjudication Officers will simply dismiss the claim or will find that the complaint was without merit or some other wording.

Where the Adjudication Officer does so then it would appear at the present time that the employee has no appeal to the Labour Court.

This did arise in case TED19/23 being a case of Dunnes Stores and Karen Walsh. This is a case where I acted for the employee. The Adjudication Officer dismissed the case.

In that case the Labour Court stated;

*"The Court finds that the Adjudication Officer made the decision to dismiss the within claim and that the decision was not within the jurisdiction conferred upon the Adjudication Officer by the Act of 2015 at Section 41 and in accordance with the Act at Section 7 (being the Terms of Employment (Information) Act) and that consequently no decision had been made by the*

*Adjudication Officer in accordance with the Act of 2015 at Section 41. The Court therefore has no jurisdiction to hear the appeal of the decision made on 31 July 2017."*

The decision of the Adjudication Officer in that case was a claim under the Terms of Employment (Information) Act.

There is a view that Section 39 of the Organisation of Working Time Act would enable an amendment to be made. This is not one I would agree with. Section 39 of the Act which does refer to various pieces of Legislation but only refers to a situation where the decision does not state correctly the name of the employer concerned.

The relevant case involving Dunnes Stores and Karen Walsh is under appeal on a Point of Law to the High Court however pending a decision in that case and it is listed for hearing in July colleagues need to be aware that the decision of the Labour Court is the standing decision on this issue and that if you receive a dismissal of a claim that does not use the words set out in Section 27 by which we mean that the Adjudication Officer does not use the words;

*"Not well founded"*

Then there appears to be no right of appeal to the Labour Court.

This is an issue which I have written to the Director General of the WRC about. I have raised it with the Employment Law Committee of the Law Society. I recently undertook a review of a four week period of decisions from the WRC which indicated that in a significant number of the cases the wrong wording was being used. This problem arises not just in relation to this particular Act but in relation to all of the Acts and I would caution colleagues to be careful to check that they actually have a decision which can be appealed. If not then it would appear that it is necessary to bring Judicial Review proceedings to the High Court to have the matter remitted back to the WRC for a further hearing.

**Senior Executives and their Rights under the Organisation of Working Time Act**

An issue is now arising in relation to senior executives and managers bringing claims under the Organisation of Working Time Act. There are exemptions under the Act in respect of senior executives in relation to the provisions of Sections 11-16 inclusive.

The relevant Section in the Act is Section 3 (1) (c ) where the exclusion from the benefits of the Act applies to;

*"A person, the duration of whose working time (save any minimum period of such time that is stipulated by the employer) is determined by himself or*

*herself, whether or not provision for the making of such determination by that person is made by his /her contract of employment."*

Effectively this section is deemed to apply to senior executives.

The first issue in a case like this is always going to be to look at their contract of employment.

If the contract of employment is very clear providing, for example, that the hours of work of the employee will be from 9-5 Monday to Friday then the provisions of Section 3 may still apply. However, when the case of Trinity Lodge Holdings –v- Kolesnik & another 2019 IEHC654 is considered that is a case where the High Court stated in relation to the issue of Sunday Premiums that;

*"The Labour Court had before it written evidence, in the form of the contracts of employment of the respondents. The language used in the contracts is plain English and could not be more clear… the wording is not buried in small print somewhere in the middle of the contract…"*

The High Court in that case went on to state that the words themselves may not always be conclusive but the Court pointedly pointed out that in a claim being made that the words themselves are not conclusive the person arguing that position;

*"…will have to overcome the Parole Evidence Rule".*

Because Section 3 is a derogation when you look at the case of Flexsource Limited –v- Karaliunas DWT13/18 it is one where the Labour Court stated;

*"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…It is well settled in the laws of the European Union that a derogation must be interpreted strictly see case C-222/84 Johnson –v- Chief Constable of the RUC [1986] ILR 263 Par 36, see C-477/09 Prigge –v- Deutsce Lufthansa AG Par 72".*

This issue has been dealt with by the Labour Court previously in cases of M & J Gleason & Company –v- Maloney DWT1395 where in the context of a transport manager where his time when he was required to perform his work was essentially dictated by fulfilling customer orders was a form of employment which the Labour Court held they were not satisfied came within the type envisaged by Section 3) (1) (c ). In Erac Ireland Limited –v- Murphy DWT15/83 the Labour Court ruled that a branch manager of a car rental company was employed to work hours set by the company and as determined by its business needs and consequently was not a person in control of his own working hours.

Therefore the cases which do run are ones where those claiming the exemption must look carefully to see is the business one where the employee actually has that degree of flexibility.

Recently in a case involving a chief risk officer and a bank ADJ00021873, being a case in which I was involved the claim by the employee was lost. It did go on appeal but the appeal was never heard. That is a case where the Adjudication Officer had held against the employee. What was interesting in that case is that the Adjudication Officer had held that the employee;

*"Knew the times he was to be at work".*

It is hard to understand on a reading of Section 3 how in those circumstances the employee would have come within the provisions of Section 3.

While the following issue has not been litigated as yet it is likely to be litigated in the not too distant future. Section 3 is a derogation which derives from Article 17 of the Directive.

There is an issue as to whether the derogation in Article 17 is compatible with Article 31 (2) of the Charter of Fundamental Rights of the European Union.

The first argument is that Article 31 (2) refers to the rights of every worker which would extend even to those workers in an unmeasured work situation. I would argue that given the fact that health and safety is the basis of the rights in Article 32 (2) that any unmeasured work derogation is inconsistent with this provision of the EU Charter.

The Charter of Fundamental Rights of the European Union has Treaty status. It is the fact that it has Treaty status that enabled the CJEU to hold that the Directive effectively obtains direct effect because of the provisions of Article 31 (2) of the Charter. This is the effect of the case of C-684/16 being the case of Max Plank Gesellscraft.

