Introduction

Welcome to the August / September issue of Keeping In Touch.

Since the last issue of our newsletter we have moved to

9 Herbert Place, Dublin 2

Our new telephone number is 9695781

Our new fax number is 9695782

Our new DX Number is 179016 Ballsbridge 2

We are delighted with the move to our new premises. It gives us the potential for expansion. We are now in premises which have been upgraded to provide the highest standard of technical support to assist all those working in the firm to provide the best service we can to our clients.

July was an exciting month for the firm. Our Senior Associate Michelle Moran and our Office Manager Lorraine Eagers both obtained the Advanced Diploma in Applied Employment Law. Our congratulations to both our colleagues on this fantastic achievement. The firm seeks to ensure there is ongoing training in the firm. By ensuring that our professional and support staff have appropriate training it facilitates us in providing a better service to our clients. The ability to be able to identify claims or cases where immediate action may be required in scheduling appointments facilitates us in providing quality service to our clients. Of course all professional advice and representation is undertaken by qualified Solicitors in the firm. Saying this, the ability to be able to identify issues where immediate attention is going to be required facilitates us in streamlining our client services.

Richard Grogan of this firm had an article published in The Parchment being the official publication of the Dublin Solicitors Bar Association Summer Edition entitled “Tax and WRC Decisions – A Disaster Zone”. In this article Richard has been highly critical of certain decisions of the WRC which he believes are contrary to the tax

legislation applicable in this country. What is interesting is that since Richards's article was published a decision from the Labour Court has issued which would be exactly opposite to the approach taken by the WRC. The WRC in certain cases is awarding compensation in unfair dismissal cases as being exempt from tax. The Labour Court in a recent case, which is reviewed in this edition of our newsletter, has confirmed that such awards are subject to tax. We did write to the Law Society about the incorrect tax treatment of awards by the WRC. We would like to thank Stuart Gilhooley and Michael Quinlan the President and Vice President for their support. As a result the Society met the WRC and we are now assured Adjudicators have been advised of the correct tax treatment.

Two members of our firm have recently got married (not to each other). On behalf of the entire firm we would like to wish them and their spouses a long, happy, and, healthy marriage.

We would like to thanks those colleagues who have told us that they found our publication useful and helpful to them. We particularly like to thank those colleagues who have taken the time to bring to our attention cases which they believe we might be interested in commenting on.

Currently we have to review in the employment area, cases in the European Court of Justice, the Supreme Court, the Court of Appeal, the High Court, the Labour Court, and the WRC along with the Employment Appeals Tribunal. This is a considerable amount of case law which has to be read. This does not include new legislation coming through. For a firm of our size this is a considerable time and resource issue which we have to give to this function. We believe that it is important that we do so for the purposes of keeping ourselves up to date. However, it is always possible to miss a case and where colleagues bring cases to our attention we are extremely grateful.

Finally Richard Grogan of this firm was interviewed on The Last Word with Matt Cooper on 21 August dealing with age discrimination and forced retirement of employees.

We hope you find this issue useful and informative.

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Labour Court and WRC Cases

In this edition we have included a review of cases in respect of the Labour Court issued up to 27th July (published by the Labour Court on 3rd August) and the decisions of the Adjudication Officers up to 20th July, which were placed on the website on 3rd August.

There is a time lag between the dates that matters go up on the system and us including them in our Newsletter. That however is primarily due to the volume of cases which we have to review. As a small specialist boutique firm this is additional work which we undertake in addition to our normal work and therefore we have to put a realistic cut off date to enable cases to be reviewed fully and then for this publication to be typed.

Helen Earley and Health Service Executive (Number 2)

The Court of Appeal in Decision 2017IECA being a judgement delivered on 18th July is one which is a follow on from the previous decision delivered on 15th May 2017. In this case for the reasons stated the Court has granted an injunction directing the HSE to restore the plaintiff to her contractual position as an area director of nursing, mental health services for the Galway Roscommon Region.

The Court pointed out that once she is restored to that post her tenure there is of course subject to the terms of her contract of employment.

The Court in this case pointed out that just in the case of Wallace and Irish Aviation Authority 2012 IEHC178 the employer in the present case who decided to give Ms. Earley a specific contractual position which was shrouded with a range of specific commitments which excluded unilateral action of this kind which was subsequently taken by the self same employer in the present case. The Court went on to state;

“Again, just as I put the matter in Wallace, the HSE “can hardly feign surprise or look askance if this Court merely holds it to its own word”.

Who is an employer?

In the case of The Minister for Education and Skills and Jecqueline Walsh DWT1716 the Labour Court had to deal with an issue as to who the correct employer was in relation to claims under various pieces of legislation. This office was involved acting for the employee.

The issue as to who the correct employer is for various claims has been the subject of a lot of discussion since the decision of the Court of appeal in Minister for Education and Skills and Anne Boyle 2017 IECA39.

The Labour Court in this case had to deal with extensive submissions by both sides which involved the school, the Department and the employee as to whom the correct employer was.

The Labour Court has confirmed that in claims under the Payment of Wages Act the Department as they pay teachers is the correct employer for that Act. But that for a claim under the Organisation of Working Time Act the employer would be the school.

This case is very important in clarifying the law. It will mean going forward that a person who is for example a teacher who has claims for non payment of wages, for example, may have a claim under the Organisation of Working Time Act, such as an equality claim especially one where the equality claim may also have, for example, an equal pay claim. There is going to be multiple respondents having to be brought into the proceedings. In a case such as that which is given in this example you would have a situation where for a claim for equal pay under the Equality legislation or for an outstanding Payment of Wages claim. Such claims will go against the relevant department being the Department of Education and Skills whereas claims for discrimination not involving a pay element and a claim for example under the Organisation of Working Time Act would have to go against the school. This decision from the Labour Court is an important clarification as to what the law on this issue is.

The Court has helpfully pointed out that there has been a history of uncertainty as to whom employers are in cases where an employee is engaged by one entity but is paid by a second entity.

It is our understanding that the case of the Department of Education and Skills and Anne Boyle being a decision of the Court of Appeal is being appealed to the Supreme Court. It would therefore appear that the best practice for colleagues who may have a claim on behalf of an employee will be to issue all claims against all parties so as to protect their position. The reason for saying this is evident from the case of our client against Mary Keane and Others under TED1715 where the claim was against the Members and Board of Management of the relevant school where compensation was awarded under the Terms of Employment (Information) Act.

It is highly unsatisfactory, in our opinion that the issue is not clarified as to whom an employer is. Unfortunately our legislation appears to have different definitions of employer and employee depending which Act you look at. Such a situation can arise when there are legitimate reasons for this but it is our view that there has been a haphazard approach to defining who an employee is for the purposes of legislation.

The Gig Economy

In ADJ2518 the Adjudication Officer in this case held that an individual who was involved in food delivery paid €2 per delivery on top of the price of the food was not an employee. The employee was not listed as an employee on any documentation. This whole issue of who is and who is not an employee and who is and who is not a self employed contractor is a significant problem in these service type industries.

It is clearly an issue which needs to addressed.

We would certainly see more and more individuals being classified as self employed when they are not self employed.

The decision of the Adjudication officer in this case is quite a short decision. It may well be that the individual was not an employee. However it is relevant in our view that this whole issue of the gig economy needs to be addressed at Government level and with set rules set out as to who is and who is not an employee.

There is certainly an argument that there should be a minimum hourly rate which must be paid before anybody can be classified as self employed and this should be well in excess of the National Minimum Wage.

Termination Date – HSE and Long UDD1731

This is a very interesting decision from the Labour Court.

The employee was under a disciplinary process. During the process the employee was paid. The employee received a P45 dated 28th may by letter dated 16th June 2016.

It was argued by the employer that the payment was a "mere benefit". The Labour Court rejected this.

The Labour Court held that the employer by continuing to pay the employee, though not requiring the employee to work, seemed to the Court to be a clear acknowledgement that the employment continued. On that basis the Labour Court gave a preliminary ruling that the employee had commenced the claim in time and that the Court could proceed to hear the case.

The decision itself is important and relevant. It is also however an indication that the Court is prepared to use its new jurisdiction to issue preliminary rulings. This makes clear sense where a preliminary matter may actually dispose of the entire case. This is not the situation here of course that the matter will now go for full hearing but it is extremely useful that the Court is using this procedure.

