

Ref: E109/103/97

**6/10/09 LP**

6<sup>th</sup> October 2009.

**Re: Worksharing and public/bank holidays**

Dear Personnel Officer

1. I wish to bring to your attention the findings of Labour Court recommendation – Revenue Commissioners and Gerard Doyle (WTC/06/17 Determination No: 0625 of 19 September 2006 - copy below).

Your Department/Office should ensure that payment to worksharers similar to patterns outlined in this specific case are in line with the findings of the recommendation.

2(a) The Organisation of Working Time Act 1997, gives an employer the discretion to determine whether employees shall accrue the benefit of the public holiday/ privilege day by means of

- (i) a paid day off on that day,
- (ii) a paid day off within a month of that day,
- (iii) an additional day of annual leave or
- (iv) an additional day's pay.

2(b) This discretion is exercised at Departmental/Office level by the Personnel Officer.

2(c) Where the worksharing pattern of a staff member is based on an attendance regime of 50% s/he may be offered, subject to the business requirements, the option of either payment or time off in lieu. The time off in lieu entitlement in this case would be a full half day (to be taken within one month of the public holiday or privilege day). In respect of other worksharing patterns it may not be feasible, or may result in inequitable benefits to afford a facility of time in lieu of a public holiday or privilege day. Where time off in lieu is not feasible, employees should be paid in accordance with the provisions of paragraphs 5 and 6 below.

3. The following has been determined in relation to the **payment** of worksharers in respect of public holidays / privilege days, in accordance with S.I. No. 475 of 1997, Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997.

4. For the purposes of paragraphs 5 and 6 below, the 'normal rate' of an officer's pay, is the sum (including any regular bonus or allowance, the amount of which does not vary in relation to the work done by the officer, but excluding any pay for overtime) that is paid in respect of the normal weekly (or fortnightly, where applicable) working hours worked by the officer. The normal daily rate shall be the sum that is equal to one fifth of the sum paid in respect of the normal weekly hours or one tenth of the sum paid in respect of the normal fortnightly hours worked by the officer.

5(a). An officer who works or is normally required to work during any part of a day which is a public holiday or privilege day will be paid the rate that would normally be due to him / her on that day if the hours of work for which he or she is scheduled to work are **equal to or greater than one fifth** of that officer's normal working week.

5(b). If the hours of work for which the officer is scheduled to work on the public holiday or privilege day **are less than one fifth** of the officers scheduled hours for the normal working week then the following procedure should be followed:-

*The number of "scheduled working hours" (A) for which the officer was due to work should be deducted from the "number of hours which represent one fifth" (B) of the officer's normal weekly hours and payment made in respect of the difference. See worked example at Appendix A*

6. An officer who does not work or is not normally required to work on a day which is a public holiday or privilege day shall be paid in respect of that day the sum that:-

- (a) is equal to one fifth of the sum that is paid in respect of the normal weekly hours worked by him/her, or
- (b) is equal to one tenth of the sum that is paid in respect of the normal fortnightly hours worked by him / her.

Yours sincerely

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Oonagh Buckley  
Head of Equality Unit.

Appendix A

*Example: Officer on 4 day pattern as follows:-*

<i>Mon</i>	<i>Tues</i>	<i>Wed</i>	<i>Thurs</i>	<i>Fri</i>
$\frac{1}{2}$	1	1	1	$\frac{1}{2}$

*4.1h 8.2 8.2 8.2 4.1 = 32.8hrs = 80%*

*(A) = 4.1 hrs (B) = 1/5 of 32.8h = 6.56hrs*

*B-A = 6.56h - 4.1h = 2.46hrs*

*Payment due for 2.46hrs*

FULL RECOMMENDATION  
WTC/06/17 DETERMINATION NO. 0625  
(r-034784-wt-05/JC)

SECTION 28(1), ORGANISATION OF WORKING TIME ACT, 1997

PARTIES :  
REVENUE COMMISSIONERS

- AND -

GERARD DOYLE

DIVISION :

Chairman: Ms Jenkinson  
Employer Member: Mr Doherty  
Worker Member: Ms Ni Mhurchu

SUBJECT:

1. Appeal against Rights Commissioner's Decision R-034784-WT-05/JC.

BACKGROUND:

2. The appeal concerns an employee who works an attendance pattern under the Work Sharing Scheme as follows:-

Half day each Monday and Friday  
Full days Tuesday, Wednesday and Thursday.