In that judgement it was stated;

*"In that regard it follows first from the wording of Article 31 of the Charter of the Provisions enshrined "the rights" of all workers to "annual periods of"".*

Because Article 31 (2) refers to maximum working hours this would also be enshrined.

The CJEU pointed out that the explanations relating to Article 31 of the Charter, which in accordance with the third sub paragraph of Article 6 (1) TEU and Article 52 (7) of the Charter must be taken into consideration for the interpretation of the Charter. Article 31 (2) of the Charter is based on Directive 93/104 and Article 2 of the European Social Charter signed in

turn on 18 October 1961 and revised in Strasburg on 3 May 1996 and on Point 8 of the Community Charter of Fundamental Social Rights of workers adopted at the meeting at the European Council in Strasbourg on 9 December 1989.

Case C-378/17 has held effectively that a Court can override Irish Law so as to be compatible with the Directive and the Charter. Therefore there is an argument that the derogation in Article 17 itself cannot stand up and if that is the position then the provisions of Section 3 automatically falls.

If that argument is not correct then there are two issues which relates to the Directive. The derogation in Article 17 refers to;

*"Managing executives or other persons with autonomous decision taking powers".*

That is a much more restricted definition than the definition set out in Section 3 (1) (c) of the Act.

The derogation in the Act of 1997 cannot go further than the derogation specified in the Directive.

When you look at the issue as to what autonomous decision taking powers will mean then you have to look at that using the normal words. That effectively is an individual who decides when they come to work. When they go home. When the take a break. When they go on holidays. That is an individual who can make those decisions without having to get approval from anybody else. It may in fact go further that in relation to operating a business that they have those autonomous decision taking powers as well and are effectively not answerable to anybody else.

On either of these interpretations the derogation as specified in Section 3 may go further than the derogation allowed under the Directive.

The issue then is whether the derogation in Article 17 is in conflict with Article 31 (2) of the Charter and in those circumstances which provision takes precedents. The wording of the Charter is very clear. It sets out that every worker has a right to limitation of maximum working hours, to daily and weekly rest periods and to annual periods of paid leave in Article 31. This is an issue which ultimately may have to go to the CJEU as well as the directive derogation or the charter takes precedents.

That itself would be an interesting point.

However when looking at the Irish legislation the question is whether the Derogation introduced in Irish legislation is in conformity with the derogation set out in Article 17. If that derogation in Section 3 goes further than the working of the derogation in Article 17 then it is not a matter of amending the Irish legislation to be in line with the derogation in Article 17.

It is that the derogation in our legislation is not a derogation which the Government of the day could have enacted and therefore the provisions of Section 3 would be contrary to the Directive and would have to be set aside.

It might be argued that Section 3 could simply be amended to be in conformity with the Directive taking account of previous cases which I have referred to. That is the alternate argument. However, this is a Directive derogation and that must be strictly interpreted as to whether the derogation is in line with the Directive.

In case DWT1318 which we referred to previously derogations from a right is one well settled under the laws of the European Union and which must be interpreted strictly. If the derogation is wider than provided for in the Directive then no derogation has been put in place. Following cases C-684/16 and case C-378/17 referred to previously those circumstances taking the issue of the derogation having to be strictly construed and the case law, the Irish legislation, at a minimum, has to be restricted to those of the strict wording of the Directive but I would argue if the state has inserted a provision wider than Article 17 there is a strong argument that no valid derogation has been claimed and therefore that provision has to fall. If however it is only that the Act must be read in line with the Directive then the issue is whether an employee will come into the category of an autonomous decision maker.

If you take a situation where an employee is obliged to be there for even a set number of hours per week, might have to apply to get approval for holidays or to take an afternoon off it is going to be difficult to contend I believe that the individual comes within the terms of the wording in Article 17.

I do not have case law on what is an autonomous decision maker from the CJEU and clearly this is an issue which at some stage may have to go to the CJEU by way of referral from the Workplace Relations Commission, the Labour Court or the High Court. Both the High Court and the Labour Court have in the past referred matters to the CJEU.

In the case of an employee where the exemption is being claimed it must be noted that the provisions in respect of public holidays and annual leave are not ones where the exemptions apply. In such circumstances therefore even if the exemption does apply whether it is Section 3 of the Act or Article 17 of the Directive those provisions are not exempted. Therefore if the employee works on a public holiday they are entitled to an additional days pay or if they take annual leave this must be uninterrupted annual leave. The reality on matters is that many senior executives will be contacted while they are on holidays. This means that they do not get their two weeks uninterrupted leave. The provisions of Section 19 (3) provides that the annual leave of an employee who works eight or more months in a leave year that is subject to the provisions of any employment regulation order, registered employment agreement, collective agreement or any agreement between the employee

and his or her employer shall include a non-broken period of two weeks. When you then look at Section 20 (3) it provides

*"Nothing in this Section shall prevent an employer and an employee from entering into arrangements that are more favourable to the employee with regard to the time of, and the pay in respect of his or her annual leave"*

An agreement is sometimes raised that that subsection effectively amends the provisions of Section 19 (3) of the Act. This is one that I would not agree with. The particular wording of that subsection relates to

*"This section"*

That relates to the time and pay per annual leave where in particular you are looking at Sections 20 (1) which does enable the employer and the employee to agree more beneficial provisions taking into account the requirements of the employee and for leave to be carried over where it is agreed. I do not believe that Section 20 as it refers specifically to the words "this Section" can be taken to amend Section 19 (3) which relates to the two weeks uninterrupted leave. Equally these employees will be entitled to be paid their annual leave in advance. In case of Customer Service Advisor –v- A Computer Service Company ADJ00014935 the Adjudication Officer in that case stated that a "strict technical interpretation" of subsection (2) will cause problems for employers who operate a monthly based payroll system. That may be the position. However the fact that it creates problems does not mean that the employee is not entitled to be paid in advance of going on holidays.

