Introduction

Welcome to the December issue of Keeping In Touch.

We would firstly like to wish all our readers a very Happy Christmas and a Peaceful New Year.

We would like to thank our colleague Mr. John O Keeffe of John O Keeffe & Co. Solicitors in Cork who wrote to us and proposed that we would include in our website the following;

"Richard Grogan's Keeping In Touch Newsletter is authoritative, accessible and a great way for busy practitioners to stay aware of developments in employment law".

We do greatly appreciate when we get a comment like that from a colleague. We greatly appreciate it when we receive such a comment from a Solicitor who is a recognised expert in his own area of insolvency and commercial law.

Our website does have many comments. All comments are from individuals or companies who are not clients of our office.

December will be a busy time. On 1st December Richard Grogan was speaking at the Employment Law Conference 2016 on the practical aspects of the Workplace Relations Act as it will affect Solicitors and HR and IR professionals.

November has been a busy time for the firm. In addition to the usual run of cases, there were a lot of speaking invitations and being asked to write opinion pieces.

On 3rd November Richard Grogan was asked to write an opinion piece in the Irish Times on the proposed Garda strike. This was also covered in Irish Legal News.

Richard is now writing a regular column for Irish Legal News on Employment Law. We were honoured to be asked

On 11th November, Richard Grogan was a panel speaker at the Practice and Regulations Symposium 2016 presented by the Small Practice Network, the Dublin Solicitors Bar Association and the Law Society Finuas Network. Richard Grogan spoke along with Mr. Brendan Keenan and Ross Golden Bannon.

On 15th November, Richard Grogan presented a paper on the "Workplace Relations Act 2015 – Tips and Traps" to the Dublin Solicitors Bar Association.

On 18th November as part of the Law Society of Ireland Skillnet Group in association with the Southern Law Association and the West Cork Bar Association a detailed seminar paper on the Workplace Relations Act 2015 was presented.

On 24th November a full day training course entitled "The Workplace Relations Act 2015 and Presenting and Defending Claims in the WRC and the Labour Court" for CMG Professional Training was given by Richard.

The firm was successful in a High Court Point of Law appeal against a decision of the Labour Court where the respondent was First Glass Limited. This case was reported in Stare Decisis.

Our publication is expanding somewhat to include practical issues on personal injury cases and I would like to thank my colleague Michelle Moran for her input to this section.

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Appeals on Points of Law

In November, this office had three cases before the High Court where two hearing dates had been given. In one case a half day has been given for the 4th April and in the second case a hearing date of 16th May has been given where a full day will be required. One is still awaiting a statement of opposition but we expect to be able to apply for a hearing date before Christmas.

Review of Adjudication Officers Decisions

It has been pointed out by some colleagues that we have undertaken a considerable amount of work in reviewing decisions of Adjudication Officers. We do appreciate these comments.

Our reviews cannot be, taking into account the size of this office, very detailed other than in extremely important decisions.

They are a note or an aid to colleagues and we would admit to ourselves as a reminder of important decisions. This is particularly so at the present time due to the fact that there is no easy way of reviewing the decisions of Adjudication Officers relating to particular Acts currently. We note that we have commented on this and this will hopefully be rectified in 2017.

Our comments should be regarded as general comments only. They are there as an aid for those who read this publication and to ourselves and a reminder that particular decisions have issued.

There will be some decisions which we criticise. We believe that it is important that where we believe criticism is due that we make the criticism. Equally where praise is due it is important that we do so. It is equally as important that we highlight to colleagues issues which

are arising and which will be of benefit to them in either defending or bringing claims.

As a specialist employment law and personal injury claims office we must constantly keep ourselves up to date. This is an investment in our time. We are, however, happy to share it with colleagues and we hope that you find our commentaries useful. We are sure that there are a number of Adjudication Officers who will see decisions that they have been involved in. We hope that they will take the criticism as constructive criticism, where it is made, and the praise as our acknowledgement of a job well done.

Adjudication Officers have a considerable burden to undertake which is not always recognised. They are there sitting alone. They have resources but there is an issue with these resources as to whether they are sufficient. They do have back up from the Registrar. However, the level of work which is undertaken, the time involved and the professional way in which they determine cases is important and should be recognised for the quality of their decisions. We may not always agree with them. There will be cases which will go on appeal to the Labour Court. Such cases may or may not be upheld. There will be decisions of the Labour Court which may go on Appeal on a Point of Law, or, Judicial Review to the High Court which may or may not be upheld. That is the benefit of the systems which we have. The decisions of first instance by Adjudication Officers are subject to an Appeal and in the case of the Labour Court an Appeal to the High Court normally on a Point of Law.

We hope colleagues find our review of Adjudication Officer Decisions and those of the Labour Court useful.

Who is an employee?

In case ADJ4297 the Adjudication Officer in this case has helpfully set out a detailed overview of the law on this topic which may be useful for colleagues.

Cases will of course depend on the particular circumstances of a particular case but it is very useful to have an overview of the legislation.

In case ADJ2233 the Adjudication Officer in this case set out a very useful overview of the legislation relating to the test. The Adjudication Officer not only referred to the Revenue Guidelines but also to the Supreme Court case in the Sunday Tribune Limited (In Liquidation) 1984 and the decision of Carrol J and also the decision of Mr. Justice Geoghegan in Castle Island, Cattle Breeding Society Limited –v- Minister for Social and Family Affairs. This decision is very useful as it reviews a considerable number of cases and the tests to be applied.

It can be difficult for practitioners sometimes to determine whether an individual is or is not an employee and this is a further decision which colleagues should look at when looking at this complex issue.

Termination Pay during Notice Periods

In Case PWD1639 being the case of Intect Billing Ireland and Angela Lally, the Labour Court in this case determined that the employee was not entitled to pay during the period of notice. The Labour Court relied on the Second Schedule of the Minimum Notice and Terms of Employment Act 1973 to determine that as the employee was ill and was not fit for work during the notice period there was no obligation on the employer to pay her.

Setting Compensation in Unfair Dismissal Cases

The case of Jade Brady and others as Applicants, The Minister for Social Protection Respondent and Stephen Tennant as Receiver of White Sands Hotel Limited being a decision of the High Court [2016] IEHC553 is a decision of Ms. Justice Baker.

There is a very useful overview of the law relating to the calculation of loss and damages in an Unfair Dismissal case which is set out at paragraphs 20 – 27 of the decision.

In that case it was pointed out that Section 7 (1) (c) (i) of the Unfair Dismissals Act provides that if an employee incurred any financial loss attributable to the dismissal payment to him by the employer of such compensation in respect of the loss should not exceed an

amount of 104 weeks remuneration in respect of the employment from which he was dismissed calculated in accordance with the Regulations under Section 17 of the Act as is just and equitable can be awarded having regard to all the circumstances.

The Court pointed out that the monetary jurisdiction is limited to an amount which represents 104 weeks remuneration. The Court pointed out that "financial loss" is expressly defined in subsection 7 (3) as actual loss and any estimated prospective loss of income and the value of the loss or diminution attributable to the dismissal of the rights of the employee under the Redundancy payment Acts 1967-2014 in relation to superannuation.

The Court pointed out that the legislation does not envisage the deciding body being required to always or perhaps ever engage in a calculation or mathematical formula by which it determines the extent of the financial loss exclusively by reference to the weekly remuneration of the employee.

The Court pointed out that an award to an employee on account of a dismissal which is found to be unfair can be made even without the employee being in a position to show there has been financial loss. The Court pointed out that an employee may immediately obtain new employment at the same or an increased salary and under Section 7 (1) (c) (ii) such compensation has a statutory maximum of 4 weeks remuneration.

The Court pointed out that MacMenamin J in Stephens –v- Archaeological Development Services Limited [2010] IEHC540 at paragraph 41 explained that the parameters within which an award is made must be;

"Strictly within the realm of financial loss and still does not encompass any scope for a claim under any heading in the law of torts nor for the awarding of punitive or exemplary damages".