The claimant states that Section 21 of the Organisation of Working Time Act, 1997 (the Act) sets out the range of entitlements that an employer may determine in respect of public holidays. The Act states that an employee is entitled to time off or pay in respect of public holidays that fall on days when an employee is not scheduled to be in work. The claimant states that as every public holiday falls on either a Monday or a Friday they, therefore, fall on those days when he is not required to work for the second half of those days. The entitlement to a full day that he should have received is, therefore, foreshortened solely by virtue of the fact that he does not attend for duty on Monday afternoon. The worker claims that under the Act both of these half days count as paid time off. The worker claims that on each occasion he is not present to enjoy the benefit of the full public holiday then he is entitled to be compensated as outlined in Subsection (1) of the Act. The worker claims that the Employer to date has only allowed a half paid day off for the Monday and Friday public holidays that he is scheduled to attend on, but has refused to grant him the entitlement under the Act for

the balance of those days when he is on paid time off. The worker also states that the Employer has chosen to treat Privilege Days as fixed public holidays and only grant him the benefit of a half day when they occur on Mondays, despite the fact that a Privilege Day is in the nature of earned annual leave to which he would be entitled to .8 rounded up to a full day's entitlement. The claimant contends that the Employer's method of calculating his entitlements is contrary to the provisions of Section 21 of the Act.

The Employer rejected the claim stating that the claimant received all his entitlements in accordance with the provisions of the Act, in respect of public holidays. Section 21 of the Act, provides that an employee is entitled to a paid day off on the public holiday, a paid day off within a month of that day, an additional day of annual leave or an additional day's pay. In the claimant's case when a public holiday falls on a Monday or Friday, i.e. the days on which he is scheduled to work a half day he is given that day off and paid as he would have been paid had he worked on the day in question. The Governing legislation in the context is Sections 21 and 22, of the Act, together with S.I. No. 475 of 1997 Organisation of Working Time (Determination of Pay for Holidays) Regulations, 1997.

The dispute was referred to a Rights Commissioner for investigation. On the 28th February, 2006 the Rights Commissioner issued her decision as follows:

" ..... Section 21 of the Organisation of Working Time Act, provides that "an employee shall in respect of a public holiday be entitled to whichever one of the following his or her employer determines, namely

- (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 22 provides that the rate at which an employee is paid in respect of a day off under Section 21 and of an employee's additional day's pay under that section shall be at such a rate as determined in accordance with regulations made by the Minister for the purposes of that section.

Statutory Instrument No. 475/1997 Organisation of Working Time (Determination of Pay for Holidays) Regulation, 1997 addresses how the relevant rate is determined.

I find that Regulation 5 applies in this case. Regulation 5(2) provides that if the employee concerned does not work on a day that is a public holiday, then the relevant rate in respect of that public holiday is the sum that is equal to one-fifth of the sum (including any regular bonus or allowance the amount of which does not vary in relation to the work done by the employee but excluding any pay for overtime) paid in respect of the normal weekly hours last worked by the employee before that public holiday. Provided that the relevant rate to which the employee concerned is entitled under this paragraph does not exceed the relevant rate to which he or she would be entitled in respect of the public holiday if subparagraph (1) (a) of this regulation were to apply to him or her. Regulation 5 (1) (a) provides that the relevant rate in respect of that public holiday is the sum that is equal to the sum (including any regular bonus or

allowance the amount of which does not vary in relation to the work done by the employee but excluding any pay for overtime) paid to the employee in respect of the normal daily hours last worked by him or her before that public holiday.

I declare that the complaint is well founded in part.

I order the respondent to pay the complainant as per Regulation 5 (2)(a) in respect of public holidays with effect from 17th December, 2004.

This decision to be implemented within 6 weeks of the date of this decision".

On the 11th April, 2006 the Employer appealed the decision to the Labour Court. The Court heard the appeal on the 13th July, 2006.

#### DETERMINATION :

##### The Complainants case

In November 2003, the Complainant's application for a work sharing position in the Office of the Revenue Commissioners was approved and he was assigned to a four-day week arrangement (scheduled off duty each Monday and Friday afternoon). This working arrangement commenced on 3rd November 2003. His approval letter dated 5th November 2003, states:

"it is imperative that this pattern must be strictly adhered to as it has serious implications for sick leave, PRSI contributions and claims for Bank Holidays under the Working Time Act"

Since that time his working arrangement has not changed and could not be changed without prior approval. The Work Sharing Scheme operated by the Revenue Commissioners states that it is open to management and an applicant to agree an attendance pattern which best suits the service requirements of a Department and the personal responsibilities for choice of an applicant, however, all patterns must at a minimum provide for the equivalent of at least one day's attendance each week.

Therefore, patterns may include:

"mornings only, afternoons only, split week, a 9.00am to 3.00pm working day, three day week and four day week."