Where you are dealing with an employee whether a senior executive or anybody else where the payroll operates on a monthly basis it is probably advisable to have a provision in the contract providing that they will be paid monthly including when they are going on annual leave but that the employee shall be entitled to request to be paid their holiday pay in advance.

The issue particularly in relation to holidays as regards uninterrupted periods and being paid in advance, when bringing a claim for senior executives are usually met with the argument that the individual is a senior executive. However the exemption does not apply to Section 19 or 20 or to working on public holidays.

**The Dangers of Relying on the Exemption in Section 3**

The first of these relates to a situation where the defence is raised. If the defence is raised and the employee is not held to be an individual who has autonomous decision making powers then there is a real risk that the employer will be in a position that they will not have the records to show compliance with any of the sections being Section 11 – 18 inclusive the main ones of these are sections 11, 12, 13, 15, 16 and 17. The employer will have contended that the employee is not covered by the legislation. That would

tend to indicate that some of the other defences that could be put in place to mitigate any award could not be realistically run because the employer will have nailed their colours to the mast on the basis of the employer has no entitlement.

The more dangerous situation is, particularly where the employee is still in employment, that the employee simply argues that the provisions of Article 17 would apply. The employee may limit it to that and may then even admit that they come within that category. The employer defending the case may be happy to accept that situation. However the effect of that being a decision from the WRC which would not be appealed would be that the employee can very quickly state

*"I don't like Mondays"*

The employee will then be in a position effectively of saying that they can work the days that they wish to work provided they get the work done, they can go on holidays when they wish. They can come in when they wish. They might become night owls and instead of coming in and working from 9am – 5:30pm maybe in a job which allows them effectively to decide that they will not come in until 2pm.

They may decide that they like to go off playing golf on Friday afternoon or just leave on Friday afternoon.

An employer running this particular argument may well find themselves in difficulties.

In many service industries at the present time employees are working excessive hours. There is a significant risk in this. The Organisation of Working Time Act is a piece of health and safety legislation. Now I accept that the reason it came in as a piece of health and safety legislation is probably because of the fact that if it had not been classified as a piece of health and safety legislation the UK would have been able to block it being brought in. By bringing it in under health and safety legislation all the UK could do, at that time, was effectively take derogations from the Directive rather than seeking to block it entirely. However the rationale for the European Union as to why they did something is irrelevant when it comes to dealing with cases before the WRC or the Labour Court. It is stated by the CJEU as a piece of health and safety legislation and therefore has to be applied as such.

When it comes then to senior executives I certainly see risks where an individual is still in employment for an employer to contend that the exemption applies to that particular employee. The employer might win the particular case particularly if the contract does not have provisions in it that the employee does not have to work 9am – 5pm but the employer then could be in serious difficulties in trying to direct the actual hours that the employee works. The shield in Section 3 or Articles 17 (and I personally

believe that Article 17 has to be the test which is applied) may become a sword to be used by the employee against the employer.

The other situation is that if Article 17 is held to be the relevant test really a significant number of those employees particularly in service companies and the professions will not be excluded and will not have the exemption applied to them and in those circumstances the employer losing such a case may simply open the floodgates of claims from other disgruntled employees. The argument about the requirements of the business or the requirement to service customers does not stand up. Of course there will be emergency situations but emergency situations are not going to be something that applies on a daily or weekly basis. The argument in relation to this would be similar to that in Section 5 of the Act. Section 5 allows for derogations from Sections 11- 13 and 16, 17 and 18 (a) where due to exceptional circumstances or an emergency the consequences of which could not have been avoided despite the exercises of all due care or otherwise to the occurrence of unusual and unforeseeable circumstances beyond the employers control it would not be practical for the employer to comply with the Section concerned. In the case of Nurendale Limited –v- Suvac DWT1419 the employer contended that there had been a fire and that this gave a complete defence to the claims which were brought. The Labour Court in that case stated that Section 5 of the Act must be read in conjunction with Article 17 (1) (g) of the Directive and was intended to apply to circumstances in which it was not practicable to comply with the Act in order to undertake work in the immediate aftermath of an accident or where there is an imminent risk of an accident. The Court stated that that suggests a close temporal nexus between the accident and the work in question. In the case of Scally –v- Lynch and Kelly DWT13102 which related to Section 17 was one where the complainants gave evidence that they were required to work overtime and receive little or no notice in circumstances which include the arrival of a large number of customers following a football match or a concert. The Labour Court did not accept that the occurrence of exceptional demands on the business due to a match or concert was an unforeseeable event as contemplated by Section 17 on the basis that it could not have been foreseen.

It would therefore appear there is a significant risk for those in the service industries and in the profession where employees who do not have an autonomous decision making role who working will be were contrary to the Organisation of Working Time Act.

It would be interesting to see even in some partnerships when the facts that the Directive refers to *"A worker"* whereas our legislation refers to a "*employee"*

Whether the Directive provision would actually apply and whether the definition of a worker may well include even a partner.

That may be a matter for another date entirely.

It would however appear to me that the provisions of Section 3 do not stand up to scrutiny and that at a very minimum the provisions of Article 17 would apply and that the Directive provisions are far more restrictive than that set out in Section 3.

**Opt Out Clauses**

There has been a move particularly over the last two years for contracts to provide opt out clauses.

There is no provision to opt out of the Organisation of Working Time Act. The provision which is most often sought to have an opt-out clause put in is in relation to Section 15 being the maximum working hours. Such an opt-out clause is void under Irish law. There is no provision to opt out.

There are limited provisions relating to Collective Agreements or Employment Regulation Orders for provisions of the Organisation of Working Time Act to be attended. There is no provision however for a contractual provision, in an employee's contract, to provide for an opt-out clause.