The Court pointed out that financial loss therefore is the determining factor and not remuneration as such. The Court pointed out that an employee can claim loss of pension rights and loss of superannuation entitlements.

The fact that an employee may not obtain employment and has been unfairly dismissed does not mean of course that the full 104 weeks compensation has to be paid. It is very clear from the decision of Ms. Justice Baker when she stated that the Supreme Court in Kearney –v- Balkan Tours [1997] 1 I.R. 153 stated that a Court has a very wide discretion to award such amount as was just and equitable in all the circumstances.

This case revolved around the issue of the statutory scheme for compensating employees in an insolvency situation.

Because of the potential interaction between the insolvency scheme and Unfair Dismissal it is, in our opinion, useful where a Tribunal such as the WRC, in hearing cases will set out the decision with sufficient particularity so that if a claim had to be made to the Social Fund that any review would be capable of being clearly understood.

This is an important Employment Law Decision by Ms. Justice Baker and it is one which we would encourage anybody interested in Employment Law to read.

Unfair Dismissal and the case of Bank of Ireland –v- Reilly

The case of Bank of Ireland –v- Reilly [2015] IEHC241 is a decision which anybody involved in employment law should look at carefully. Effectively it is that case decided that where one employee is treated differently from others who have acted similarly that dismissing one employee and not taking action against other employees can result in the dismissal being deemed unfair even if the actions of the employee if they had been the sole wrongdoer would have grounded a defence to an Unfair Dismissal claim.

The Adjudication Officer in this case also referred to the decision in Nurendale trading as Panda Waste and Burke UD/15/1 in the Labour Court decision. This matter has been appealed by Nurendale to the High Court by way of Judicial Review. That is a case where this office has been involved and is involved in the High Court proceedings.

In this case ADJ2402 the Adjudication Officer relying on those decisions awarded compensation to the employee of €6,000.

Unfair Dismissal – Getting the Contract Right

Sometimes you come across a case which shouts out the importance of employers having a proper contract. One of these is ADJ929. In that case, the employer contended the dismissal of the employee who had penalty points was fair and reasonable. The employer contended that the contract of employment provided that the employment was contingent on the company being able to maintain a suitable policy of insurance entitling the employee to drive a vehicle. The contract provided that in the event the company was unable to obtain insurance or if the insurance premium was prohibitive the company would be able to terminate the contract on notice.

The Adjudication Officer in this case held that Section 6 (4) (d) of the Act must be dealt with on the basis that a situation which arises after the fact cannot be used to justify the dismissal in the absence of a clear and unambiguous contractual provision or parameters as it relates to penalty points on the first instance.

If an employer is going to have a policy where an employee can be dismissed for having excessive penalty points or having any penalty points, it is important, in our opinion, that this is very clearly set out in the contract of employment. In this case, the employer had an award of €16,000 made against him.

Simply having a clause in a contract which is not clear and precise will not enable an employer to terminate an employment.

In the case of drivers a company needs to have a policy which will set out how many points will result in the employer being entitled to terminate the employment. If an employer does so however, the employer must be very careful to ensure that following the decision of the High Court in Governor and Company of Bank of Ireland and Kelly, which is a 2015 decision which we have addressed in this publication, that this policy will have to be applied across the board.

Therefore, if an employer sets out that after four penalty points or five penalty points or however many penalty points, that this is a disciplinary matter which can result in dismissal, then the employer will be obliged once they become aware of penalty points for any driver to apply that provision equally. The case highlights the importance of appropriate contracts of employment.

Unfair Dismissal – A Sham

In ADJ731 the Adjudication Officer found that the dismissal in the case was a sham of the highest order. The Adjudication Officer found that no allegation having any material substance was put to the complainant. It was found that no proper procedure whatsoever was followed and that the employee had been the victim of an abusive process of the highest magnitude.

The Adjudication Officer found that it was reasonable to conclude that the employee's membership of a trade union was a source of irritation to the employer. The Adjudication Officer found that the respondent company was, in the Adjudicator's view, willing to take unfair and unreasonable action against the complainant on foot of the notification of that membership and used same as part of the justification of the subsequent unfair dismissal.

An award of €6,500 was awarded.

This case is a timely reminder to employers that dismissing an employee for membership of a trade union is a ground to bring an Unfair Dismissal claim. It should also be noted (though it was not relevant in this particular case) that there is no requirement for the employee to have twelve months service to bring a claim that they were dismissed because of Trade Union activities / membership.

Unfair Dismissal and Compensation

In ADJ2018, the Adjudication Officer in this case very helpfully set out a detailed decision as to how the employee had contributed to his loss. It was clear from the decision as to how the level of

compensation awarded for the unfair dismissal which was only €1,000 was arrived at.

The Adjudication Officer helpfully set out the provisions of Section 7 (2) (b) of the Act in a very detailed decision setting out the factual circumstances.

This is a decision where it would be easy for both employer and employee to understand why compensation was awarded and why there was a reduction in the level of compensation awarded.

In our view, it would be best practice as to how a decision should be set out.

Unfair Dismissal Act – Compensation

In Case ADJ2951, the Adjudication Officer held that the dismissal of the employee was grossly unfair. The employee requested compensation. The Adjudication Officer found that the employee did not seek employment to mitigate his loss arising from the Unfair Dismissal. The Adjudication Officer held that the employee is obliged at law to seek employment and in the absence of efforts the Adjudication Officer was limited in the level of compensation which could be awarded. The employee was paid €208 gross being €140.38 net and a fuel allowance of €20 each per week.

The Adjudication Officer awarded the employee a sum of €1,664 for the Unfair Dismissal.

We would have a difficulty with this decision in that where it is found that there was no effort to obtain work the compensation in those cases is, in our view, four weeks wages, being the net wages. It is an obligation on an employee to mitigate their loss, and, failure to do so is a serious matter. In this case, the employee received €1,664 being some 10 weeks net wages.

In awarding compensation under the Act, compensation is the net loss not the gross loss.

Appeals in Unfair Dismissal Cases

The case of Sean Lonergan and Dunnes Stores UD691/2015 is interesting in that the Employment Appeals Tribunal stated, in their decision;

"The Tribunal was not impressed by the respondent's offering an appeal in writing only".

The fact, though it is not set out in this particular case that an employer may have a particular disciplinary and appeal process in writing is not the end in itself. The procedure for a disciplinary process and the appeal must be fair. It is important that employers would consider looking at the Code of Practice on Grievance and Disciplinary Procedures. If an appeal process is not fair and that includes the original disciplinary action, then the employer runs a risk that even though they will have complied fully with their own policy and procedure, the dismissal can still be deemed unfair.

It is important for employers to get advice from a Solicitor in drafting an appropriate disciplinary policy which will include an appeal process to avoid difficulties so that the process will be held to be fair.

It is equally important that when employers have a disciplinary process that they make sure they understand their own disciplinary process, that they apply that disciplinary process and that they regularly review the disciplinary process with their Solicitor who advises them on employment law to take account of any changes that need to be put in place and to take account of changes in the law or practice or court decisions.

Unfair Dismissal cases with which we have a difficulty

In case ADJ909, the Adjudication Officer in this case in awarding compensation made an award in finding that the employee was Unfairly Dismissed. The employee was awarded €10,000 being approximately 14 months' salary less payments from the Department of Social Protection over the period.

It is not necessary for us to review the case law on this but there is significant case law which determines that Social Welfare is not to be taken into account in determining an award under the Unfair Dismissal Legislation.

The Legislation in Section 7 (2A) clearly sets out that in calculating financial loss for the purposes of subsection (1) payments to an employee under the Social Welfare (Consolidation) Act 2015 in respect of any period following the dismissal concerned or under the Income Tax Acts arising by reason of the dismissal shall be disregarded.

In this case, the Adjudication Officer appears to have actually taken into account payments under the Social Welfare Legislation.

To be fair to the Adjudication Officer, it may simply be the manner in which the decision was written.

In case ADJ2527 we find this decision unusual.