Unfair Dismissal Awards

We are still seeing decisions coming out from Adjudication Officers in the WRC awarding compensation under the Unfair Dismissal Legislation for gross loss. We regard this as incorrect. The Legislation provides for a net loss not a gross loss. As a firm which represents employees or is known for representing employees might be a better way of putting matters, it might be thought that we would be in favour of such a situation. The opposite is the truth. Our job is to present

cases in accordance with the law and to argue in accordance with the law and we have never argued for other than net loss of earnings. We have never argued for a gross loss of earnings. The legislation is absolutely clear under the Unfair Dismissal Legislation that it is a net loss of earnings not a gross loss of earnings award which can be made.

The fact that it is a net loss of earnings award which is made will however mean that under the Taxes Acts that that net award is treated as actually a gross award for Tax Legislation. Of course that is unfair but that is the law. It is the duty of an Adjudication Officer to apply the law. The fact that an Adjudication Officer has to award on the net loss and then it is then subject to tax again is outside the remit of an Adjudication Officer. Equally, for an office like this, in presenting cases on behalf of employees or defending cases on behalf of employers, it will always be on the net loss not on the gross loss.

As set out by Mr. Justice Charleton in the case of Galway Mayo Institute of Technology it is a matter for a Court or a Tribunal to apply the law as it is whether it is liked or not. It is a matter for the Oireachtas to make the law.

Unfair Dismissal and Fair Procedures

In Case UDD1735 being Pottle Pig Farm and Panasov the Labour Court had to deal with a case involving an Unfair Dismissal. Both the employer and the employee were legally represented by Solicitors and Counsel.

The case is an interesting one for individuals to read as there is a comprehensive decision. There are some parts of that decision which we think are very noteworthy to comment on.

The Court concluded that the manner in which the decision was made to dismiss the complainant was void of any form of procedural fairness and offended against the principles of natural justice to which he was entitled.

The Court held that no investigation or inquiry was carried out. The Court held that the employer had come to the conclusion that the complainant was guilty of a serious offence without giving him an

opportunity to defend himself and/or to respond to the allegations made. The Court also pointed out that the employee was not allowed any representation and was given no right to appeal.

The Court held that the employee was dismissed in an insensitive manner as it was done over the phone.

The Court quoted the case of Gearon –v- Dunnes Stores Limited UD367/1988 where the EAT held;

"The right to defend herself and have her arguments and submissions listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent of the respondent or the Tribunal…As the right is a fundamental one under natural and constitutional justice; it is not open to this Tribunal to forgive its breach".

The Court held that it was of the view that a failure to properly investigate allegations of misconduct or to afford and employee who is accused of misconduct a fair opportunity to advance a defence will take the decision to dismiss outside the range of reasonable responses thus rendering the dismissal unfair.

This is a very important decision of the Court. The Representatives of the employer had contended that procedural flaws alone could not render a dismissal unfair as regards must be given to all the circumstances particularly the substantive reason for dismissing the complainant.

The Labour Court has importantly in this case clearly set out the legislation and has confirmed that that submission could not stand.

The issue of procedural fairness is one that is constantly raised in employment law cases.
The Labour Court has, importantly in this case, restated in some detail the importance of procedural fairness.

This is most definitely a case which those interested in employment law do need to read.

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Unfair Dismissal – Fair Procedures

In Case ADJ6554 the Adjudication Officer had to deal with the issue of what is fair procedures.

In this case the Adjudication Officer helpfully set out a significant amount of law such a Looney & Co. Limited – v- Looney UD843/1984 which pointed out that it was not the function of the Adjudication Officer to establish the guilt or innocence of the claimant rather whether a reasonable employer in the respondents position and circumstances at that time would have done and set this up as a standard against the employers actions and decisions be judged.

The Adjudication officer has set out very importantly that there is a requirement of fair procedures and a fair hearing refers to the case of Gallagher –v- Revenue Commissioners 1995 E.L.R. 108 with details of the complainant was entitled to fair procedures and a fair hearing in particular with regard to the timely conclusion of the investigation which in the instant case a decision was postponed due to business reasons. The Adjudication Officer held that if matters were that serious as suggested then it would have been a priority issue. Equally the Adjudication Officer quoted a case of C-v- The Mid-Western Health Board 2000 ELR38 which held that a complainant had a right to know to the full case against him. In this case the Adjudication Officer held that it was an unfair dismissal due to lack of fair procedures and awarded €3,000.

Unfair Dismissal Claims – Seeking reasons for a dismissal

The Labour Court in a case UDD1736 being a case of Faughill Properties Limited and O Sullivan is a case where the Court pointed out that the employee did not seek reasons for his dismissal from the respondent as provided for in Section 14 (4) of the Unfair Dismissal Acts 1977 – 2015.

The Court pointed out that the legal representative of the employee had entered into correspondence with the respondent's legal

representatives and the question of the summary dismissal to which neither the respondent nor the legal representatives replied.

The provisions of section 14 (4) of the legislation is an extremely useful provision for employees. The employer has a period of seven days to respond. In the absence of a response the employer can only reply upon substantial grounds to justify a dismissal.

This case is important for raising the issue of Section 14(4) of the Act which is often overlooked by those acting for employees in seeking same and equally by employers and those acting for employers in responding to same.

It is a timely reminder by the Labour Court of this important provision.

Unfair Dismissal – An employee must minimise their loss

In Case ADJ5398 the Adjudication Officer dealt with a case where an employee who was on long term sick leave was dismissed.

The Adjudication Officer found that the employee was Unfairly Dismissed.

An interesting aspect of this case is that the Adjudication officer referred to the case of Sheehan –v- Continental Administration Co. Ltd (UD858/1999) where the EAT stated;

"A claimant who finds himself out of work should employee a reasonable amount of time each weekday in seeking work…The time that a claimant finds on his hands is not his own unless he chooses it to be, but rather to be seeking to mitigate his loss".

The Adjudication Officer in this case awarded the maximum in such circumstances of four weeks wages being €3,200. It is sometimes misunderstood by employees that where they are dismissed they have a duty to mitigate their loss. This means just what the Tribunal stated namely that they are out actively seeking work.

Unfair Dismissal – Financial Loss

In ADJ4681 the Adjudication Officer had to deal with a case where an employee was dismissed but was working through her notice period. The employee was allowed, as the employer was claiming this was a redundancy, to attend job interviews. This would be in line with the redundancy payment legislation. The employee obtained a higher paid employment. On that basis the Adjudication Officer found that the employee had suffered no financial loss and no award was made.

Even if the Adjudication Officer had found that there was an Unfair Dismissal the maximum compensation that the Adjudication Officer in such circumstances could have awarded was four weeks wages.

The Unfair Dismissal legislation as we have set out on a regular basis is there to compensate for the financial loss an employee suffers.

Other issues such as any upset or stress or otherwise suffered by the employee as a result of dismissal is irrelevant to an Unfair Dismissal case.

Some employees will tell us this is unfair. It may well be. However it is the law. The WRC can only apply the law as it is.

Unfair Dismissal – Lack of Work

In the case ADJ5344 the Adjudication Officer had to deal with a situation where an employee had not been paid for four months. The Adjudication Officer accepted that the employee had been constructively dismissed and awarded €20,000 in compensation along with a little over €14,000 in unpaid wages.

It is staggering that an employer would simply not have paid an employee. Of course employers can have financial difficulties. There can be a downturn in business due to losing a substantial contract. The employer always has an alternative. That is to place the employee on lay-off. This is of course subject to the condition that there is such a term in the employee's contract of employment or alternatively a custom and practice within the industry or the relevant business.

The alternative if an employer looses a major contract as a result of which work dries up then there is the alternative of undertaking a redundancy process.

Where an employer simply decides not to pay an employee then in those circumstances the employer is running the risk of having an unfair dismissal claim against them upheld as happened in this case?

Unfair Dismissal setting compensation

In ADJ6554 which we have reviewed separately in this publication the Adjudication Officer in setting compensation stated that this was based on the loss of earnings, expected loss of earnings and receipt of Social Welfare as well as his contribution to the dismissal in awarding a sum of €3,000.

In our view the Adjudication Officer was wrong in taking into account any Social Welfare contributions. Section 7 (2A) specifically provides that in calculating financial loss payments under the Social Welfare Consolidation Act 2005 are to be disregarded.

Unfair Dismissal

In ADJ4854 the Adjudication Officer in this case had to deal with a claim for Unfair Dismissal. This is an extremely useful case for any practitioner to read. The Adjudication Officer awarded €10,000 in compensation for Unfair Dismissal.