While it's not strictly under the provisions of the Organisation of Working Time Act SI36 of 2012 relating to mobile workers and generally known as the "truck drivers" provisions is one that does allow an opt out in relation to certain elements. Where there is a Collective Agreement the reference periods set in SI36 of 2012 (as amended) can be extended. In our firm we have recently come across cases where companies have sought to have employees sign up to an opt out of the maximum night time working provisions which are limited to ten hours where an employee commences work or finishes work between the hours of midnight and 4am.

The argument that is put forward in these cases is always that the employee signed the contract.

That will normally be a fact. However, that does not mean that the opt-out applies. There is no provision to opt out and therefore the opt-out clause of effectively void.

The other argument that comes in is that the employee did not make any complaint about this until they issued proceedings. That equally is not a defence. Where an employee has signed a document they may well believe that they are bound by it but they may not understand the full provisions of the legislation and in any event the employer cannot rely on a working practice which would be void and contrary to the Act or the relevant Statutory Instrument.

The issue in relation to opt out clauses in contracts particularly in relation to the Organisation of Working Time Act is invariably coming from

companies moving from the UK to Ireland. UK companies would have provisions in their contracts which allow for an opt-out of the 48 rule. Therefore often the UK contract is simply copied over and given to Irish employees.

I have had cases in the past where it has come as a shock to the Irish entity of UK companies that the UK legislation does not apply here. There are some Irish companies now attempting to have these opt out provisions placed into contracts.

The reason that I am mentioning this particular issue is that it has and is becoming an issue particularly when it comes to senior executives or those in management roles. It is also becoming an issue for truck drivers. So both higher and lower paid workers are affected.

I would anticipate that there are going to be more and more of these cases coming through which will ultimately go to the Labour Court. The reason I am saying that is that there are some Adjudication Officers who seem to take the view that once an employee has signed up to something then regardless as to what the legislation might be that the employee has signed up to it and therefore that is the relevant issue and is the final position. Effectively, if you have signed up and agreed to it you are bound by it. That does not take account of the jurisprudence of the CJEU not the Labour Court which has held that the employee in these cases is normally the weaker party.

When you look at the case of Malahide Community School and Dawn Conaty 2019 IEHC 486 which has held that an employee cannot sign away their employment rights without getting appropriate legal advice and being advised to get appropriate legal advice then it seems unclear that where an employee has signed a contract without getting any such advice or being advised to get the advice it is difficult to argue that the employee should be bound by any clause. Where a provision is void then there can be no ground for arguing what the employee signed is in any way binding on the employee. My own view is that that argument will not always be accepted by the WRC by some Adjudicators and that these type of cases may well end up in the Labour Court.

When you look at the decisions of the Labour Court in recent years as a person who regularly appears there it would appear to me that there is a considerably higher number of cases being overturned by the Labour Court on appeal than there previously was coming from either the Labour Relations Commission or the Equality Tribunal.

That may be another seminar in itself as to why this is happening but it appears to be the position.

**Burden of Proof**

The issue of the burden of proof in cases under the Organisation of Working Time Act set out in Section 25. A number of years ago the effect of same was that in cases before Rights Commissioners or the Labour Court matters were dealt with relatively quickly. It was very often with the chair of a division asking

"Do you have working time records?"

If the answer was that there were then the next question was usually

"Are the records in compliance with the Organisation of Working Time (Records) (Prescribed Form and Exemptions) Regulations 2001 S.I. No.473 of 2001".

If the answer was "yes" and they are produced then it was a matter for the employee. If the answer was "no" it then very quickly moved that it was a matter for the employer to prove the matters particularly as regards the issue of working hours and rest and break periods and notifications of overtime.

There was a sea change in the case of Jakonas Santas –v- Nolan Transport [2011] 22 E.L.R. 311. In that case the Labour Court considered the provisions of Section 25 (1) of the Act which requires the employer to maintain records of the prescribed form showing compliance with the Act. The Court referred to Section 25 (4) which provides

*"(4) without prejudice to subsection (3) where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of this act in relation to an employee, the onus of proving, in proceedings before a Rights Commissioner (Now Adjudication Officer) the Labour Court that the said provision was complied with in relation to the employee shall lie on the employer"*

The Court pointed out in that case that the normal rule in civil proceedings is that the person bringing proceedings bears the burden of proving every element of the wrong upon which their claim is founded. The Court also pointed out that the normal rule is that the party who bears the legal burden of proof also bears the evidential burden. The Court held

*"The effect of Section 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. But the burden of proof must be applied in a way that conforms with the requirements of natural justice and the right of respondents to mount a defence. This suggests, at a minimum, that the respondent must know, with reasonable clarity, what it is expected to rebut"*

The Court in that case held in relation to Section 27 (2) which is the jurisdiction of the Rights Commissioner and now an Adjudication Office that

*"This suggests that the evidential burden is on the claimant to adduce such evidence as is 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 as to allow the respondent to know, in broad terms, the nature of the complaint and the case which 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 by the evidence adduces is sufficient to "suggest a reasonable possibility"*

The Court in that case also went on to state

*"Where records in the prescribed form are not produced, and the claimant has satisfied the evidential burden which he or she bears, it will be for the respondent to establish on credible evidence that the relevant provision was complied with in relation to the claimant. The respondent who does will be required to carry the 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"*

That is a case where the Labour Court held that the employee had given credible evidence.

This case was interpreted by some as effectively requiring the employee to give times and dates on which the employee, for example, did not receive an 11 hour break or did not receive their rest period under Section 12 being the period after four and a half or six hours of work.

To be fair that was not the test that was applied by the Labour Court. However, it was one which was regularly put out before both the LRC and subsequently before the WRC.