The pattern approved for the complainant comprised of a Half day (am) Monday and Friday and a full day on Tuesday, Wednesday and Thursday each week.

The scheme states that it is not possible for a participating officer to work the normal full-time weekly hours (34.75) over a reduced week, e.g. over four days.

Under the heading "Public And Privilege Holidays", the scheme states:

"The provisions of the Organisation of Working Time Act shall apply in respect of entitlements to a public holiday or privilege day where an officer does not work or is not normally required or scheduled to work."

Under the heading "Pay", the scheme states:

"...a person will only be paid in respect of a period he or she is scheduled to work under a Worksharing arrangement. For example, a person working only three weeks in a four week cycle will only be paid for the three weeks that they are working."

Appendix 1 of the Work Sharing scheme outlines the calculation of pro-rata pay for a person participating in the Worksharing scheme. Using the formula and based on information supplied by the Revenue Commissioners, the Complainant's pay is paid in equal amounts over an agreed period; this is calculated as a pro-rata salary using gross annualised hours of attendance (2139.38), as follows:

- 8.2 hours x 4 = 32.8 gross hours of attendance per week
- 32.8 hours x 52.18 weeks = 1711.50 gross scheduled annualised hours of attendance each year
  
- $1711.50 \div 2139.38 \times 100 = 80\%$

therefore, he is scheduled to work 80% of the working time of a full-time member of staff and he is paid at 80% of full-time salary.

Section 21 of the Organisation of Working Time Act, 1997 (the Act) provides an entitlement to employees, inter-alia, of a paid day off or an additional day's pay in respect of a public holiday. Section 22 makes supplemental provisions in relation to public holidays and provides that a day's pay is to be calculated in accordance with Statutory Regulations made for that purpose - S.I. 475 of 1997 entitled Organisation of Working Time (Determination of Pay for Holidays) Regulations, 1997 (the Regulations).

The combined effect of Sections 21 and 22 of the Act is that an employee is entitled to a day off with pay or an additional day's pay, in respect of a public holiday, at a rate calculated by reference to the Regulations.

The Complainant contends that he is not receiving his full entitlement when a public holiday falls on a Monday or a Friday. He believes that his entitlement is foreshortened by virtue of the fact that he is not required to work on Monday and Friday afternoons. He stated to the Court that as almost every public holiday falls on a Monday or a Friday, they therefore fall on those days on which he is not required to work the second half of the day. He maintains that under the Act, both of these half days count as paid time off and he is not present to enjoy the benefit of the full public holiday, therefore he should be compensated as outlined in section 21, subsection (1) of the Act, i.e. he should be entitled to either a paid day off within a month, an additional day of annual leave, or an additional day's pay. He contends that his employer is only allowing him a half day off for the Monday and Friday public holidays that he is scheduled to attend and his employer is refusing to grant him the entitlement under the Act for the balance of those days when he is on paid time off. The Complainant's grievance seems to stem principally from the fact that when the public holiday falls on a Saturday or Sunday, the entitlement is transferred to the following Monday, a day when he only works four hours. If it were transferred to the following Tuesday, Wednesday or Thursday, he maintains that he would benefit from a greater entitlement.

The matter was referred to the Rights Commissioner by way of a claim under the Organisation of Working Time Act, 1997 on 16th June 2005 and covered the 6-month period from 17th December 2004 to 16th June 2005.

The Rights Commissioner found that the worker's complaint was well founded in part and ordered the employer to pay the worker his statutory entitlements in accordance with Regulations 5 (2) (a) of the S.I. 475 of 1997 entitled Organisation of Working Time (Determination of Pay for Holidays) Regulations, 1997 (the Regulations) with effect from 17th December 2004. The employer has now appealed that recommendation.

The employer contends that the worker has received his public holiday entitlements in accordance with the provisions of Section 21 of the Organisation of Working Time Act, 1997 (the Act).

### The Law

Section 21 of the Act provides entitlements in respect of public holidays. This entitlement is provided under subsections (1) and (6) of Section 21 of the Act, which provide as follows:

.-(1) Subject to the provisions of this section, an employee shall, in respect of a public holiday, be entitled to whichever one of the following his or her employer determines, namely-

- ( 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:

Provided that if the day on which the public holiday falls is a day on which the employee would, apart from this subsection, be entitled to a paid day off this subsection shall have effect as if paragraph (a) were omitted therefrom.

(6) For the avoidance of doubt, the reference in the proviso to subsection (1) to a day on which the employee is entitled to a paid day off includes a reference to any day on which he or she is not required to work, the pay to which he or she is entitled in respect of a week or other period being regarded, for this purpose, as receivable by him or her in respect of the day or days in that period on which he or she is not required to work as well as the day or days in that period on which he or she is required to work.