The Adjudication Officer pointed out that there was serious lack of fair procedures in relation to this case.

It was found that there was no right of representation granted to the employee in circumstances where dismissal was a possibility and ultimately resulted in dismissal.

That the employee was not given a right of appeal.

The Adjudication Officer in this case rightly found, in our opinion, that there was an unfair dismissal because of fair procedures not having been complied with. It is interesting that the Adjudication

Officer pointed out as regards the right of representation that the issue was not even explored as to whether it would be a family member or somebody who might be more combative.

It is quite frightening that employers still do not understand that there is a requirement of fair procedures in any dismissal case.

The Adjudication Officer, in our opinion, got this decision absolutely right as regards the law relating to Unfair Dismissal.

Unfair Dismissal – Getting it all Wrong

In Adj6307 the Adjudication Officer has issued a very interesting Decision. It appears that at the time the employee attended a disciplinary hearing he was handed a letter which the Adjudication Officer held must have been typed and signed in advance of the disciplinary hearing advising the employee that he was dismissed.

The Adjudication Officer held that this was in breach of fair procedures and awarded €9,000 to the employee.

Unfair Dismissal – the Disciplinary Process

In a case of Maybin Support Services (Ireland) Limited and Niall Campbell UDD1732 the Labour Court had to deal with a situation where an employee had been put through a disciplinary process. The employer determined that this was gross misconduct and dismissed the employee. The employee appealed the dismissal. The person hearing the appeal decided that taking into account the length of service with the company that the employee should be given a second chance and that the sanction would be reduced to a final written warning with the employee being assigned to duties on another site. The employee underwent the training required but after a short period decided the alternative assignment was not acceptable and informed the respondent. At this stage the respondent company decided to dismiss the employee on the basis that it had made a previous finding that he had been guilty of gross misconduct.

The Court in this case considered the submissions and the evidence. The Court pointed out that the company had found the employee guilty of gross misconduct. The Court however pointed out that the company had decided not to dismiss him and instead it offered a different sanction. The Court pointed out that the employer offered to transfer the employee to another location and arranged site specific training for him in that role. When the employee advised that he did not wish to take up that position the company decided to dismiss the employee. The Court stated that they did not find that justification for dismissal. The Court held that the employee had moved beyond the finding of gross misconduct and was now complaining about the nature of the reassignment. The Court stated that he was entitled to do so and to expect that he would be dealt with through the normal staff management process.

Instead they pointed out that he was met with summary dismissal on the basis of an incident that had already been dealt with and disposed of. The Court held that there was no merit in that approach and that the respondent company could not rely on the earlier incident having decided to deal with it by way of a transfer rather than dismissal.

The Court found that the dismissal was unfair.

The Court noted that the employee in this case had contributed substantially to the manner in which the situation developed and that the employee did not reasonably engage with the site reassignment given the circumstances and the spirit which the decision to transfer rather than dismiss was originally taken. In this case the Court found that the appropriate remedy in this case was to order the reengagement of the employee to be assigned duties as a security officer in a location determined by management in accordance with the terms of the employee's contract of employment. The Court pointed out that the period between the dismissal and the reengagement should be treated as a period of suspension without pay which does not break the continuity of service.

This is an important decision from the Court in that it sets out their approach in relation to how matters should be dealt with.

It is a timely reminder that employers must ensure that fair procedures are applied at all stages.

Unfair Dismissal and associated claims

In ADJ4846 the Adjudication Officer had to deal with a number of claims.

The decision is a very clear decision in relation to the issue of Sunday premium and the Adjudication Officer has held, in line with Labour Court decisions, that where the premium is not set in the contract then it is a matter for the Adjudicator to determine what the premium should be.

The Adjudication Officer also held, which would also be in line with the Labour Court decisions, that in the absence of records relating to rest and break periods the onus of proof is on the employer to prove same.

In this case there was no contract put in place. There was an issue relating to when the employee commenced employment. The Adjudication Officer decided that the date of commencement was before the date that the employer contended it was and on that basis found that the employee had 12 months service. In addition, as the time coming up to the employer's date that they say the employee commenced and the date that the employee was dismissed was only some 9 days. The Adjudication officer could also have added in the notice period to the termination notice from the employer which would have brought the employee to within 2 days of the date that the employer contended that the employee commences.

With the employee having documentation bringing matters back to a date significantly before that that the employer contended the issue would have been fairly well beyond any doubt.

As regards compensation under the Organisation of Working Time Act, Terms of Employment (Information) Act the Adjudication Officer clearly set out which part of the compensation was taxable and which part was not. In relation to the Unfair Dismissal claim it would of course be taxable. The Adjudication officer has held that the claim for Minimum Notice is compensation and is not taxable. We would disagree with that view. Minimum Notice is an amount which relates

to non payment of wages and therefore in accordance with the provisions of the section 192A TCA97 it would be our view that this is actually taxable.

While we may disagree with the Adjudication Officer on this point we would be of the view that this is a very clear, precise and well thought out decision which is easy to follow particularly as the way the Adjudication Officer has set out that the application of the law and for this the Adjudication Officer must be commended.

Constructive Dismissal

The issue of constructive dismissal has been raised by us on a number of occasions.

We thought it might be useful to review some recent decisions on this very issue. Reviewing ones where the employee has won as well as those where the employee has lost.

In case ADJ5216 the Adjudication Officer has spent a considerable amount of time reviewing the case law in some depth. The Adjudication Officer has referred to a number of cases but including in particular the case of Berber –v- Dunnes Stores 2009 E.L.R.61 where Finnegan J stated;

The conduct of the employer complaint 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 such that the employee cannot be expected to put up with it".

The Adjudication officer rightly pointed out that in such circumstances the burden of proof is on the employee.

The Adjudication officer referred to cases such as Kirwan –v- Primark (UD270/2003) and pointed out that going through the grievance procedure it must be a genuine attempt rather than simply going through it as a process. The Adjudication Officer also referred to the case of Barry -v- HSE Trading as HSE Northwest 2016 27E.L.R. 268 where it was stated;

"The Tribunal finds that the claimant did not give her employer an opportunity to deal with her complaint".

The case of Zabiello –v- Ashgrove Facility Management Limited UD1106/2008 was also quoted and in that case it was held;

"For a claim of constructive dismissal to succeed the claimant needs to satisfy the Tribunal that her working conditions were such that she had no choice but to resign....The Tribunal is satisfied that the claimant did not exhaust the grievance procedures before she resigned.

Accordingly the Tribunal finds that the claimant was not constructively dismissed."

The Adjudication Officer has rightly pointed out that it is well established law that the general rule is that the claimant must exhaust the internal process prior to lodging a claim with any external body. The Adjudication Officer in our view correctly pointed out that on occasions, and in very limited circumstances, when a claimant can prove, by the production of evidence that the invoking of the grievance process would be a fruitless exercise the general rule can be dispenses with". This is the exception in the case of Harkin –v- Guinness Storehouse Limited UD496/2015. In this case the Adjudication officer held that exception did not arise on the particular facts. In ADJ3817 the Adjudication Officer in that case held that the employee must prove it was reasonable for him to terminate his own employment due to a significant breach by the employer of a fundamental term of his employment contract or because of the nature and extent of the employers conduct and the circumstances in which the employee was expected to work it was reasonable to do so.

In both of the above cases the employee was not successful.

In case ADJ3000 it was a case where it is noted that both parties were represented. The employee was successful in this case and obtained an award of over €26,000. In this case the Adjudication Officer has set out that the legal test in respect of constructive dismissal was provided by the UK Courts of Appeal in Western Excavating (EEC) Ltd –v- Sharp [1978] I.R.L.R. 72 which laid out two tests referred to as the contract and the reasonableness tests. It summarised the contracts

test in the following terms as "if the employer is guilty of conduct which is a significant breach going to the route of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance. The reasonableness test assess the conduct of the employer and whether the conduct itself or the affairs are so unreasonable that the employee cannot fairly be expected to put up with it any longer and if so the employee is justified in leaving. The Adjudication Officer pointed out that the case of Berber –v- Dunnes Stores 2009 20E.L.R.61 held that the test for whether the employers conduct had breached the employed term of mutual trust and confidence in every contract of employment was an objective one.

The Adjudication Officer pointed out that there are cases where there are circumstances where an employee does not have to exhaust all internal grievance procedures prior to resigning such is the case of Conway –v- Ulster Bank and Smith –v- RSA Insurance Ireland Limited UD1673/13 and Higgins –v- Donnelly Mirrors UD104/1979.