The Adjudication Officer was of the view that given all the circumstances of the case, found that the penalty of dismissal was harsh and, in this case, a written warning would have been more reasonable. The Adjudication Officer then goes on to state that in upholding the complainants complaint the Adjudication Officer found that the complainant contributed 90% to the situation and set compensation in the amount of €3700.

We regard this decision as somewhat strange.

If an Adjudication Officer had found that the dismissal was harsh and a warning rightly should have issued then it is hard to understand that the employee would have been 90% responsible for their own dismissal. This is a case where it may have helped if that finding was explained fully. There is probably a good reason but it is not evident from the decision.

Constructive Dismissal

In case ADJ2858 the Adjudication Officer in this case very helpfully set out the test to be applied where an employee claims constructive dismissal.

The Adjudication Officer set out the decision of Mr. Justice Finnegan in the case of Berber –v- Dunnes Stores [2009] ELR61 where it was said;

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is as such that the employee cannot be expected to put up with it.

It is very useful that this decision sets out the law in such a precise way.

In case ADJ 1003 an issue arose in a constructive dismissal case that the employee had not used the internal grievance procedure. The Adjudication Officer in this case helpfully pointed out that the employee had on a number of occasions raised particular issues but had been "fobbed off".

The requirement in relation to constructive dismissal is that the employee must be in a position to show that they have no alternative but to leave. The fact that an employee has not gone through a formal grievance procedure is not in itself the end of a claim by an employee. Where issues are raised by an employee with their employer and they are not addressed even though the formal grievance procedure has not been invoked, this may be sufficient in itself.

Employers should be very slow to dismiss complaints by employees without investigating them. If the employee has raised a grievance then it is a matter for an employer to at least indicate to an employee that there is an internal grievance procedure and to invite the employee to use same.

Failure to do so could be detrimental to an employer in a subsequent claim.

Constructive Dismissal

In ADJ914 the Adjudication Officer in this case held that prior to involuntary resignation an employee must exhaust all reasonable attempts to resolve their complaints and grievances with their

employer. The Adjudication Officer set out as an initial step the employee must inform their employer of the issues causing those complaints and grievances. The Adjudication Officer pointed out that making the employer aware of them allows the employer to address those concerns.

He held that there was no evidence that this initial step was undertaken prior to the resignation. He also pointed out that the complainant was a member of a union yet never sought their intervention.

The Adjudication Officer held that the contention they were forced to resign could not stand up.

Again this is a further example of employees possibly jumping the gun and not getting appropriate advice prior to resigning.

In ADJ1879 being a health and safety manager at a leisure centre the Adjudication Officer in this case reviewed a number of significant decisions relating to constructive dismissal namely Berber –v- Dunnes Stores [2009] 20ERR61, McGreevey –v- Ulster Bank UD962/2009, Courtney –v- Chartered Association of Certified Accountants, UD 270/2003 and Kirwan –v- Primark UD396/1988 and Hickey –v- Bloomfield House Hotel UD384/2012.

The Adjudication Officer also referred to Barden –v- Lough Rynn castle Limited UD814/2015 and Murray –v- Rockabill Shellfish Limited [2012] 23ELR331.

The employee in this case was unsuccessful as the Adjudication Officer effectively held that the employee had failed to raise grievances with the employer and as such the decision to resign did not amount to constructive dismissal under the legislation.

What is interesting in the case is that the Adjudication Officer also pointed out that the employee may have benefited from an advocate / representative to assist him within the lifetime of the contract.

This is a very important decision where the employer was legally represented by a very competent Counsel and was instructed by one

of the leading employment Solicitors in the country namely Claire Bruton BL and Ms. Jennifer Cashman of Ronan Daly Jermyn Solicitors.

The employee was not represented.

It would be our view that employees often jump to the conclusion that actions of the employer warrant the employee leaving. It is our view that an employee who is properly advised will invariably seek to get the benefit of legal representation and that such representation will invariably advise the employee to go through the grievance procedures. It is extremely rare that an employee will be in a position to resign and claim constructive dismissal without having gone through the grievance procedures. There are occasions when this can happen but they are limited. This case is a timely reminder to colleagues on the importance of advising employees to go through grievance procedures.

Constructive Dismissal and Zero Hour Contracts

In Case ADJ3150 the issue concerned an employee who resigned when she came back from maternity leave early and was not provided with work.

The Adjudication Officer pointed out that the contract provided;

"your normal hours of work are variable each week as rostered Monday to Sunday the hourly rate of pay takes into account that fact the employee will be required to work on Sundays. You may also be required to work additional hours when authorised and as necessitated by the needs of the business. Your hours of work will be determined by mutual agreement. The employer will give you as much notice as possible of the hours of work available to you. You have a right to refuse or accept those hours…"

This is very clearly a zero hour working practice contract. The employee was not provided with work. The Adjudication Officer found that the respondent had complied with the complainants contract of employment in relation to hours of work and that every effort had been made to get her work and ion those circumstances she was not

entitled to resign and was not entitled to a constructive dismissal decision.

Unfortunately we now have a situation where these types of contracts which other than the fact that they do not have the words "zero hour contracts" set out at the top of them are quiet clearly zero hour contracts. Such workers are in a very difficult position.

If they are not provided with work the reality is that their contract provides that they don't have to get work.

This case highlights the importance of the issue of zero hour contracts being addressed.

Employment Equality Act – Age Discrimination

In case ADJ1340 compensation was awarded where a proposed employee had been asked particulars as to the age of the employee during the interview process. The defence from the employer was that the age was asked as part of the initial process for the purposes of ensuring that the employee was over the minimum age to take employment.

The Adjudication Officer rejected this and found that prima facia evidence had been made by the employee and that this had not been rebutted by an employer.

If an employer needs to be able to confirm that an employee is within a particular age category then of course there is no problem asking but this should be done after the process has completed and not at the start. There is nothing to stop an employer stating that at the end of the process evidence of age will need to be furnished by any successful candidate to show that they come within the appropriate age category.

Working Time – Determining one's own hours

In case ADJ1542 the Adjudication Officer in this case determined that the employee was an employee who determined his own working

hours for the purposes of Section 15 of the Organisation of Working Time Act which related to maximum working hours.

This can be a dangerous defence for an employer to run particularly if the employee is still in employment. While an employer can set minimum hours, if the employer is going to run this defence, the employer can end up in a situation where the employee will be entitled to say "I don't like Mondays" and, unless the requirement to work on Mondays is specifically set out in the contract, the employee will be able to say when the contract provides for 39 hours a week. I do 39 hours a week Tuesday to Friday and I am not working Mondays. The employee will be entitled in those situations often to turn around and say that they are not going to turn on their computer or mobile phone until 9am in the morning. The employee may be able to give limited notice as to when they are going to go on holidays. If they determine their own hours then they determine their own holidays.

Employers running this defence could end up in a situation where they have an employee who can create significant difficulties in the employment where the employer will be able to do very little because the employer has stated that the employee sets their own hours.

Holiday Pay – Why was it brought under the Payment of Wages Act, 1991

In the case ADJ544, the employee in this case brought a claim that the employee has not been paid the correct holiday pay. The claim was brought under the Payment of Wages Act.

It is beyond us to understand why a claim for non-payment of holiday pay would have been brought under the Payment of Wages Act. Compensation cannot be awarded under that Act other than the actual monetary loss.

The employee should have brought the claim under the Organisation of Working Time Act where, in addition to the actual loss, compensation could have been awarded.

Protection of Employees (Employers' Insolvency) Act 1984-2006

In the case of Jade Brady and others and the Minister for Social Protection Ms. Justice Baker delivered an important decision on 13th October 2016.

The case involved an issue where the President of the Circuit Court gave a decision and increased awards substantially. The awards were €20,000 to the first applicant, €60,000 to the second applicant and €70,000 to the third applicant. In each case, it was directed that they would be paid less than the maximum jurisdiction of the Circuit Court under the Unfair Dismissal Acts.

An appropriate application was made as the company was in receivership to the Social Fund and submitted by the Receiver.