I do believe that this decision misinterpreted the provisions of Section 25 (4). In my opinion it is sufficient for an employee to set out what the claim is. If the employee simply says I did not receive my rest periods under Section 11 then that is setting out matters with sufficient clarity. The employee might go further and say that this would happen two or three times a week and normally on Wednesdays and Thursdays, for example were the dates that it was most likely to arise. In other cases the employee might simply just list every day in the six month period.

The provisions of Section 25 (4) has been set by the Oireachtas. They set out, which was to be fair set out in the decision of the Labour Court, that in the absence of records, the onus of proving in proceedings, that the provisions were complied with, lie on the employer.

The rules of statutory interpretation would indicate that that is a rule. If the Oireachtas had intended that the employee would have to produce any further evidence then it was open for the Oireachtas to provide that same would be the position. If an employee simply sets out

"I did not receive rest breaks"

Then that is more than sufficient for the employer to know what the claim is about. If it covers the relevant reference period then unless the employee claims same the employer knows the period of time that is involved.

In case C-684/16 being Max Planck case the CJEU in that case specifically referred to in that case annual leave but this would apply to the other Directive provisions also that these rights are a principle of EU social law that is not only particularly important but is also expressly laid down in Article 31 (2) of the Charter. The Charter in Article 31 provides

*"1. Every worker has a right to working conditions which respect his or her health, safety and dignity.*
*2. Every worker has a right to limitation of maximum hours, to daily and weekly rest periods and to an annual period of paid leave"*

On the basis of the rational of the CJEU it is clear that all of those rights would be covered by the Directive.

The CJEU in that case set out that a worker must be regarded as the weaker party in the employment relationship and that it is therefore necessary to prevent the employer from being in a position to impose upon the employer a restriction of his rights.

In that case the CJEU stated

*"In those circumstances, it is important to avoid a situation which the burden of ensuring that the right to paid annual leave is actually exercised rests fully on the worker."*

The Court in that case importantly stated

*"In addition, the burden of proof in that respect is on the employer (see by analogy judgement of 16th March 2006 Robinson –v- Steele and Others C-134/04 and C-257/04… Should the employer not be able to show that it had exercised all due diligence in order to enable the worker actually to take the paid annual leave to which he is entitled, it must be held that the loss of the right to such leave at the end of the authorised reference or carry over period, and, in the event of the termination of the employment relationship, the corresponding absence of payment of an allowance in lieu of annual leave not taken constitutes a failure to have regard, respectively, to Article 7 (1) and Article 7 (2) of Directive 2003/88"*

It would be my view that a similar rationale would apply to Article 3 being daily rest, Article 4 being breaks, Article 5 being weekly rest periods, Article 6 being maximum working time and Article 8 being the length of night work.

The Court also in that case pointed out that according to the explanations relating to Article 31 of the Charter which in accordance with the third sub-paragraph of Article 6 (1) TEU and Article 52 (7) of the Charter, must be taken into consideration for the interpretation of the Charter, Article 31 (2) of the charter is based on Directive 93/104 and Article 2 of the European Social Charter signed in Turin on 18 October 1961 and revised in Strasberg on 3 May 1996 and on point 8 of the community charter of the fundamental social rights of workers adopted at the meeting of the European council in Strasberg on 9 December 1998.

In that case in the final part of the judgement it states

*"…should the employer not be able to show that it has exercised all due diligence in enabling the worker actually to take paid annual leave to which he is entitled under EU law, the worker cannot be deprived of his acquired rights to that paid annual leave or, correspondingly in the event of the termination of the employment relationship, to the allowance in lieu of leave not taken which must be paid, in a case, directly by the employer concerned"*

I would contend that that particular case does place an obligation on the employer to use all due diligence to ensure that employees receive their rights under the Directive.

This approach I believe would be in line with the opinion of Advocate General Kokott in the case of Commission –v- United Kingdom case C-484/04. It will not be sufficient for an employer simply to have a document in place that sets out what the relevant rights are. In that opinion which has been quoted by the Labour Court on a number of occasions at paragraph 69 of the opinion the Advocate General 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 working rest periods are actually scheduled. In addition, it must however, be a matter of course within a business in practice as well, that workers' rights to rest periods, not only exist on paper but can effectively be observed…"*

It would appear to me that the decision in the Nolan Transport case goes further than the provisions of the Act. In addition, I would be of the opinion that the case law of the European Union places the burden of proof on the employer to show that they used due diligence to ensure the employee obtains their relevant entitlements. The decision of Advocate General Kokott would appear also to back up that view.

This is an issue which is going to have to be addressed. It may well be that this is a matter which may go to the CJEU. However I believe that the Labour Court is well able to interpret European case law and that that will not be necessary. In any event it would appear that the provisions of Section 25 of the Organisation of Working Time Act, 1997 are specifically precise and that in the absence of records in the prescribed form, that the burden of proof is on the employer. It is simply necessary for the employee to set out what the claim is so that the employer will know what it is.

That rationale I believe applies both as regards the Directive and the non-Directive provisions because of the provisions of Section 25.

It is not necessary in a paper like this to go into the issue of statutory interpretation but I believe it is sufficient to say that unless there is any ambiguity then the words in an Act must be given their ordinary and actual meaning. I do appreciate that in the Nolan Transport case the Labour Court in that case was effectively trying to have a situation where matters would need to be set out with sufficient particularity. However I believe that the Court erred in saying that even the evidential burden was on the employee in the absence of records. That does not appear to the wording of Section 25.

It may well be that when this issue is fully addressed by the Labour Court that we will be back to the pre Nolan Transport situation that namely it is a matter for the employer in the absence of records to effectively go first and that where those records are not there and the employer cannot discharge the evidential and legal burden of proof that the employee will win.

Therefore it is vitally important for employers to have appropriate documentation in place recording the appropriate rest and break periods in particular.