In this case the employer did have a grievance procedure and the Adjudication Officer found that there had not been compliance with same and held that there had been a failure to deal with grievances raised.

The issue of constructive dismissal is one where they are extremely difficult cases for an employee to win. As a general rule before an employee resigns they should go through the internal grievance procedure. This would mean issuing a grievance and an appeal.

If an employer receives a grievance in accordance with the Grievance procedure then of course the grievance should be investigated. Failure to deal with the grievance in a speedy manner or at all may assist an employee in bringing a successful Constructive Dismissal claim.

Any investigation by the employer should be a fair investigation.

Before an employee resigns without going through the grievance procedures it is imperative that the employee considers whether they will pass the test of effectively that they had no choice but to resign.

Where the employee has not gone through the grievance procedures that is a significant mountain which an employee is going to have to climb.

The reality of matters from reviewing decisions of the WRC is that the vast majority of constructive dismissal cases are lost and it is a small minority which are won and that the reason people loose these claims is that they have never gone through the grievance procedures or attempted to go through to grievance procedures.

Published in Irish Legal News on 21 August 2017.

Resigning – A Cautionary Tale

In case UDD1730 the Court had to deal with a situation where an employer had told an employee that her husband could not undertake her shift because of the fact that her husband had worked 60 hours a week for a number of weeks prior to that date.

It appears that the employee got annoyed and resigned.

The Labour Court in this case has helpfully pointed out in relation to constructive dismissal, where an individual resigns that in those circumstances an employee has an opportunity shortly thereafter to rescind any resignation and to come to work as rostered. The Court pointed out that the employee had done neither.

The Court pointed out that this is a case where the employee had resigned in the heat of the moment and had not taken the opportunity to contact her employer to say that she regretted this.

It is standard in employment cases, and this would be our comment, that where an employee resigns and shortly thereafter seeks to rescind the resignation because it occurred in the heat of the moment then an employer is generally speaking obliged to accept same. Matters can arise in the heat of the moment. Equally however an employee who in the heat of the moment resigns has to consider whether that was an appropriate response and when they have had time to cool down a little bit to consider whether the resignation should be rescinded.

Constructive Dismissal cases, in our opinion, are extremely difficult to win. The employee who resigns in the heat of the moment really should take some time. Think about it, and decide whether it is a resignation which they wish to stand over in line with the requirements for a constructive dismissal claim or whether it is one that they need to consider rescinding.

It would be our view that no employee should ever resign without first getting legal advice. There is nothing to stop an employee undertaking a job instructed by the employer and writing to the employer stating that it was under protest and raising a grievance with the employer.

It would be our view that before an employee resigns it is important that the employee utilises the grievance procedures.

Unfair Dismissal – Unfair Selection for Redundancy

Where an employee is unfairly selected for Redundancy this can result in an Unfair Dismissal case. This occurred in a case ADJ2619 where an Adjudication Officer awarded €12,000 to the employee holding that the dismissal in such circumstances was an unfair dismissal. The employee had an economic loss in 2016 of €6162 between what he would have earned in his previous employment and after the dismissal. Compensation of €12,700 was awarded. This effectively is 2 years loss of earnings. Such decisions are important to have a significant impact on employers and it is important that employers apply fair procedures.

In this case the employee relied on cases of Mackey –v- Resource Support and Services Limited UD56/2009 and Fennell –v- Resort Facility Support Limited UD57/2009 where the employee maintained that the EAT had held that in both cases there were genuine redundancies but the employer did not adopt fair procedures in affecting the redundancies.

The employee in this case also relied on the cases of Gillian Free –v- Oxigen Environmental UD206/2011 where the EAT upheld that an employer must act fairly and reasonably when selecting one employee over another for redundancy.

The Adjudication Officer held that the employer;

Failed to consult or engage with the claimants before announcing the decision to restructure. Failed to properly consult with the claimants on the procedures that it adopted. No selection matrix was discussed with the claimants
Did not afford the claimants a reasonable opportunity to consider these procedures. Did not afford the claimants an opportunity to make proposals that might avoid redundancy.

On that basis the Adjudication Officer held that the complainant was unfairly dismissed. This case is an important reminder for employers that it is vitally important that employers adopt fair procedures in the selection process. The procedures should be open. It should be transparent. There should be discussions with the employees involved. The employees should have an opportunity to put forward alternatives to redundancy or the selection process.

The fact that these things are done may not change who may ultimately be chosen for Redundancy but the issue is whether the individuals were fairly selected. Where an employer fails to apply fair procedures then they run the risk of potentially having not simply a redundancy claim but in fact an unfair dismissal claim which can be fair more expensive.

Unfortunately in many cases employers fail to obtain legal advice from specialist employment Solicitors before embarking upon redundancy processes.

The cost of doing so is far less than the level of award which can be awarded which was awarded in this case. This case is one of those cases which should be read by employment law Solicitors, HR/IR Professional and by employers. It is one of those useful decisions which issue from the WRC.

Redundancy – A Trap for Employers

In ADJ4328 the Adjudication Officer had to deal with a situation where an employee on lay-off gave a notice of intention to claim redundancy to the employer. The employee did not use the RP9 Form.

The Adjudication Officer rightly pointed out that it is preferable that the RP9 Form is used. However, equally the Adjudication Officer correctly pointed out there is no requirement under the legislation to do so. The Adjudication Officer pointed out that the employer in such circumstances must give a counter notice within 7 days of receipt of the request for redundancy.

An employee is entitled to claim redundancy where they have been placed on short time or lay off for more than four weeks. The employer, if they give a counter notice must do so within 7 days. That notice must provide that the employee would be provided with 13 weeks continuous employment within four weeks of the counter notice.

In the particular case the employer received a notice but did not respond within the 7 day period of time. The Adjudication Officer therefore, in our opinion, correctly held that the employee was entitled to redundancy.

Under the Redundancy Payment Act there is no provision for an extension of time for the employer to give a counter notice. It is therefore important that employers who receive a request for redundancy respond immediately if they intend to give a counter notice failing which the employee will automatically become entitled to a redundancy.

In another case under ADJ1190 the Adjudication Officer had to deal with a situation where the employer claimed that there had been a transfer under the Transfer of Undertaking Regulations, commonly called TUPE. This is a defence to a claim for redundancy. The Adjudication officer in this case which is one which is interesting went though the history of what happened when the business closed down and found that there had been no transfer under the Transfer of Undertakings. Therefore the Adjudication Officer held that the notification of termination of the employment was simply a notification of termination of the employment which entitled the employee to claim redundancy.

If an employer is going to be relying on the defence that there is a transfer under the Transfer of Undertaking Regulations to a claim for redundancy it is important at the time that the transfer is taking place

that the employer ensures that the appropriate notifications are sent advising the employees that a transfer is going to take place under the said Regulations.

Redundancy as a cloak to an Unfair Dismissal

IN ADJ4920 the Adjudication Officer in this case held that the selection of the employee for redundancy was not valid and was effectively an attempt to dismiss the employee because of shortcomings in his performance. The Adjudication Officer held that the use of redundancy in such circumstances is precluded and quoted the case of JVC Europe Limited –v- Panisi 2011 IEHC 279.

The Adjudication Officer awarded compensation of €12,000. This is an important restatement of the law in this area.

Redundancy Payment Acts

It is interesting from reviewing decisions of the WRC that there appears to be a number of redundancy claims going through the WRC. Many of these are uncontested. To an extent we can understand this.

Currently there is no rebate available to an employer who pays redundancy. Therefore with the delays in the WRC it makes economic sense for an employer simply not to pay the redundancy, let the employee bring the claim and wait for the decision to issue. With the delays in getting hearings and in decisions issuing the employer may not receive any decision against them for maybe 10 months.

Where the employer does not pay then of course the Department of Social Protection can peruse the employer for same.

Previously where a rebate was available in those circumstances the rebate would only be allowed where the Department did not have to pay out the monies.

The issue of redundancy payment to employees is a very serious. Where an employee looses their job due to redundancy and has to

wait for many months to get an order which then has to be sent to the Department this is unfair.

It is a very simple matter for the WRC to write to employers in such cases asking the employer whether they are contesting the redundancy. If the employer does not respond then the case should be listed very quickly. If the employer responds that they are not contesting the redundancy then equally it should be listed very quickly.