The decision sets out in detail the provisions of Section 6 of the relevant legislation which provides for an amount not to exceed €600 in respect of any one week. It appears that the Minister in calculating the amount worked on a notional calculation. It appears that the Minister divided the awards by the stated gross weekly income found on the IP2 form. This resulted in a notional calculation of the number of weeks, the cap of €600 was then applied and that the maximum number of weeks for which redress might be paid was treated being 104 weeks.

The Court pointed out that the scheme does not fit neatly with the broader jurisdiction of the Circuit Court to award around figures to compensate financial loss including the loss of future employment prospects or with the broad discretionary nature of the jurisdiction of the Circuit Court to determine the amount of an award. The Court pointed out there is no mechanism provided for either under the scheme or under the Employment Appeals Legislation by which an applicant could ask the Circuit Court to formulate its award. It is difficult to that extent to characterise an award under the Unfair Dismissal Acts by reference to a mathematical formula.

In this case the IP2 Form, while it makes provision for a gross weekly wage to be set out as the High Court Judge correctly pointed out, it does not provide a mechanism to set out other payments which can properly be taken into account in calculating the weekly wage.

In this case the Minister agreed to review the calculations. The decision directs that the Judge will hear the applicant with regards to the cost of the application and whether they wish to be returned to the Minister for further review. In this case the amounts deducted were substantial in that the deductions made were from €6,480.00 up to €16,804.00.

While it is not set out in this case, it does highlight the importance for those giving decisions in Unfair Dismissal cases to set out clearly in the decision the number of weeks compensation being given on the basis under which compensation has been awarded.

There is significant benefit particularly if a company goes into liquidation and now with cases coming on more quickly that an Adjudicator would going forward specify the compensation by way of the number of weeks being given, for example, in an Unfair Dismissal and in the event of there being a future loss going forward, setting out that amount on the basis of the number of weeks that it is calculated on and the loss per week.

The insolvency legislation which applies in protecting employees is a statutory scheme which applies through European legislation. This case highlights the significant difficulties with the scheme and its interaction with employment legislation.

We do not understand why, and it is not dealt with in the decision, why the employees as applicants did not refer the issue under Section 9 of the Act to the EAT (now the WRC and on appeal under Section 9A to the Labour Court). The Act specifically provides for a method of appeal of the Minister's decision.

Redundancy / Fair Selection

In the Labour Court in the case UDD1629, being a case of Kohinoor Limited and Hussain Ali, has given a very detailed overview in relation to redundancy and the selection processes. The Court in this case referred to a case of Gillian Free –v- Oxigen Environmental UD206-2011 being a decision of the Employment Appeals Tribunal wherein the decision of the Tribunal was quoted with approval. The Court in

this case pointed out that it was satisfied that having made the decision to make a number of employees redundant from among a number of chefs carrying out the same or similar duties this was done with the assistance of expert advice and that the company had devised a very detailed selection matrix to decide on the criteria to be used to select those to be made redundant. The Court found that the selection criteria were fair and reasonable. The Court found that redundancy was the reason for dismissal and dismissed the Unfair Dismissal case. This case is a very useful reminder for practitioners as to the best practice which should be engaged in when undertaking a redundancy.

In Case ADJ1461, the Adjudication Officer rightly pointed out that the burden of proof is on an employer to show that the selection process was fair. In this case, the Adjudication Officer found that the employer had not shown that the selection process was fair and an award of €5,000 for Unfair Dismissal was awarded.

Where an employer is considering redundancy, it is vitally important that appropriate advice from an employment law solicitor is obtained.

It is vitally important that employers ensure that there are fair procedures for all redundancies. Failure to do so can result, as in this case, in an award for Unfair Dismissal.

Redundancy and Proper Procedures

In case ADJ2590 an employee was awarded €25,000 on top of the redundancy payment she received.

In that case, the Adjudication Officer held that while an employer is entitled to restructure their business there are certain basic requirements which must be followed. The Adjudication Officer found that the dismissal of the employee was contrary to fair procedures and was done in a most insensitive way. This case is a warning to employers.

Where an employer is instituting a redundancy then appropriate procedures need to be put in place. At a very minimum, in our view, the employee should be treated as part of a redundancy process no

less than they would be in relation to a dismissal. By this we mean that they should have a meeting at which they are advised that their job is at risk. They should be entitled to make representations and they should be entitled to appeal any dismissal by way of redundancy.

This is a case where an employer has had to pay a substantial sum of monies. This could easily have been avoided and probably the same result achieved by the employer with the benefit of legal advice from an employment Solicitor on how to properly go through a redundancy procedure.

Genuine Redundancies

The issue of redundancy is one which can have a devastating impact on any employee. It is however important in all redundancy cases that it is a genuine redundancy. An interesting case on this is a case of JBC Europe Limited and Jerome Penisi [2011] IEHC279 being a decision of Mr. Justice Charleton.

The case determines that to prove that a redundancy was genuine the burden of proof is on the employer in this regard.

The Court also helpfully dealt with the issues of damages and how damages are ascertained.

It is one of those cases that I would commend to colleagues to read.

Terms of Employment (Information) Act

In case ADJ975 the Adjudication Officer in this case determined that in the particular circumstances of the case compensation was not going to be awarded. The Adjudication officer has considerable latitude under the Act as to whether to award compensation or not.

However, this is a piece of European Legislation. It would be our view that in making a determination for the purposes of an employee or in an appropriate case an employer deciding whether they wish to appeal a decision or not it is necessary that the reasons are set out.

A determination that simply states that in particular circumstances and in a particular case compensation is not to be awarded is not in itself sufficient unless those circumstances are set out.

The European Court of Justice has set out that where a matter is to be dealt with under European Law it is necessary that the reasons are set out so that if a matter ultimately has to go to the European Court of Justice or to a local Court which in this case would include the Labour Court that that body must be able to review the decision and be in a position to understand the reason for same.

In this case there may well have been very good reason why compensation was not to be awarded. However, it is a basic entitlement that both employers and employees know the basis under which a case is won or lost and the basis under which compensation is or is not awarded. If compensation is not awarded then why and if it is, why it is set at a particular level.

Terms of Employment (Information) Act

The Labour Court in a case TED1631 being a case of Cork Opera House Plc and Dermot O Driscoll, determined that while they held against the employee as regards whether the contract furnished complied with Section 3 found that it had not been furnished within the two month period prescribed by the Act and awarded the employee the sum of €1,268.75 for contravention of the Act.

In ADJ3089 the Adjudication Officer found that the employer had confirmed that no contract had been provided within the statutory 8 week period. The Adjudication Officer went on to set out the legislation. The decision is interesting in that the Adjudication Officer awarded a sum of €1,716 but calculated same on the basis of four weeks' pay based on a 39 hour week at €11 per hour. It is very useful that the Adjudication Officer took the time to set out the basis under which the compensation was calculated.

Payment of Wages – Deductions

In Case ADJ283, the employee was a Human Resource Assistant. The employer had a pension scheme. It provided in her contract for

contributions of 1.5%. The respondent advised the employee that the contributions would increase from 1.5% to 5.45% from 1 April 2015. This meant that the deductions increased by €130.78 per month. The respondent submitted that this deduction was required by law.

This is a cross border body and the employer contended that as a result of a meeting of the North/South Ministerial Council the increased payments were put in place. The respondent employer accepted that the employee had objected to the proposed changes. The respondent contended that the scheme can be termed a statutory provision and referred to the definition of the expression statutory instrument in the Statutory Instruments Act, 1947. They contended that the scheme made in exercise of a power conferred by statute was the British Irish Agreement 1999 which is a statutory instrument. They contended they were entitled to make the deductions. The Adjudication Officer found that the Belfast Agreement on the authority of the Supreme Court in O Neill –v- The Governor of Castlerea prison that they do not have the force of law. The Adjudication Officer referred to case ADJ254 and followed that determination and awarded the employer €130.78 from April 2015 per month. The case highlights that an employer may only make a deduction from wages without the employees consent where it is authorised by law.