This section allows an employer to grant an employee a day off within a month in respect of the public holiday where the employee works on the public holiday or where the public holiday falls on a day which the employee would normally have off. This provides an alternative mode of providing a benefit for the holiday, but does not shift the public holiday itself.



Based on this provision, 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 normally selected as the day when employees, who are otherwise off on those days, will benefit from the holiday entitlement.

Section 2(1) of the Act and the Second Schedule combine to fix the days, which are to be regarded as public holidays.

Regulation 5 (1) (a) of the Organisation of Working Time (Determination of Pay for Holidays) Regulations 1997 S.I No.475 of 1997, provides as follows:

"5. (1) If the employee concerned works or is normally required to work during any part of the day which is a public holiday, then -  
in case the employee's pay is calculated wholly by reference to any matters referred to in Regulation 3 (2) of these Regulations, the relevant rate in respect of that public holiday shall be the sum that is equal to the sum (including any regular bonus or allowance that does not vary in relation to the work done by the employee but excluding pay for overtime) paid to the employee in respect of the normal daily hours last worked by him or her before that public holiday,.....".

Conclusion of the Court.

Is the complainant on paid time off on Monday and Friday afternoons?

The first question the Court must address is whether the Complainant is on paid time off on Monday and Friday afternoons, as asserted by him.

Having reviewed the terms of his Worksharing arrangement, the Court is satisfied that he is not on paid time off on Monday and Friday afternoons. The scheme states that a person will only be paid in respect of a period he or she is scheduled to work under a Worksharing arrangement. He is 'scheduled to work 80% of the working time of a full-time member of staff and he is paid at 80% of full-time salary'.

## DETERMINATION

Having reached this conclusion and applying the Law as outlined above the Court makes the following determination:

(a)The complainants entitlements where the public holiday falls on a day on which he is not required to work i.e. Saturday or Sunday

Regulation 5(2) provides that if the public holiday falls on a day on which the employee does not normally work e.g. Saturday and Sunday, the appropriate rate is 1/5th of a week's pay. Accordingly, on the basis that the transfer of the entitlement is merely an alternative mode of providing a benefit for the holiday, but does not shift the public holiday itself, the Court is satisfied that the complainant's public holiday entitlement in such circumstances is one-fifth of a week's pay.

(b)The complainant's statutory entitlements where the public holiday falls on Mondays or Fridays

The employer accepts that the complainant's pay should be calculated wholly by reference to matters referred to in Regulation 3 (2) of the Regulations. The Court is satisfied that the complainant is normally required to work "during any part of the

day" when a public holiday falls on a Monday or a Friday, and for this reason Regulation 5 (1) (a), which covers the relevant rate, should apply in his case. This provides that the complainant should be paid the amount payable in respect of the normal daily hours last worked prior to the holiday (excluding pay for overtime).

#### Meaning of " normal daily hours"

The application of Regulation 5(1)(a) requires an interpretation of what is meant by the expression "normal daily hours last worked by him" as is appears in that paragraph. 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 apply. It could 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 an 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 the day.

Having examined his contractual working pattern, the Court is satisfied that in this case a special arrangement applies to the Complainant which results in his working week - 80% of the working time of a full-time member - being spread over five 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) states:

- ( 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) the period of 13 weeks ending 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 time was last worked by the employee before that public holiday.

Section 5 (1) (b) clearly provides for the calculation of an "average" daily pay (excluding overtime pay) calculated over a set period. This averaging provision is in line with that provided in section (1) (a) also. 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 entitlement in respect of public Holidays which fall on Mondays and Fridays should be an average daily rate, based on his contracted working arrangement, i.e. 1/5th of his weekly rate of pay = 6.56 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 pay for such public holidays on the basis that he is already paid 4 hours for those days.

(c) The complainant's statutory entitlement where the public holiday falls on any other day, Tuesdays, Wednesdays and Thursdays

The complainant should receive a paid day off on that day.

In conclusion, the Court has found that the employer has not properly applied the Regulations in calculating pay due to the complainant in respect of public holidays. The Court upholds the Rights Commissioner's decision that the complaint concerning pay for public holidays was in part well founded and ordered the respondent to pay the complainant as per Regulation 5 (2) (a) in respect of public holidays with effect from 17th December, 2004.

Accordingly, the Court upholds the Right Commissioner's Decision and the employer's appeal is disallowed.

The Court so determines.

Signed on behalf of the Labour Court

Caroline Jenkinson  
19th September, 2006  
tod \_\_\_\_\_  
Deputy Chairman

NOTE

Enquiries concerning this Determination should be addressed to Tom O'Dea, Court Secretary.