There is an exception to this that is in relation to the provisions relating to the maintaining of records.

That is the exemption in Regulation 5 of the Organisation of Working Time Act (Records) (Prescribed Form and Exemptions) Regulations 2001 S.I. No. 473 of 2001 which provides that the exemption from keeping records shall apply to an employer if he or she complies with the following conditions and that is that the employer notifies in writing each employee of the rest periods and breaks referred to in Sections 11, 12 and 13 or the non-application by virtue of a Regulation or a Collective Agreement and secondly that the employer puts in place and notifies in writing each employees procedures where the employee may notify in writing the employer of any rest or break periods 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 on a particular occasion.

The employer in those cases must keep a record of having notified each employee of the matters referred to and a record of having notified each employee of the procedures and a record of all notifications received by an employee.

Even then it is not a carte blanche situation. It would be my opinion that taking into account the Jurisprudence of the CJEU it is advisable that the employer on a regular basis checks with employees and reminds them of these rights. In particular the employer should check whether the employee has obtained the relevant rest and break periods under Sections 11 – 13 inclusive. That exemption does not apply as regards to the 48 hour rule or the requirements to provide notifications of overtime under Section 17 as just two examples.

The issue of record keeping is one which regularly arises. The keeping of records in Ireland is extremely poor. Even where there are clocking in records it is surprising the number of times that those records will actually prove the case of the employee. It is evident to me from running these cases that many employers never have these checked. They may have a clocking in system that clocks people in and out and may even clock them in and out for rest breaks but those records are maintained more often than not for payroll purposes rather than for compliance with the Organisation of Working Time Act. Where you act for an employer who maintains and has clocking in records it is imperative that the employer has the records checked to make sure that employees get their rest periods within the prescribed period. If an employee is not getting them within the prescribed period then appropriate action needs to be taken by the employer. This may be up to and including taking disciplinary action against a supervisor or manager but it will certainly include proper training of supervisors and managers and also employees. An employee who fails to take their rest and break periods provided that the employer encourages them to do so and is seen to do so which ultimately will always depend on having appropriate records in place, such as an email (emails might be better) may well be able to rely on the principles in the Max Planck case referred to previously where the employer can argue that the employee is effectively just refusing to take break periods despite the best efforts of the employer.

**Conclusion**

In the paper today I have tried to look at some of the common problems which come up in cases in the WRC and the Labour Court. I have also tried to look at some of the issues which are likely to come up in both the WRC and the Labour Court and give my view in respect of same. I do not claim that the arguments I am putting up could be regarded as definitive. They are simply my opinion. They are clearly views which I have and which I am happy to take and argue before either the WRC or the Labour Court. There are issues in Ireland that compliance with the Organisation of Working Time Act is seen as an Act only applying to those who are manual workers or those who are on lower grades. My experience and that of those in our firm

is that the cases which are now coming through are coming through for individuals who are on much higher salaries and are in senior management positions. We are also regularly seeing the arguments coming forward about the requirements of the business and the requirement of the clients or customers of the business.

I fully appreciate the stress of running a business and trying to run a profitable business. Many here today will be in that position. However the Organisation of Working Time Act is a piece of health and safety legislation.

Because it is a piece of health and safety legislation it must be looked at as such. Where employees are tired or do not get appropriate rest periods there is always the potential that that can be a factor in causing an accident in the workplace. This may either be to the employee themselves or to another employee. In a worst case scenario it can result in a death. In reality where these health and safety issues are not addressed and an accident occurs the cost of that compared with the cost of compliance may be far greater. That issue rarely comes to mind with employers until the issue arises or until they recognise that it is an issue which could arise. Those who recognise that it could arise and take appropriate action are less likely to have accidents in their workplace.

The second issue which we are seeing is claims by senior executives suffering burnout and stress claims often caused by the 24/7/365 working environments where there is a situation of having to be available all the time. Some individuals can work in that situation. Others cannot. Where senior executives have excessive hours there is an issue that burnout can arise. This can lead to stress claims. Where a stress claim comes in which has had the effect of creating a psychiatric injury to the employee the cost to the employer in a personal injury claim can be very substantial indeed. If you have a senior executive earning over a six figure sum per annum who has a stress related claim due to working excessive hours and lack of rest and breaks then if they are in their early fifties the claim for potential loss of earnings going forward which can include pension rights can be extremely high.

For employers who are found in breach of the Organisation of Working Time Act or where their actions resulted in because of non-compliance with the Act in accidents or injuries including psychiatric injuries in the workplace there is a significant issue of reputational loss and damage to them. Their ability to attract and retain individuals may be undermined. Certainly the issue of attracting the best talent or the best workers into that workplace if they are the subject of a claim for breach of the Organisation of Working Time Act may be a relevant factor particularly for companies who rely on highly qualified individuals.

It can be said at times that I may have a “thing” about the Organisation of Working Time Act. To an extend I accept that. However, when I look at our current practice and those in that practice who work on cases and in a

previous practice where I was also a partner I have seen the quite catastrophic injuries both physical and psychiatric caused to individuals where when the appropriate records are checked you find that they were working excessive hours and that whether it is an accident in the workplace with machinery where somebody can lose a limb or a person working in an office where there is excessive working that it is clear that the way the individual worked was most probably the cause of the injury being sustained.

It is for that reason that I see the Organisation of Working Time Act as being of such importance. The Labour Court in particular has been very clear in setting out that the rights under the Directive are all fundamental social rights and have equally been very clear that the legislation is a piece of health and safety legislation.

The Act of 1997 is not a pick and mix Act where employers decide for a business reason not to be compliant. I see the particular Act going to be used going forward by more and more employees for the purposes of having a work life balance and for ensuring their rights.