Where an employer contends that they are contesting the redundancy then in those circumstances a submission from the employer should be sought. It should be reviewed by the WRC and a determination made whether this is a case which should get priority as the defence is, for example, fairly thin and unsustainable, or one where there may be a full and valid defence which may mean that the matter has to await its normal place in the queue. In uncontested redundancies they should be listed very quickly.

That is just our opinion but it is our opinion and it is one that we think should be considered.

Pregnancy Related Dismissal

In case ADJ4877 the employee in this case brought a claim that she had been dismissed due to her pregnancy. The claim was brought under the Unfair Dismissal legislation

Certain facts do not appear to be in dispute namely that the employee had a fixed term contract. The fixed term contract had a specific provision in it that there would be no claim under the Unfair Dismissal Act if the termination related solely to the expiry of its terms.

On 1 July the employee informed her manager that she was pregnant. She at this stage was given the rota for July and August and it would appear that the employee was on same.

On 5th July the employee was advised that her employment was being terminated with immediate effect. The Adjudication officer in this case

has held that because the employee was on a fixed term contract with the relevant provision in it relating to the non application of the Unfair Dismissal legislation that the employee could not bring a claim.

We would have certain difficulties with this reasoning.

The exclusion for bringing a claim for a fixed term worker only applied where the termination of the employment relates solely to the expiry of the fixed term contract. Where an employee is on a rota for July and August and informs the manager on 1 July and subsequently is terminated with immediate effect on 5 July there is sufficient, in our view, to put an onus onto the employer to prove that the employment was not terminated because of the employees pregnancy.

If this case had been brought under the Employment Equality Acts then the issue of the unfair dismissal legislation exclusion would not have been relevant whatsoever.

While there is an argument in relation to the Unfair Dismissal Act treatment as determined by the Adjudication Officer, where there are different views, we would accept, the position under the Employment Equality legislation is quite clear. In such circumstances the burden of proof would have been on the employer to show that the termination was other than because the employee was pregnant.

This is a further example of why employees need to get legal advice to work out what is the correct claim.

In some cases it will be the Unfair Dismissal Acts. In others it will be the Employment Equality Acts.

From a practical point of view because the employment Equality Acts are derived from European Law it is invariably, though not always, better for an employee to bring a claim under the Employment Equality legislation as there is the benefit of European Law to support any claim for dismissal.

Discriminatory Dismissal

In Case ADJ2552 this office was quoted in relation to this decision in a number of publications including the Irish Times and Irish Examiner along with the Journal and subsequently Richard Grogan was interviewed on the George Hook Newstalk High Noon.

In this case the Adjudication Officer in setting compensation has stated that the Adjudication Officer was taking into account the fact that while the termination occurred in January 2016 the company went into liquidation subsequently later that year.

We may be wrong but it is clearly our view that the fact that a company would subsequently have ceased trading should in no way impact upon the level of compensation for a breach. In setting the compensation it is the date that the breach occurred.

Of course there can be mitigating circumstances which occur subsequently but the company going out of business is not in our opinion a mitigating factor.

By this we mean that if for example a claim under the Organisation of Working Time Act that an employee claimed that they had not received their proper rest periods and the employer came in and stated that way the position but that they now had procedures to make sure that the employee was getting there rest breaks which would have been put in shortly after any claim was made, then that would have been a mitigating factor in the future breach which would be covered under the Von Colson and Kamann principles would not apply as the deterrent effect would not be needed to be addressed. However, the breach under any piece of European legislation must be compensated for and other than an issue where the employer has shown that they have taken steps to rectify matters subsequently can any other issues be taken into account.

That is our view. We base this also on the recent case in the Labour Court under EDA1718 and an older case of EDA098. We review the case under EDA1718 later in this publication. It is one of the great benefits of the Labour Court that decisions can provide certainty going forward as to how cases should be dealt with.

Retirement Age – Equality

This is a case where an employer effectively was contending that the employee should have been aware that 65 was the retirement age. The Adjudication Officer referred to the case of Shirlaw –v- Southern Foundries Limited 1939 2KB206 where the Court held that a term as to retirement age must be implied in the contract by the application of the so called "officious bystander" test. It was set out as;

"Prima facie that which in any contract which is left to be implied and needs not be expressed is something so obvious that it goes without saying that if, while the parties were making the bargain, an officious bystander were to suggest some expressed provision for it in the agreement they would testily suppress him with the comment "oh of course".

The Adjudication Officer held that a term can be implied in the alternative and somewhat overlapping custom and practice test adopted in this jurisdiction in O Reilly –v- Irish Press 1937 71I.L.T.R.194 where it was stated that the practice must be:

"… so notorious well known and acquiesced in that the absence of agreement in writing it is to be taken as one of the terms of contract between the parties…..It is necessary in order to establish a custom of the kind of claim that it be shown that it was so generally known that anyone concerned should have known of it or easily become aware of it".

In this case the Adjudication Officer held that there was no documentation in place that provided for such a retirement age and that the employee could not be expected to be aware of it and a compensation of €5,000 was awarded.

Compensation in Equality and Associated Cases

The Labour Court decision in the case of G4S Secure Solutions (Ireland) Limited and Tiina Villi EDA1718 is an important decision in that the Court has taken the time to set out the legislation and the case law relating to the issue of compensation to be awarded. In this

case the Adjudication Officer had awarded €6,000 which the Labour Court increased to €8,000 and reaffirmed the decision of the Adjudication Officer that the employee should be placed on a roster in accordance with the terms of her contract of employment. An argument was made by the respondent employer that while they accepted that the Employment Equality Act had been breached that the employee in this case has not suffered any economic loss.

The Court importantly considered the case of Von Colson and Kamann case C-14/83, the decision of the Labour Court in C&F Tooling Limited and Cunnife DWT15125and a case of Watters Garden World Limited and Panuta EDA098.

The Labour Court has confirmed in this case that the Von Colson and Kamann principles do apply.

The Court in this case pointed out that they have been asked to take into account the financial standing of the respondent in determining the awarded of compensation. The Labour Court referred to the case of Watters Garden World Limited and Panuta EDA098. That is a case where Richard Grogan of this firm was involved as the Solicitor in charge of that case being a Partner in the firm of PC Moore & Co. Solicitors at that time for the employee. In that case the employee was represented by Ms. Marguerite Bolger who is now a Senior Counsel. In the Panuta case the employer had contended that the Court should take into account the financial circumstances of the employer in setting compensation which in that case was €20,000. The Court rejected that position. In this case again the issue of the financial standing of the employer was raised but in this case it was raised by the employee. The Court again referred to the case of Watters Garden World Limited –v- Panuta in holding that the financial circumstances of the employer is not an issue to be taken into account in setting compensation. The Court held that while the size of any award intended to have dissuasive effect may, for its effectiveness, have to take account of the financial capacity of the enterprise. The other elements of the award are related solely to the pecuniary loss suffered by the complainant and the gravity of the transgression. The Court held that the financial capacity of the respondent is neither an aggravating nor a mitigating factor in measuring compensation under those headings.

In this case the Court held that there had been no financial loss but increased the compensation to €8,000.

The Labour Court is being very consistent in assessing compensation for a breach which comes under the Von Colson and Kamann principles by which we mean a breach of European Legislation. It is clear that in setting compensation an Adjudication Officer or the Labour Court on appeal may take into account the financial circumstances of an employer as regards the element of an award which is intended to be dissuasive as regards the financial capacity of the enterprise. This makes perfect sense and is in line with the jurisprudence of the Court. An element of an award which is to be persuasive of an employer for even the same level of breach is going to be different for a multinational than it is going to be for a corner shop. That makes perfect sense. The Labour Court is consistently applying that. However, as regards the compensation for the breach itself as regards the financial loss which the employee has suffered or the gravity of the transgression then in those circumstances the financial ability of the employer to pay is not relevant. The Court in those circumstances is setting compensation for the transgression and/or the financial loss. That makes no difference to whether the employer is a multinational or a corner shop. Again, this makes perfect sense and is in line with the jurisprudence of the Labour Court. While it would not be relevant to this particular case let us take an example of a situation where you have an employee who does not receive rest breaks at work. Let us assume that the level of breach is exactly the same for two employees one of whom is employed by a multinational and one of whom is employed by a corner shop. Neither is probably going to have any economic loss. Therefore there is simply going to be the compensation for the transgression. That will be the same as it is the same breach. However, as regards the persuasive element of any award the level of an award which will be persuasive of a multinational going forward not to allow this to happen again is going to be substantially higher than would apply to a corner shop. That equally makes absolute sense.