Deduction of Wages – Attachment of Earnings Orders

In case ADJ3377 the Adjudication Officer correctly set out that a deduction required to be made on foot of a Court Order as part of an attachment of earnings order was a lawful deduction which the employee could not complain about.

Deduction of Wages

The Labour Court in case PWD1640 being the Office of Public Works and John O Sullivan held that the deduction was in line with a collective agreement. The Court found that the contract of employment provided for the alteration of terms and conditions in consequence of such agreements. The Court therefore held that there had been no unlawful deduction of wages.

Where there is a collective agreement and the contract is properly drafted it will allow for deductions in appropriate cases. This case highlights the importance of employers having proper contracts of employment.

In Case ADJ3180 the Adjudication Officer looked at a situation where there was a deduction from the employees' wages in relation to damage to a vehicle.

The Adjudication Officer in this case pointed out that no documentary evidence was given as to the cost of repair so it could not be ascertained whether the deduction was greater or not than the repair cost. No receipt for the deduction as made. While the contract provided for deductions for damage to a vehicle the employer in this case at no stage produced any documentation.

The Adjudication Officer in this case equally pointed out that there was reference to the respondent keeping insurance certificates. This however was not the case as the employee had to avail of his private car insurance. The insurance policy was not furnished but concerns were raised by the Adjudication Officer as to whether the private insurance would cover business driving at all. The use of the vehicle was exclusively for business use. On that basis there was an issue as to whether the documentation could be relied upon to justify any deduction.

The Adjudication Officer held that the deduction was illegal.

The case is useful in highlighting the importance of proper procedures being put in place by an employer before a deduction is made. The Adjudication Officer helpfully set out Section 5 of the Act which is very specific as to when deductions can be made.

Bonus Payments – Payment of Wages Act Claims

In ADJ3012, the Adjudication Officer in this case has again held that bonus payments are wages and can be claimed under the Payment of Wages Act.

In case ADJ 2489 the Adjudication Officer held that a bonus payment in the circumstances of the particular case was a contractual obligation and could therefore be sought under the Payment of Wages Act.

In ADJ2016, the Adjudication Officer held that a contract which provided that the employee would receive €77.26 per week as an attendance bonus could be recovered under the Payment of Wages Act.

In this case the Adjudication Officer also awarded one weeks wages as compensation for not receiving a contract of employment.

Force Majeure Leave

It is interesting that there were two decisions recently under ADJ1945 and ADJ3690, both of which dealt with the issue of the entitlement to Force Majeure Leave.

In both cases, the employees won. In neither case did the employee receive compensation.

European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003 – TUPE Regulations

In the case of Longford Pool Construction Limited and Dusan Stipala reference TUD169 the Labour Court helpfully set out Regulation 8 (6) of SI 131/2003 being the above Regulations.

Those Regulations state that when a transfer takes place each employee must be informed in writing, where reasonably practicable, not later than 30 days before the transfer and in any event in good time before the transfer of the following:-

(a) The date or proposed date of the transfer;
(b) The reasons for the transfer;

(c) The legal implications of the transfer for the employee and a summary of any relevant economic or social implications for that employee and;
(d) Any measures envisaged in relation to the employees.

The Court stated that the term used in the Regulations is "must" and is accordingly mandatory. The Court pointed out in this case that the obligation lay with the respondent to demonstrate to the satisfaction of the Court that it met its obligations.

The Labour Court in their determination has helpfully set out that this is a mandatory requirement and has equally helpfully restated that the notification must be given "in writing".

Workplace Relations Commission / Decisions

I have learned that one of the major programmes to be undertaken this year by the WRC is that a new website of decisions will issue.

Previously the Labour Court had an excellent website. You could search the website by way of Act, Section and Subsection. Currently the WRC website which includes the Labour Court decisions can only be searched by way of the Act. This limits its use as a tool to research cases.

I understand that, later this year, work will be undertaken to ensure that going forward, practitioners and those interested in employment law will be able to search by way of Act, section and subsection. This is a very welcomed development.

It is a development we have been seeking. We are delighted that our proposal in this regard has been accepted.

We are reminded of a quote in the Skibbereen Eagle during the Crimea War which was quoted at the House of Commons when the editor of the Skibbereen Eagle stated that;

"The Skibbereen Eagle would be keeping their eye on the Tzar of Russia".

Well to borrow from that comment, this office will be keeping it's eyes on the WRC.

This office was a supporter of the new Workplace Relations Act.

As an office which supported the new procedures, we feel entitled to make sure that we hold the Department of Jobs, Enterprise and Innovation and the WRC to account to comply with the promises which were made when the Bill was going through the Oireachtas.

Contract Cleaning Industry

On 1st November, Mr. Pat Breen TD Minister for Employment and Small Business signed an amended Employment Regulation Order for the contract cleaning sector.

The Order provides that the new rate of pay will be €10.05 per hour to come into effect 55 days from 1 November 2016. Further increases will take place on 1 December 2017 and 1 December 2018 when the rates will go up to €10.40 and €10.80 per hour respectively. The Order also provides that from 27th October, being the date the Order was signed, deduction / charges for uniforms shall cease for all existing employees and an initial once off charge of €15 will apply to new entrants.

There are some 34,000 employees employed in the contract cleaning industry currently.

We have discussed in previous issues of our newsletter how the contract cleaning industry Employment Regulation Order applies. Depending on the structure within particularly a group company, it may be possible that individuals who might be seen as direct employees, who are not covered by these Regulations may in fact be employees. This can arise where one group company employs individuals who are then undertaking cleaning duties for other group companies. For further information or advice, you can always contact this office.

Frivolous and Vexatious

This issue was considered in a case ADJ40. A very substantial decision has issued by the Adjudication Officer holding that the claim was both frivolous and vexatious. Importantly, the Adjudication Officer has set out a detailed overview of the law on this point.

This is quite interesting. What if the matter is appealed to the Labour Court. If the Labour Court wants to overturn matters, then the case goes back to the Adjudication Officer. We are not saying from the facts of this case that that would happen but rather that it is helpful that the Adjudication Officer has set out such a considered decision. This is a case which I would encourage all practitioners to read as it is useful for setting out the law in some detail on this issue.

Detailed decisions like this can only be helpful for practitioners.

Some practitioners issuing defences regularly claim complaints are frivolous and vexatious. This decision is useful in setting out what it means.

Where an employer puts forward a defence of the matter being frivolous or vexatious and that defence is not upheld then it may be possible that the employee will seek exemplary damages. The issue of exemplary damages has been dealt with in a separate part of this publication.

Wrong claims being made

In ADJ2279, the employee brought a claim against their employer under the Equal Status Act. The claim should of course have been brought under the Employment Equality Acts.

We mention this case in passing as we are seeing, from decisions of Adjudication Officers, that a considerable number of claims are being brought under the wrong Act.

The cases do not indicate normally whether a person is represented or not represented. However, if they were represented it is unlikely that the claim would have been brought under that Act and would have

been brought under the Employment Equality Acts. There is unfortunately a lack of information for employees. The fact that claims can be submitted online and that you do not need to use a Solicitor does not mean that employees should not use Solicitors. Potential legitimate claims by employees are being dismissed because employees are not getting advice from an employment Solicitor.

If a person is ill they go to a Doctor. If you have an electrical problem in your home unless you are a trained electrician only an idiot will attempt to repair the electrical fault. They are most likely to electrocute themselves.

When it comes to the law however it appears that everybody is an expert or they know somebody who is an expert. There are many barrack room lawyers. When it comes to the law employees and employers should get advice from an employment Solicitor. Employment law is complex and legal advice from a Solicitor is always required.

In Case ADJ3229 the employee in this case along with deductions from wages claimed annual leave or holiday pay under the Payment of Wages Act.

The employee was successful and obtained the holiday pay. We have pointed out in other cases that claims for under payment of Annual leave should be brought under the Organisation of Working Time Act. That Act enables employees to claim compensation on top of the actual economic loss.