I will finish by saying that there is a campaign at present for a right to disconnect. To be fair to the Labour Court they actually brought in a right to disconnect many years ago. The Labour Court has consistently held that individuals have a right to know their start and finishing times and the Labour Court has very clearly set that out on the basis that that is for individuals to be able to balance their work and family/leisure time. In fact the Labour Court when you read their decisions has been ahead of the campaigns to have a right to disconnect. The Labour Court have said that you have a right to disconnect by setting out that there are maximum working hours and in particular in looking at Section 17 the Labour Court have held that unless you get the notification 24 hours in advance of a requirement to do overtime that there is no requirement for the employee to do the overtime. In DWT1820 being a case of Kepak Convenience Foods Unlimited Company and Grainne O'Hara the Labour Court in that case held that the respondent was through the operations of its software and through emails aware of the hours the employee was working and took no steps to curtail same and awarded €7,500. In Sandra Cooney Homecare Limited and Morgan DWT1914 the Labour Court awarded €15,000 for the failure to ensure an employee took her rest breaks. In the case of Musgrave Limited – v- Vasilijevs DWT18/25 the Labour Court in that case stated

*"The Court finds that a worker is entitled to 24 hours' notice of their start and finishing times so as to enable them to reconcile their work/life commitments. A failure to provide such notices causes considerable inconvenience for workers who have other plans and commitments in their lives and undermines their capacity to function as full human beings in society"*

I simply mention this simply to say that the Labour Court has effectively already put in a right to disconnect by applying the legislation already in

place. The incoming government may well decide to enshrine that right in legislation but actually it will not be necessary because the Labour Court has been to the forefront in protecting the rights as set out in the Directive and the Act that they are required to do and which they have done.

I would like to thank you for listening to this presentation today. I hope that you have found it useful and I would like to thank the Law Society and Skillnet for inviting me to speak.

**The Horse Racing Industry – A Questionable Statutory Instrument**

Following the  case of Golden Dale trading as Ballydoyle Racing and the Workplace Relations Commission CNN181 the then Minister introduced S.I. No. 576/2018 being the European Communities (Organisation of Working Time) (General Exemptions) (Amendment) Regulations 2018.

This amended the Organisation of Working Time (General Exemptions) Regulations 1998 S.I. No. 21/1998 to amend paragraph 3 (1x) of the schedule to insert a new definition of agriculture being;

*"Agriculture, including, inter alia, the caring for or the rearing or the breathing or training of race horses" for agriculture".*

I will at the start say that I would regard the Regulations as questionable. Legally unsound might be a better definition.

It is worth reading the decision CNN181. It is a very detailed decision.

That decision refers to Article 17 of the Directive which includes a provision relating to the exemption from Article 3, 4, 5, 8 and 16 of "agriculture".

The Labour Court in that case helpfully stated that it is established as a matter of European law that provisions which are in their nature of a derogation or exemption from general law;

*"must be interpreted strictly. See, for example, case 216/97 Gregg –v- Commissioners for Custom and Excise where at paragraph 12 of its judgement, the Court of Justice stated;*

*"It should be observed at the outset that, according to settled case law of the Court the terms used to describe the exemptions envisaged in Article 13A of the Sixth Directive are to be interpreted strictly since these constitute exemptions to the general principle…(see case C-2/95)".*

The Court also referred to Dodd Statutory Interpretation in Ireland Tottel Publishing 2008 which notes at paragraph 14.65;

*"The scope of derogations and exceptions is not normally to be extended further than is necessary to achieve their purpose".*

The Court pointed out helpfully that the burden of proving an entitlement to avail of an exemption under legislations transposing EU Laws is on the party seeking the exemption.

The Labour Court in that case looked at the ordinary meaning of the word "agriculture" is that which is found in any standard, reputable dictionary of the English language. The Court pointed out that from the various dictionaries this would include,

(1) The art or practice of cultivating the land
(2) The science or practice of framing, including cultivation of the soil for the growing of crops and the rearing of animals to provide food, wool and other products;
(3) The science or occupation of cultivating land and rearing crops and livestock; farming; husbandry".

In that case the company sought to contend that the definition would also include the production of animals or plants "for value".

The Court pointed out in its view that the appellant company was seeking to advance an interpretation of "agriculture" which is far broader than the ordinary dictionary meaning of that word.

The Court pointed out that;

*"It follows as a matter of logic that an undertaking might be engaged in an activity which can be described as agriculture in nature but it doesn't necessarily follow that some or all of the employees are necessarily engaged in ensuring the continuity of production. An entity seeking to rely on the exemption at paragraph 3(b) of Schedule 1 of the Regulations, in relation to particular workers, it seems to the Court, must be able to demonstrate that those workers are "directly involved in ensuring the continuity of production".*

The Court pointed out that the exemptions do not apply if the employees are not engaged to "wholly or mainly" in carrying on or performing the duties of the activity concerned.

The appellant company lost before the Labour Court.

As a result of same the then Minister introduced S.I. No 576/2018. This was effectively to exempt stable hands who would be travelling to race meetings or would be involved in training race horses.

It is stretching the imagination almost to breaking point to consider that training horses or being involved in bringing them to race courses to race could under any stretch of the imagination be deemed to be agriculture.