When it comes to European Legislation the compensation must be set at a figure which is effective proportionate and dissuasive. The dissuasive element is the only element where the size or ability of the enterprise to pay is a relevant factor. The effective and proportionate element is not a factor where ability to pay would have any bearing on

the compensation. The decision which we refer to above is an extremely useful decision for setting out the law. It is well thought out and clearly set out. It is a decision which anybody interested in employment law particularly those representing employers or employees should read.

Employment Equality Legislation – Burden of Proof

In EDA1722 the Labour Court again restated setting out significant amount of case law that it is for the employee initially to produce sufficient evidence to raise a prima facia case of discrimination before the burden of proof passes to the employer. This fact is often not understood by some employees. It is however important that the Labour Court have again stated the law on this point. In this case the employee was held not to have set out a prima facia case and lost. It is however interesting that in case EDA1721 the Labour Court has set out in that case that the employee had set out a primia facia case. The Court pointed out in that case that the employer had failed to rebut the claim. The particular case involved an employee who was employed by an agency. An award of €20,000 was made.

This case highlights that once the employee can show that a primia facia case that this moves the burden of proof to the employer to show that there was no discrimination. This is a situation then that if the employer cannot do so compensation can be awarded which is what happened in this case.

Equality Legislation – Rules of Evidence

In Case ADJ5087 the Adjudication Officer in this case has set out a considerable amount of law relating to the issue of the burden of proof and has quoted a number of decisions of the Labour Court. We are highlighting just one.

In NT0KO –v- Citibank EED045 the Adjudication Officer pointed out that the Labour Court directed that the normal rules of evidence must be adapted to avoid the protection of anti-discrimination laws being rendered nugatory by obliging complainants to prove something outside their reach, which may only be within the respondents capacity to prove.

While the employee was unsuccessful at the same time this is an important restatement of the law and one of those decisions which those interested in Equality Legislation should read.

Protected Disclosure Act

In Case ADJ1380 the Adjudication Officer in this case was dealing with a case where the Adjudication Officer found that there had been a protected disclosure relating to health and safety issues. The employee had brought claims under the Unfair Dismissal Acts and the Protected Disclosure Act. The Adjudication Officer in this case pointed out that as there was a protected disclosure as a result of which they found the employee was dismissed that the Adjudication Officer was entitled to award up to 5 years compensation. In this case a little over €19,000 was awarded.

The decision does not set out what the economic loss of the employee was. In our view the Protected Disclosure Act because of the way it interacts with the Unfair Dismissal legislation only enables an Adjudication Officer to award compensation in relation to economic loss. The only difference between the Unfair Dismissal Legislation which is based on economic loss and the Protected Disclosure Act, which is also based on economic loss, is that the compensation under the Unfair Dismissal Legislation is limited to 2 years but under the Protected Disclosure Act it can be up to 5 years.

The employee in this case did not bring a claim under the Safety Health and Welfare at Work Act. If the employee had made such a complaint then in those circumstances the Adjudication officer under the Safety Health and Welfare at Work Act would have been entitled to award unlimited compensation. In addition the issue of economic loss would have been irrelevant.

There appears to be some confusion as regards how the Protected Disclosure Act applies as regards setting compensation. Certainly we would be of the view that it is limited to economic loss. That may or may not have been the intention of the legislation.

However, on the wording of the legislation it would appear that that is the effect of same, namely that it is economic loss.

Ultimately one of these cases is going to go to the Labour Court and there will be clarity then as to how the Labour Court determines the compensation is to be set. That approach will be binding upon Adjudication Officers whether it is limited to economic loss or that it is compensation regardless of loss.

It is equally clear at some stage that this issue may end up before the High Court.

It is unfortunate that when legislation is going through the Oireachtas that these issues are not made absolutely clear and precise, not just in the legislation but also in the public pronouncements by Ministers relating to the legislation.

Family Leave

The issue of family leave and by this I mean cases where an employee believes they are entitled to take leave because of an urgent family issue is becoming a contentious issue at the present time.

The relevant legislation is Section 13 of the Parental leave Act 1998 - 2006. An employee is entitled in certain circumstances to take leave from their employment which is known as “Force Majeure” leave.

Force Majeure leave applies where an employee is required to be present with an ill or injured person. The first issue is whether the individual who is ill is a family member. Under Section 13 (2) (F) of the Act the person who is ill or injured must be a person who resides with the employee in a relationship of domestic dependency. Domestic Dependency will arise where the person reasonably requires from the other person to make arrangements for the provision of care. This of course would include a child, partner and of course a parent.

Employees now sometimes misunderstand what this entitlement is. They must be urgently needed to be present with the ill or injured person. In addition their presence must be indispensable. This means that their presence must be absolutely necessary. The test is a subjective test. But let us take a simple example. You have two parents. One of whom works and the other minds the children. The person who minds the children suffers an injury and is taken to hospital. The employee who works needs to mind those children who

had been left at home because the other parent is taken to hospital. Of course this is Force Majeure but that is for that day. The next issue is whether on the next day their presence was indispensible. This is a subjective test and the issue is could other arrangements effectively have been made to mind the children. It is possible that the parent who works might get over the second day on that test. It is unlikely that they are going to get over it for the third day.

The subjective test is determined at the time that the decision is made to take the leave. It is not with the benefit of hindsight. The fact that it might be difficult for a person or even costly to arrange other care for children, in the example set out above, will not mean that their attendance is indispensable.

The entitlement to force majeure leave is 3 days in any 12 month period and 5 days in any 36 month period. This is the entitlement to paid leave. Employees sometimes forget that it is important for the purposes of claiming force majeure leave that as soon as is reasonably practicable after the leave that they must submit certain information to their employer. They must submit notice confirming that they have taken force majeure leave, the date on which the leave was taken and a statement of the facts which entitled them to force majeure leave. This statement is not one that can be added to or subtracted to into the future if the taking of the leave is challenged by the employer.

Entitlement to this force majeure leave is only in respect of days that the employee would have been working. In the example above, if the parent looking after the children was taken to hospital on a Friday this does not mean that the employee taking Force Majeure leave can take the Friday and the following Monday and Tuesday. They most certainly will not be paid for the Saturday and Sunday unless they actually normally work those days. Force Majeure leave is very restrictive. Once a person has used their Force Majeure leave entitlements then in those circumstances any further leave is certainly not leave the employee is entitled to be paid for. In addition, it will be subject to their contract of employment and there is no automatic right for a person to take leave whether paid or unpaid take further leave even as unpaid because of a family emergency.

This may seem unfair. That may well be the position. That however is the law.

We are constantly coming across cases where employees have been subjected to disciplinary procedures for taking leave and they have said to us that they have had no alternative but to do so. When matters are drilled into it often appears that they have not complied with the provisions of the Act particularly as regards giving the appropriate notification to the employer and particularly appropriate statement or it was in circumstances where it is unlikely that they would have been entitled to claim force majeure leave.

Where such unauthorised absences then occur over a period of time it can lead to disciplinary action and subsequently to dismissal. Unfortunately some people have a misconception as to what the law relating to Force Majeure leave is and their entitlement to take leave and leave their job in the event of what they term a family emergency. It must also be remembered and some employees again forget this, that Force Majeure leave is for any part of the day or a day. If in the example above the stay at home partner who was minding the children was taken to hospital at 3pm or even 4pm in the afternoon and the other parent has to leave at say 4pm. For force majeure leave purposes that is the full day. That is one day of the 3 in any 12 month period or 5 in any 36 month period gone and utilised. Some employers have a very family friendly policy towards employees. Others have the exact opposite. The Force Majeure leave legislation is there to effectively protect employees who do not have an employment which is family friendly. Employees however must be aware that even in family friendly companies only a certain amount of latitude will be granted before disciplinary action is taken. Just because a person has a sick child or a sick partner does not automatically allow them time off.

Individuals are employed to do a job. From an employer's point of view they are paying them to do a job. They want them to be there to do the job and where they are not there this interferes with the smooth running of the company.

Unfortunately legislation as it currently stands is less than satisfactory for either employers or employees. Good employers have to go to the expense of putting in place and drafting family friendly policy which encourages diversities in the work place. Those who do in our experience are attracting better employees and more committed employees. For those employees who are left in a working environment

that does not have a family friendly policy the legislation as it currently stands does not take account of the factual realities of life and does not encourage diversity in the workplace and in particular, from our experience, does not encourage women back into the workplace particularly those with young children where the woman may have the primary caring role.