In this case the employee simply received his or her economic loss.

It is not clear whether the employee was represented but it is likely the employee was not.

The Taxation of Compensation in Employment Cases

In case ADJ801A, the Adjudication Officer in this case had to consider a claim under the Terms of Employment (Information) Act 1994 and Section 8 of the Unfair Dismissal Acts.

The issue we are looking at is the compensation. For the claim under the Terms of Employment (Information) Act, compensation of 500 was awarded. The Adjudication Officer held that this was redress of the complainant's statutory rights and was not subject to Income Tax under Section 192A taxes Consolidation Act 1997. We fully agree with this.

The Adjudication Officer awarded €30,000, being equivalent to 64 weeks' pay, in compensation for the Unfair Dismissal claim. The Adjudication Officer in this case also stated that, as this was redress for a statutory right, it was not subject to Income Tax under the Section set out above. This we disagree with.

Compensation under the Unfair Dismissal Acts is treated as income. While it is compensation for redress of a right the legislation is quite clear in that it must be the net loss and secondly the tax legislation in Section 192A TCA 1997 (as amended by Section 7 Finance Act 2004) is clearly specifically excluded from this provision.

To an extent, we are speaking from experience. Richard Grogan of this office was involved with the Law Society in the drafting of the legislation which was submitted to the then Minister. There were various meetings in the Department of Finance and it was clearly set out by the Department that any compensation which could be in the category of wages which would include claims under the Unfair Dismissal legislation were to be excluded from the general compensation relief in Section 7 of the Finance Act 2004.

If a person brings a claim under the Employment Equality Legislation for being dismissed, then compensation can be awarded which is exempt from tax. If a person brings a claim under the Unfair Dismissal Legislation, then the award under the Unfair Dismissal Legislation will always be subject to tax even though the compensation must be awarded on the "net wages". This is an anomaly but the Department of Jobs, Enterprise and Innovation have for years failed to address this. There are specific exemptions some of which automatically apply and some of which have to be applied for but the entire compensation subject to the exemptions are subject to tax.

On our website in the publications section, you will find a paper entitled the Taxation of Employment Law Awards which was presented by Richard Grogan of this office to the Adjudicators as part of their training.

Payment of Wages Claims and Taxation

In Case ADJ4007 the Adjudication Officer found that there had been a deduction from wages and awarded compensation of €600. The Adjudication Officer stated that this was redress for statutory rights and was not subject to income tax under Section 192 A of the TCA, 1997.

We would disagree with this finding in relation to taxation. Payment of Wages awards are always subject to tax. They are payment of wages or anything which is equivalent to wages is specifically excluded by the provisions of the Act being the Taxes Consolidation Act 1997.

Gig Economy

The rise of on demand services such as fast food delivery has led to a debate about whether they give workers and customers valued flexibility or do they foster exploitation.

There is a noted rise in individuals who are being categorised as self-employed.

This office is coming across cases where individuals who are effectively general operatives in the construction industry are now being told by their so called employer that to maintain employment, they must register as self-employed. We have companies like Uber in the UK who have recently lost a case in respect of drivers whom an employment Tribunal has determined are employees. Uber is appealing that ruling.

We anticipate that there will be a considerable number of cases coming forward in the not too distant future relating to the fact that individuals here in Ireland have been put in the category of a self-employed individual when they are not in that category. These employees do not get paid holidays. They do not get public holidays paid. They do not get sick pay. They are not in a pension scheme and

are not offered a PRSA. What will be interesting is what kind of claims can be brought. One of them will be whether they can actually bring a National Minimum Wage Act claim for all the hours that they worked with no credit for the payment they have received. The payment they would have received is not in the category of a wage. Treating them as a self-employed individual is illegal. Therefore, an argument may well be able to be structured that no credit should be able to be claimed in respect of any payment made to those workers. If the employer in such cases does claim that the individuals have received a payment then the employer will be admitting that they have committed a criminal offence namely the non-payment of Tax and Social Welfare and employers PRSI and the other deductions which would have had to be made. Now under the Workplace Relations Act such illegal activity, by an employer who makes such a claim, will have to be reported to the appropriate regulatory authorities with the documentation and admissions made. Therefore an Adjudicator or the Labour Court would have to advise a person, who is an employer, who makes such a claim that this, particularly if it is made before the Labour Court on Oath, will be a matter which is effectively something that could be used against the employer in a subsequent case as evidence.

It would be interesting to see how these cases develop and whether employers will run the risk of a criminal prosecution for effectively tax evasion and Social Welfare Fraud. These cases are in the pipeline and it will be interesting to see how they develop.

Protected Titles

The title “dietitian’s” and “speech and language therapists” are now protected titles.

The Health and Social Care Professional Council “HSCPC” is a multi-Professional Regulator in Ireland.

Under the Health and Social Care Act 2005 a person who uses a protected title and is not registered with the Health and Social Care Professional Council is guilty of a criminal offence. This can attract a Class A fine and/or a six month period of imprisonment.

Duplicate Claims

In case ADJ2699 the Adjudication Officer in this case set out an issue relating to duplicate cases.

The Adjudication Officer set out the case of Cunningham –v- Intel [2013] IEHC2007 and the Judgement of Mr. Justice Hedigan which in particular referred to the case in Henderson –v- Henderson (1843)3 Hare 100. The High Court also referred to the case of Woodhouse –v- Consigni PLC [2002] 1 WLR 2558.

The Adjudication Officer in our view rightly set out the law that public policy would dictate that litigation should not drag on forever and that all matters should be taken at the same time and namely that issues arising from the same set of facts or circumstances must be litigated in one set of proceedings save for special circumstances.

This case related to a claim under the Industrial Relations Act.

However, we can see circumstances where a different view might possibly be taken. Take the situation of an employee who claims they have been subject to an illegal deduction of Wages. Under the Payment of Wages Act, they are limited to bringing the claim before the WRC to six months prior to the date of lodging the claim. Let us assume the deductions have gone on for say 5 years. The employee can only bring a claim for six months before the WRC. There is nothing to say that they could not bring a separate claim for the period of 4.5 years to the District Court or Circuit Court.

You may have an employee who has suffered an injury at work. They bring a claim under the Organisation of Working Time Act for not having been paid while out sick from an accident at work. There is an argument that this could be dealt with as loss of wages. If the claim is brought under the Payment of Wages Act, it could stand up. If it is however brought under the Organisation of Working Time Act the employee can in addition obtain compensation for not having received their entitlement. It is a separate claim. It is not one that a personal injury claim can deal with.

The decision of the Adjudication Officer in this case which was under the Industrial Relations Act 1969 and is a very useful decision for colleagues to read as regards the issue of duplication of claims.

Exemplary Costs – Maybe not just for Personal Injury Claims

The case of Darius Savickis and Governor of Castlerea Prison and Others being a Court of Appeal decision [2016] IECA310 is one where there is an interesting twist which may possibly have an implication for employment cases. In this case Mr. Justice Hogan delivered a judgement on 27th October. The Court considered whether the Plaintiff was entitled to exemplary damages for breach of a constitutional right in respect of an assault. It was pointed out that the leading case on this is the case of the Supreme Court in Conway – v- Irish National Teachers Organisation [1991] 2 IR 305.

That was a case which arose out of an industrial action taken by the Defendant's trade union in a particular area of West Cork which had the effect of depriving certain primary school students of schooling for the best part of six months.

In that case Mr. Justice Finlay as Chief Justice set out the test to be applied namely;

"..This is an appropriate case in which the Court should feel obliged to mark its disapproval of the conduct of the defendant to the extent of awarding exemplary damages against them for the following reasons;

(a) The right which was breached on this occasion was one which was expressly vested in a child by the constitution;
(b) The right which was breached was one which, having regard to the education and training of a child was of supreme and fundamental importance;
(c) It must be presumed that the defendants were aware of that importance;
(d) The breach of the constitutional right involved was an intended, as distinct from an inadvertent consequence of the defendant's conduct".