I make no bones of saying today that if anybody has or knows of a stable hand who wants to bring a claim I am very happy to take it on. The Labour Court may be met with a situation where they have a Statutory Instrument. However following recent case law that Irish Legislation must be in conformity with the Directive and that Legislation can be set aside it is going to be questionable whether that Statutory Instrument has any standing whatsoever. Because the Government has now introduced a new definition of agriculture there will then be a question as to whether the exemption for "agriculture" can be severed from the new definition inserted. If that cannot be severed from the new definition inserted then the effect is that there is no exemption for those in the agriculture industry. Where a government claims an exemption the exemption in my opinion that it claimed is claimed on the basis under which it is claimed. Let me explain. There can be a total exemption given or in this case an exemption in respect of certain articles. In granting an exemption the Government does not have to avail of all of those Directive provisions where an exemption can be claimed. There can be more beneficial provisions. So an exemption can be claimed in respect of some Directive provisions but not on others even though there would be a right to claim an exemption for the others. The converse of this is that if the State seeks to put in place an exemption which goes further than that provided in the Directive the exemption then is not scaled back to the level of the exemption which the Government could have claimed as a maximum but rather the entire exemption goes. In relation to this particular Statutory Instrument at some stage this issue will go to the Labour Court. The Labour Court may well deal with it themselves or alternatively this is a matter which may well go to the CJEU. So it is possible all those working in the industry no longer have the exemption to be applicable to them because of a desire to benefit one identity.

This particular Statutory Instrument concerns me in that it is an arguable position that even an agricultural worker coming could seek to challenge now the exemption on the basis that the state has put in an exemption that goes further than the Directive and therefore the exemption in its entirety fails.

This particular exception was introduced by the Department of Employment Affairs and Social Protection. It may have been signed by the Minister but certainly the work of the Department and it was the Department who were the moving force in this. This is another example of the relevant Department effectively being pro employer and anti-worker. The logic behind this particular exemption when you read the decision of the Labour Court cannot stand other than that it was to placate a particular industry in Ireland. It was not there to placate a particular employer. It was the industry.

It is simply an example also of very sloppy and incomprehensible drafting.

**Developments which might occur and which should occur**

There are moves certainly for some of the legislation to be amended.

The issue of the right to disconnect, which I have dealt with previously, is one which is gathering momentum and is likely at some stage to be introduced on a more formal way. This is going to be a challenge for those in the service industries particularly in the professional service industries and in some multinational organisations. This is probably the reason that there will be the greatest resistance to such legislation particularly from the Department of Employment Affairs and the Department of Business Enterprise and Innovation.

The EU has stated recently that the Cartel Rules are going to be relaxed so that effectively gig-workers who currently under the Cartel Rules cannot organise by way of a union for bargaining purposes will be entitled to do so. The UK has a separate category of individuals referred to as "workers". They fall somewhere between the category of self-employed and employee. We have no such category. A person is either an employer or an employee. There had been recent cases concerning the issue of the gig economy. This is likely to arise in further cases. In the past it was very clear if a person was a self-employed individual or they were an employee. That boundary has now, which in the past was very much black and white, is now grey. We have an issue in Ireland as quite correctly pointed out by the Labour Court in one case that a decision of the Labour Court as to whether a person is a self-employed or an employee is not binding on the Revenue Commissioners or the Department of Social Protection but equally a decision by the Revenue Commissioners or the Department of Social Protection that an individual is an employee or self-employed is not binding on the Labour Court. In theory this raises the issue that you could have an individual who is declared by the Labour Court to be an employee for employment law purposes but is treated as self employed by the Revenue. The converse could also apply. That would appear to me to be a bit of nonsense. At the same time it is clear that there is a strong argument that the Labour Court should not be bound by the Revenue Commissioners and the Revenue Commissioners should not be bound by the Labour Court as both have separate and distinct duties.

On that basis it would appear that at some stage the issue is going to have to be addressed of either introducing a new category of "worker" or alternatively that there is a Legislative provision or procedure brought in place to determine whether a person is or is not an employee or self-employed. At the same time for the purposes of certainty it would appear to make sense that there would be some form of new Tribunal or Court which where an issue arises can make a determination which would be binding upon the Labour Court and Adjudication Officers and on the Revenue as to whether a person is or is not an employee. That may sound radical but with appropriate individuals such as an Appeal Commissioner and individuals

from the Labour Court combining it may be a way of having certainty for both employers and those working for them. The idea of an individual being treated one way for employment law purposes and a different way for tax has the potential to cause significant problems. This will probably be more relevant if a new category of “worker” is brought in where in such circumstances the relevant individual may well be treated as self-employed for tax purposes but may get certain employment law rights.

Today I could have gone through a number of provisions of the Organisation of Working Time Act where there are questions over the drafting of the Act when you look at the Directive. There is no the position arising in many cases that those appearing for employees are having to argue that the Irish legislation is set aside and the directive provisions applied. There is significant resistance in the WRC to such applications. The Labour Court has traditionally always applied the situation that provided a matter was not contra legume adept the Court would apply the European Law and Directive to the extent that it could. With the changed situation that effectively now that the European Directive has direct effect as against both the State and private entities some of the mental gymnastics which the Labour Court had to undertake in the past to be able to apply the Directive has gone. They were extremely adept at doing so in a way that could not be challenged.

Because it is clear that the Act is not in conformity with the Directive to some significant extent there is an issue now as to whether the Act needs to be redrafted. That should happen but it probably will not.

There is also then an issue of bringing the legislation somewhat in line with business and how it operates.

There are a number of historic matters which really do need to be looked at. You have the anomaly in respect of shop workers. A shop worker who works between the hours of 12 noon and 2pm is entitled when it comes to getting their break to get a break of 1 hour during that period of time. That price of legislation which is by way of statutory instrument in Ireland goes back to 1903. There was outrage when it first came in, in 1903, on the basis that a number of gentlemen would have been concerned that there was going to be difficulty getting newspapers. The legislation in the UK provided that both men and women would get this one hour break. The legislation did in the UK, which applied in Ireland also up until 1997 that a woman would also have to be given a chair. The Regulations here in Ireland did away with the chair. However the reality of matters is that that break is an anomaly as regards how businesses actually operate. Equally even allowing for the one hour break taking into account that somebody has to be standing possibly for a considerable length of time and should get a rest period it would be far better if we had conformity so as businesses would have certainty.