The Importance of giving notification of returning to work after Maternity Leave

In ADJ5793 the Adjudication Officer has correctly pointed out that an employee who is returning from maternity leave is subject to specific time limits under Section 28 of the Maternity Protection Act 1994 to notify the employer not later than four weeks before the return date of their intention to return to work.

For some reason this is not undertaken by a number of employees.

This is surprising. The documentation from the Department of Social Protection is very clear on advising employees of this obligation.

An employee who fails to provide the relevant documentation to the employer looses the protection of the Maternity protection Act 1994.

Parental Leave 1998

In ADJ5093 the Adjudication Officer had to deal with a situation where an employee had sought force majeure leave on the basis that his partner had suffered an injury.

The Adjudication Officer has found that the employee was asked to provide evidence for his attendance at home was “indispensable”. The employee had refused to furnish same.

The Adjudication Officer, in our opinion, quite correctly that an employer is entitled to have evidence furnished that the attendance by the employee is indispensable.

The Adjudication Officer in this case helpfully quoted Section 13 of the Act.

A similar issue in relation to force majeure leave, was covered in the July issue of our newsletter where the Labour Court gave a very extensive determination on this same issue of the attendance of the employee being indispensable.

Safety Health and Welfare at Work Act – Penalisation

In HSD174 the Labour Court in this case had to deal with a complaint under the above act.

The Labour Court has taken the time in setting out the legislation and in particular referred to the test set by the Labour Court in the case of Toni & Guy Blackrock v. O'Neill where a substantial portion of that Judgement has been set out.

While the employee lost this case this case is a very useful restatement of the law by the Labour Court.

Protection of Employees (Fixed-Term Work) Act 2003

In case ADJ6770 the Adjudication Officer had to deal with a situation where the employee made a claim under the Act. However at the time of making of the complaint the employee had not been on a fixed term contract for over six months and in addition had been given a contract of indefinite duration.

The Adjudication Officer rightly held, in our opinion, following the case of Hannify –v- Athlone IT FTD117 that the Adjudication Officer had no jurisdiction to hear the case where there was a contract of indefinite duration in operation.

Payment of Wages – Illegal Deductions

The Labour Court in a case of State Wide Towing and Recovery Limited who were represented by Peninsula Business Services (Ireland) and George Hayes being PWD1719 dealt with a case of a claim for an illegal deduction of wages.

The employee in this case issued a complaint under the Payment of Wages Act and a number of complaints under the Organisation of Working Time Act.

The complaints under the Organisation of Working Time Act were not appealed by the employee to the Labour Court.

In this case the employee resigned. He contended that the company wrongfully deducted a sum of €1,050 from his final pay cheque. The company submitted that that the deduction in question related to the repayment of 75% of the cost of specialist training it had paid.

The Court heard evidence from the complainant and from the respondent company. The representative of the respondent from Peninsula drew the Courts attention to various provisions in the employee's contract which was signed by the employee which made reference to the employee handbook. The employee contended that he had never seen the handbook and had never been given a copy of it. The respondent company submitted that the employee had been given a copy of the employee handbook. It was however accepted that it did not have a written acknowledgement of receipt signed by the employee.

The Court in this case set out the provisions of Section 5 (2) (b) of the Act and held that as there was no evidence that the employee received a copy of the handbook the deduction of €1,050 from the final paycheque was not authorised. This case is an important reminder for employers to ensure that if documentation is being given to an employee that there is a receipt for same signed by the employee.

The employee must be furnished with a copy. This is specifically set out in the Act.

In our view it is best practice for employers to ensure that;

All contractual documentation is given to the employee
That the employer retains a copy signed by the employer and the employee
That there is a specific acknowledgement by the employee of receipt of the various contractual documents of policy documentation.

If the employer had such documentation then in those circumstances it is likely that this case would have been won by the employer.

Payment of Wages and Compensation

In ADJ5965 the Adjudication Officer in this case found that there was an underpayment of a little over €1,700. Addition, the Adjudication Officer under Section 6 awarded general compensation of €750 the employee.

It is now becoming quite evident that the Section 6 of the Payment of Wages Act in relation to underpayment of wages is being regularly pleaded and compensation is being awarded in excess of the economic loss.

Bonus Payments

In ADJ6467 the Adjudication Officer had to deal with a situation where there was a collective agreement providing for the payment of a Christmas bonus. The employer made the decision to change from paying this by way of a monetary sum to payment by way of vouchers. The Adjudication Officer held that this was an illegal deduction and awarded compensation to the employee.

An employer cannot unilaterally change a contract of employment without the consent of the employee. Equally where there is an agreement to make a payment to an employee the employer cannot change same so that payment would be in some other way. We would have thought at this stage that employers would be aware of this fact but clearly not as this kind of case has to go before the WRC.

Payment of Wages Awards Must Be Net Loss Not Gross Loss

In ADJ7535 the Adjudication Officer awarded a sum of a little over €13,000 as the net loss of wages.

This is in line with the provisions of the Payment of Wages Act.

From a tax point of view that sum then becomes actually subject to tax because of the fact that the tax legislation, for some unknown reason treats the net award of tax as actually a gross amount for the purposes of the Taxes Acts.

This might appear unfair. Of course it is. However, when it comes to tax there is no equity in tax.

Transfer of Undertaking Regulations

In case TUD178 the Labour Court had to deal with a case where employees claimed as a result of a transfer their conditions of employment had changed because the employer moved from a bi-weekly to monthly payroll. The Court pointed out that this change occurred 9 years after the transfer and could not logically be associated with the transfer. The decision of the Adjudication Officer was upheld.

It would appear incredible to us that anybody could contend that something that occurs 9 years after a transfer could in anyway be related to the transfer.

The Decision makes admirable sense.

Transfer of Undertaking Regulations

In case C-416/16 the ECJ have held that where an entity which is owned by a municipal authority is wound up and the functions transferred to another entity which equally has as sole shareholder the same municipal entity that in those circumstances the transfer of undertakings regulations apply.

This is an important restatement of the law by the ECJ.

National Minimum Wage Rise

The National Minimum Wage is due to rise to €9.55 from 1 January 2018. The Cabinet approved the new national minimum wage on 18 July. A new Statutory Instrument will have to issue to implement same.

Burden of Proof in Organisation of Working Time Cases

In the case of Medfit Wellness Limited and R Murphy DWT17/17 being a claim where this office represented the employee the employee in her initial claim to the Adjudication Officer was awarded €250 for not receiving her proper rest under Section 12 of the Organisation of Working Time Act. The matter was appealed by this office on behalf of our client where the Labour Court awarded a sum of €3,250 as compensation.

The Labour Court importantly restated that the decision of the ECJ in Von Colson and Kamann Case C-14/83 applied.

It is also relevant that the Labour Court have restated that where records are not kept the burden of proof passes to the employer in these cases.

Calculation of Holiday Pay

In ADJ4867 the Adjudication Officer in this case had to deal with the issue of the calculation of holiday pay.

The employer contended that it was on the basis of 8% of the hours worked as to how it was calculated. The issue arose in relation to a Sunday Premium payment. It appears that the employee worked a number of hours on a Sunday but was paid for additional hours. This would commonly be called a Sunday premium. Sunday premiums can either be an additional percentage or additional hours as a bonus payment.

The Adjudication Officer in this case determined that in calculating holiday pay that it would be unfair to take in all of the hours and that only a portion of these additional hours which were effectively bonus payments should be taken in to account in calculating holiday pay.

This is an issue which we would disagree with. The definition of pay is Section 2 of the Payment of Wages Act includes any fee bonus or commission. Payment of bonus hours for working on a Sunday would certainly come within that category, in our opinion.

In our view the issue of holiday pay should be calculated on the basis of the average of the thirteen weeks prior to the date that the employee goes on holidays. Effectively there are a number of methods under the Organisation of Working Time Act for calculating holiday pay and the one which is most beneficial to the employee is the one which must be used.

In this case we believe that the Adjudication Officer has got the decision wrong as to how holiday pay should be calculated.

The issue as to how holiday pay should be calculated has been dealt with on a number of occasions by the Labour Court and interestingly recently in the UK EAT in a case of Dudley Metropolitan Borough Council and Mr. G Willetts and Others UKEAT/0334/16/JOJ. There are a number of important ECJ Decisions on this including British Gas Trading Limited –v- Lock 2017 ICR1 and Bear Scotland Limited – v- Fulton & Another 2015 ICR221. They are two important ECJ Decisions being Robinson –and – Steele C 131/04 and C257/04 and Stringer –v- Revenue and Custom Commissioners 2009 ICR932.