The Court in this case pointed out that the trial had lasted for six days and that the prison officers who were called to give evidence on behalf of the State repeatedly denied that the plaintiff had been punched even when the relevant CCTV evidence was shown to them. The Court pointed out that this is conduct which should not be tolerated for an instant. The Court pointed out that the damages were to mark not only the grievous breach of the plaintiffs constitutional rights but also to mark the strong disapproval by the Court of an endeavour by agents of the State to hide their complicity in this wrongful conduct in the face of overwhelming evidence to the contrary.

Mr. Justice Hogan went on to point out that such damages are normally awarded at 50% of the sum awarded as compensation.

At first sight this may not appear to be a case which may have an employment law element. But it may well have.

Take a case of an individual who brings a claim that they have not received their proper annual leave.

Let us assume that the employer contends that they have and that an Adjudicator in the WRC or The Labour Court holds that the employee did not receive their entitlements. Let us look at the four issues.

(a) The right to annual leave is expressly vested in an employee by way of the Working Time Directive which is a fundamental social right which will be equivalent to a constitutional right;
(b) The right which is breached will be one which is of supreme and fundamental importance as it is a fundamental social right and is there for health and safety purposes;
(c) The employer will be assumed that they were aware of the importance of an employee getting the appropriate entitlements; and
(d) It cannot be an inadvertent consequence if it has been claimed that the employee received their entitlements.

There are many cases currently going before the WRC and the Labour Court where employers simply come in and deny everything or seek to justify a breach on grounds that have no legal validity.

It will be interesting to see to what extent this case may be quoted before the Labour Court or Adjudicators for the purposes of seeking exemplary damages.

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Without Prejudice Communications

Just because something is marked without prejudice does not mean that it is without prejudice. A "without prejudice" communication or discussion cannot be disclosed in proceedings.

The simple rules in relation to the without prejudice protection is;

(a) The communication(s), whether they be written or oral, must be made in the context of a genuine attempt to negotiate the settlement of a dispute which has given rise to, or is likely to give rise to, the issuing of legal proceedings.
(b) You and your opponent intend that the communication(s) will not be admitted into evidence.
(c) It is in our view best practice when phoning a colleague that you would start by asking whether he/she is treating the discussion as without prejudice as you are and it is on the basis that you are phoning in a genuine attempt to try and settle matters and that the discussion will proceed on the basis that this will not be admitted into evidence.

If you do that and have it as a consistent method of dealing with matters over the phone then difficulties should not arise.

In relation to written communications, if you are acting for the defendant then it is worthwhile clearly setting out that you wish to enter into a without prejudice discussion in writing and will do so on the basis of the other side agreeing that the correspondence would not be admitted into evidence.

Certainly if you are communicating on a without prejudice basis then it is useful that an outline of settlement terms is put forward on a without prejudice basis so that it will be clear that there was a genuine attempt to settle matters.

2016 Book of Quantum

The case of Liga Pop and C. Morton and Sons Limited [2016] IEHC594 is a case where judgement was delivered on 27th October 2016. However, what is interesting is that the 2016 Book of Quantum was actually referred to in the decision.

Harrington Undertakings

In 1998, Statutory Instrument 319 of 1998 was introduced. It deals with the contemporaneous exchange of expert reports. The effect of the Statutory Instrument was fully considered in the case of Harrington –v- Cork City Council and Cork County Council [2015] IEHC41.

In this case the Plaintiff sued the Defendant for personal injuries. The parties exchanged their disclosure schedules pursuant to Order 39 Rule 46 in the usual way. The First Defendant listed witnesses but did not list any expert witness or report but they did reserve the right to call expert evidence or to produce expert reports as matters may arise. The First Defendant requested the Plaintiff to furnish copies of their expert reports. The Plaintiff refused in the absence of an undertaking from the First Defendant that it would not furnish those reports to any expert it may engage prior to the First defendant's expert completing their report. The First Defendant refused to provide such an undertaking and sought directions from the High Court.

The issue before the Court was whether a party can refuse to furnish an expert report to disclose pursuant to SI 391/1998 in the absence of an undertaking from the other side that the report will not be disclosed to their expert prior to the completion of their experts report.

The case was heard before Mr. Justice Kearns as President of the High Court. The decision was based on the jurisprudence of the European Court of Human Rights and the principle of "equality of arms" which permeated judicial thinking in this jurisdiction. He also emphasized the Supreme Court decision in Kincaid –v- Aer Lingus which had held that the exchange of expert reports should be contemporaneous in order to avoid the danger of the rules being abused.

Mr. Justice Kearns ordered the Plaintiffs disclosure of reports in accordance with Order 39 Rule 46 (3) to be conditional upon the first defendants undertaking that those reports would not be given directly or indirectly to any expert retained by the First Defendant until such expert had furnished his report.

The issue is then what does this mean in practice?

(a) A party who does have an expert report can now insist on an undertaking from a party that they will not directly or indirectly disclose an expert report to the expert retained by the other party until the other party's expert has completed their report.
(b) In the absence of such an undertaking a party can refuse to furnish their report to the other party.
(c) There is an exception where the other party does not intend to retain such an expert or lacks the means to do so.
(d) It would now appear that Order 39 Rule 46 only provides that a party needs to furnish reports on a like for like basis. For example, a party who has a report from an Engineer need only furnish same when the other side's Engineer has completed their report or, alternatively, they can insist upon an undertaking as per the undertaking ordered in the Harrington case. If the other party is not going to obtain an engineer's report then possibly the expert report may not have to be given at discovery stage.

High Court to disallow unnecessary expert evidence

In October of this year, new High Court Rules came into effect. Order 36 Rule 58(1) Rules of the Superior Courts provides that the High Court can exclude expert evidence where the Court considers such evidence is not "reasonably required to enable the Court to determine the proceedings".

In the case of O Brien –v- Clerk of Dail Eireann [2016] IEHC597 being a judgement of the President Mr. Justice Kelly on 3rd November 2016, the issue of this order was considered. The High Court ruled that under this Rule the Court is entitled to restrict such evidence to that which is reasonably required to enable the Court to determine the

proceedings. No longer are parties free to call expert witnesses willy nilly. The Court can determine what is needed and restrict expert testimony accordingly.

In the case in question the President determined that he could not see how the evidence would be required still less reasonably required to enable the Court to determine matters.

This decision determines that the Court can decide in certain cases that expert evidence will not be allowed.

This does not mean that practitioners should not get input from a relevant expert. The issue that practitioners will need to address is whether expert evidence is going to be reasonably necessary and this is the test which should be applied.

Judge refers papers to DPP over crash claim

A High Court Judge has asked the DPP to consider taking criminal proceedings against a County Limerick man for falsely claiming damages arising from a crash.

The High Court judge instructed that the court's digital audio recording of the case along with the relevant papers be sent to the DPP.

The digital audio recordings have replaced Court stenographers and records everything that is said in Court. The High Court Judge in the case ruled that the claimant had given false and exaggerated evidence.

False evidence alone or exaggerated evidence alone would in our view be sufficient to warrant a judge sending papers to the DPP.

The UK Great Repeal Bill

Theresa May at the Conservative Party Conference this year, unveiled her cunning plan. The UK Prime Minister promised a Great Repeal Bill. This is intended to repeal the European Communities Act (ECA)

1972, the legislation which gave effect to the UK law in the UK and will convert all EU Laws into UK law.

Is it really a repeal Bill?

It will not repeal EU legislation. It is going to increase the volume of legislation. All the legal Acts and Court decisions which make up EU law will be converted into British law.

There are difficulties ahead. Most EU Directives have been implemented into UK Law. Some of these were by Acts of Parliament but many by way of secondary legislation being Statutory Instruments. In relation to the UK Statutory Instruments some have been adopted under powers given by specific Acts of Parliament but the majority have been adopted under the powers in Section 2 (2) of the European Communities Act 1972. The repeal of the 1972 Act will result that these Statutory Instruments will become invalid. There will therefore need to be specific UK legislation to contain a provision ensuring the continued validity of these measures if EU law is going to be adopted straight away into UK law.

With regards to EU Regulations these are directly applicable. This means they do not need to be implemented. They are automatically part of UK law as they are part of Irish law. These Regulations will need to be implemented specifically by the UK Government into British Law. Effectively, this will mean that it will not be a repeal Bill but effectively a Retention Bill.

There are other issues which will arise too. The UK Prime Minister has stated that she will convert all EU Law into British law as a starting point. This will include the EU Charter of Fundamental Rights; certainly it is not popular in the UK Government. The UK Government has stated that once this great Repeal Bill is in place, they will review the entire EU rules to see which will be maintained and which will be improved or repealed. There are difficulties with this. Many of these will be subject to international agreements.

There are some 14,000 international Treaties which the UK has signed. Some of them may limit the freedom of the UK Government.

The UK Prime Minister has stated that existing workers legal rights will continue to be guaranteed. Let us look at situations such as the Working Time Directive and the Agency and Fixed Term Work Directives. You also have for example the Transfer of Undertaking regulations. By taking over all EU Law in the Great Repeal Bill this means that existing Judgements of the Court of Justice interpreting these EU Directives will effectively become of UK Law. They will effectively be considered binding. However, post Brexit, they would not be binding. Will they be of persuasive value only?

How this is going to operate in practice is a nightmare. In Switzerland judgements of the Court of Justice were persuasive only. This meant that for a number of year's Swiss judgements needed to explain what effect the Court of Justice judgement had in Switzerland. This became an impossible task. In 2009, the Swiss Supreme Court ruled that the judgement of the Court of Justice would apply unless there was a good reason why not.

EU law is not going to remain as it is. There will be new Directives. There will be amendments to existing Directives and Regulations. What happens if for example the Transfer of Undertaking Regulations which are being considered for update are amended. Will the UK continue to apply the old Regulations or will they apply the new. What happens if there is a Transfer between a UK company and an Irish company.

There is a huge volume of UK law which has implemented EU law. The Prime Minister has stated that this would be subject to full scrutiny and proper parliamentary debate. Realistically this can never happen as the UK parliament neither has the time, capacity nor the ability to undertake a review of all EU laws. The only way this can be done is effectively by granting the executive power to amend Statutory Instruments and even Acts of the UK Parliament.

You then have to look at how the UK is now structured. You have evolved government in Scotland, Wales and Northern Ireland. These evolved entities are entitled to set their own laws as they effect the local situations. Effectively you could have a situation where there are different working time rules in Northern Ireland, Scotland, Wales and the rest of England. This is a potential nightmare. There are many social pieces of legislation which are applied differently in different

parts of the UK. For example, gay marriage is allowed in England but it is not allowed in Northern Ireland. With the UK currently as part of the EU then EU Directives and Regulations effectively were applied across the United Kingdom. With evolved government repeals, and alterations will have to take place in each of the four now sections of the UK. That will create difficulties.

In Ireland there has been a considerable amount of talk about there being a common travel area and no border between Northern Ireland and the Republic. There are huge challenges in the area of employment law alone. Let us take a company which is registered in Northern Ireland. Their workers work both in Northern Ireland and in the Republic. What happens when a State project comes up in the Republic. What happens if the Northern Ireland Company applies but is receiving State Aid from the UK Government? Currently, this would be illegal under EU laws but if EU law no longer applies will that give the Northern Ireland company a competitive advantage?

What is going to happen in the case of job applications? You have a job advertised in the Republic by a company and the same company offering the same job in an associated company in France. An Irish national, Spanish National and the UK national apply for both positions. For the job in France, will the individual be regarded as a non EU national and that therefore priority must be given to the EU nationals if they can perform the post? Will different rules apply here in the Republic? Will we be allowed to have them?

In relation to employment law rights, are we going to be into forum or State shopping particularly when it comes to where jobs will be performed? There may be different employment rights which could be significantly different and more beneficial to an employer depending on whether the factory was based in Dundalk or Newry. The freedom of movement of workers is a fundamental right within the EU. If the UK is going to close that down, it is difficult to see how Ireland is going to be able to get a special treatment. There will be potential for huge abuse. Let us take a position of a UK company who wishes to move 500 workers to Paris. They wish to set up a group company in Paris. As Brexit has occurred there will be no freedom of movement of workers. If Ireland has this common travel area and a freedom of movement of workers between the Republic and the UK then the UK Company could simply set up a company somewhere in the Republic

for a very short period of time. They then advise that they are closing down the Irish operation and moving to Paris. They give the individuals an option of redundancy which is never going to be really an option as they will know what is happening or to move to Paris. This will be an Irish company with Irish workers who just happen to be UK nationals who have gained a right to work in the EU who are now being transferred to Paris. If it applies one way it equally is going to apply as regards going to the UK. It is therefore difficult to see how post Brexit despite everything that has been said that there is going to be a common travel area particularly a right to automatically work in the UK or Ireland.

There is equally going to be difficulties in relation to companies that go into liquidation where they have operations in Ireland which may have limited assets but where the main assets are in the UK particularly as regards making claims to the Social Fund. There is a lot of talk going on in relation to Brexit but there is virtually none in the area of employment law.

If we do not address this issue at the very start of any Brexit negotiations we could be left with an employment law nightmare once Brexit occurs.

SERVING PLEADINGS DURING THE LONG VACATION

Order 122 of the Rules of the Superior Courts have been amended by S.I. No. 471 of 2016 Rules of the Superior Courts (Order 122) 2016 and rules 4 and 5 have now been substituted with the following: -

" 4. Subject to rule 5, a party may deliver or amend a pleading during the long vacation.

5. Save on consent of the parties or by direction of the Court, the month of August shall not be reckoned in the computation of the times appointed or allowed by these Rules for amending, or delivering a pleading. "

In summary, a plaintiff or defendant may deliver or amend a pleading during the long vacation and the month of September is now reckoned

in the computation of the times allowed by the Rules of the Superior Courts.

This amendment came into operation on 10th October 2016.

TIME LIMITS IN PERSONAL INJURIES CASES

In most cases for personal injuries, the case must be brought within a period of 2 years from the date of knowledge of the injury. There are some exceptions to this rule which will not be explored in this short article. However, the exceptions to the rule and the information set out below are only some of the reasons why people who are injured should seek legal advice and use a solicitor instead of bringing a claim by themselves.

The introduction of the Injuries Board and the associated legislation have provided for a very generous application of the time limits for bringing a personal injuries case and how this time limit calculated. Below is a brief summary of this calculation: -

- Time is stopped once the Injuries Board acknowledge receipt of the completed application form and medical report.

- Time continues to remain on hold until 6 months after the claim has come out of the Injuries Board, i.e. a period of 6 months from the date of the legal document known as the authorisation.

- Time will start to run again after the expiration of 6 months after the claim has come out of the Injuries Board, i.e. 6 months from the date of the legal document known as the authorisation.

- The remainder of the 2 year period will run until the court proceedings have been issued out of the relevant court office.

Section 46 (3) of the Personal Injuries Assessment Board Act 2003 makes provision for the Injuries Board to issue a legal document known as an authorisation in circumstances where the injured person omitted to specify in his or her application form a person that may be liable for his / her injuries due to a genuine oversight or ignorance of all of the facts. This is a very interesting piece of law in that it allows

for an even more generous application of the time limits in personal injuries cases in addition to the calculation set out above.

The Supreme Court addressed the use of Section 46 (3) in the case of Renehan –v- T & S Taverns Limited [2015] IESC 8. The Supreme Court ruled that where a second authorisation is issued by the Injuries Board under Section 46 (3) of the 2003 Act, the starting point is the making of an application to the Injuries Board against the incorrect person which stops time running and it was only after the Injuries Board issued the authorisation against the correct person that the time started running against the person named in the authorisation.

Time limits in personal injuries cases are difficult and confusing to a person who is not legally trained. It is always best to obtain the advice of a solicitor if you have been injured and think that you may have a claim for personal injuries.