It is our view that holiday pay is calculated on the basis of the average of the 13 weeks prior working on anything that comes within the category of wages or bonuses.

What is interesting however about this case is that this was brought under the Payment of Wages Act rather than the Organisation of Working Time Act. It is also interesting that the definition in the Payment of Wages Act of Wages would appear to be different and more restrictive than that under the Organisation of Working Time Act when the provisions of SI475/1997 are taken into account and when you take into account the decisions of the ECJ which would appear to even bring into account anything that could be a form of regular allowance which might not actually be a wage for the purposes of the Payment of Wages Act or taxable under the Tax Legislation for example a travel expense which is paid under the Revenue Scheme as regards the non vouched element.

Holiday Pay

IN ADJ6501 the Adjudication Officer dealt with a case where it was agreed between the parties that the holiday pay was calculated on the basis of basic hours. The holiday pay did not take into account any Sunday Premium and did not take into account and unsocial hours premiums which were paid.

The Adjudication Officer in this case rightly pointed out that this was contrary to the provisions of Section 20 of the Organisation of Working Time Act and awarded compensation of €2,000 for the breach. This was awarded as compensation.

This is a timely reminder for employers of the importance of the importance of holiday pay being correctly calculated. The legislation at this stage now is over 20 years old. It is a constant surprise to us that these types of cases are still arising.

Organisation of Working Time Act – Compensation

In ADJ6419, without going into the case in detail the Adjudication Officer in this case helpfully set out as regards the issue of a claim for not receiving annual pay the economic loss. The Adjudication Officer then set out the additional compensation for breach of the right. What is interesting is that the Adjudication Officer helpfully set out this as a multiple of week's wages.

In addition, in relation to the element which was pure compensation rather than the economic loss the Adjudication officer has correctly set out the tax treatment that the latter element of the award was exempt from tax.

This is a very useful decision in that it is very clear how compensation was set, at what level it was set, and the tax treatment of same.

The Adjudication Officer must be commended for this decision as regards its clarity.

Rest Breaks at Work

In ADJ2069 the Adjudication Officer while dealing with a number of complaints had to deal with a situation where an employee was claiming that the employee did not receive her rest breaks in accordance with section 12 of the Organisation of Working Time Act. The employer was unable to produce any records to show that the employee received her rest periods. The Adjudication Officer in this case, in our opinion, rightly found that in those circumstances that the burden of proof is on the employer and in the absence of evidence the employee was entitled to succeed and awarded €1,000 as compensation.

This case is a timely reminder on employers to keep appropriate records of rest and break periods.

Holiday Pay

In Case ADJ7109 the Adjudication Officer had to deal with a situation where an employee had gone on holidays and had not been paid for his holidays.

The Adjudication Officer found that the employee was paid €700 per week and awarded a sum of €1400.

This case is interesting. The Labour Court has consistently held that an employee is entitled to be paid his/her holiday pay before going on holidays. In addition, the Labour Court has taken a very serious view of situations where an employee does not receive their annual leave payment.

The position, as we would see it, in line with previous decisions of the Labour Court is that such claims are covered by the Von Colson and Kamann principles and therefore in addition to the economic loss the employee is entitled to compensation for breach of his/her rights.

The issue of holidays has been held by the Labour Court to be an issue to ensure that as this is health and safety legislation that an employee has an opportunity to take a rest period. The Labour Court has held that a requirement of same is that the employee will be paid

for his/her holidays. Any breach of this under the Organisation of Working Time Act is covered by the Von Colson and Kamann principles. This has been held by the High Court and by the Labour Court who have both held that provisions which arise as a result of the Directive are covered by that principle.

Calculation of Holiday Pay Claims

In ADJ6818 the Adjudication Officer refereed to the case of DWT176 being a decision of the Labour Court and held that as the claim had been brought on the 17th June 2016 the relevant period was from 18th December 2015 to 17th June 2016 for calculating any underpayment of holiday pay. This we disagree with. The annual leave year set out in the Organisation of Working Time Act the period commencing on 1st April and finishing on following 31st March. A claim issued within 6 months of that date being up to 29th September will cover the annual leave year which finishes on 31st March and includes all underpayment of wages for the leave year finishing on that date. In this case it would cover the entire annual leave year from 1 April 2015 to 31 March 2016 and will then have covered the period from 1st April 2016 to the date that the employee left employment.

The Labour Court in its cases has been very clear in relation to these matters in the past.

Case DWT176 is a case where the employee in that case had his employment terminated on 16th October and lodged a claim subsequent to that date. On that basis as a 6 month period would have applied because the employee would not have been able to get back to the previous annual leave year ending on 31 March. This is a case where we believe the Adjudication Officer has got the decision wrong as regards the time limit. They were quite correct as regards referring to the Labour Court decision but that was where the claim was brought outside the period which would have brought the matter back to the 31st March. Once the 6 month period can be brought back to 31 March then in those circumstances the entire leave year ending on that date is brought into account. This is the clear import of the case of Royal Liver Assurance Limited –v- Macken [2002] 4I.R.427.

Fair Procedures

The case of RSA Medical Limited trading as Park West –v- The Royal College of Surgeons in Ireland being a decision of the Court of Appeal 2017 IECA 228 is a significant decision from the Court of Appeal dealing with the issue of fair procedures.

While the case does not involve an employment law matter the case does deal with the issue of legitimate expectations and fair procedures and natural and constitutional justice together with the issue of the right to make representation. It also deals with the issue of failure to exhaust alternative remedies and appeals.

It is outside the remit of this Newsletter to deal with this decision in full but it is one which I would encourage colleagues to read as a very useful decision which has wider implications

Disciplinary Hearing

In case ADJ2553 the Adjudication Officer had to deal with the issue of the procedures which should be taken into account by an employer in deciding to dismiss. This is a very useful decision for colleagues to read as it clearly sets out that the employer in this case failed to follow any reasonable procedures as found by the adjudication officer.

When it comes to buying property it is "location location location" when it comes to dismissing it is "procedures procedures procedures".

Where an employer has procedures as the employer in this case appears to have had it is vitally important that the employer follows same.

Taxation of Employment Law Awards

Case UDD1733 the Labour Court has set out the correct treatment of awards under the Unfair Dismissal Legislation. There is a very clear and precise statement made by the Labour Court that as compensation was for loss of earnings arising out of the dismissal the compensation award is taxable. The Adjudication Officer at first

instance in this case had awarded the same amount but had not specifically determined in that decision that the compensation was for loss of earnings. However the particular Adjudication Officer is an Adjudication Officer of substantial experience and it can be reasonably presumed that in setting the compensation that the particular Adjudication Officer was doing so on the basis of loss of earnings. It is however extremely useful that the Labour Court in not only setting out that the compensation was compensation for loss of earnings and is therefore taxable has also taken the time to set out that it was compensation for loss of earnings. This will be exactly in line with the Unfair Dismissal legislation which specifically provides that compensation is limited to the economic loss. There is an exception but where there has been no economic loss and in which case the compensation is limited to four weeks wages.

While that issue was not dealt with in this case as it was not relevant it would be our view that where the four weeks sum is awarded where there has been no loss that that is compensation simplicitor and actually falls outside the tax code and is compensation which is exempt.

Unfortunately the tax treatment of employment law awards is extremely complex. For those who would like to consider this issue in greater detail there is a detailed lecture note given by Richard Grogan of this office to the Wicklow Solicitors which is available on our website www.grogansolicitors.ie in the section on information and also in the publication section.

Setting out Compensation to identify elements which are taxable and non taxable

In ADJ6896 the Adjudication Officer in this case helpfully set out the compensation in a very clear and precise manner.

For example in the award under the Organisation of Working Time Act the elements which amounted for compensation for non payment of holiday pay and Sunday Premium both of which are taxable were clearly set out as was the general compensation figure of €1,000 for the breach.

It is most helpful when an Adjudication officer sets out a decision in that way as it means that it is easy for an employer and in particular their tax advisors / Solicitors to advise them as to what elements are taxable and what elements are not taxable.

There is a detailed paper on our website www.grogansolicitors.ie given to the Wicklow Bar Association in March of this year which sets out the taxation issues. For example, if the Adjudication Officer in that case had awarded all the sums as one total sum without setting out how they were divided out then everything would have been subject to tax. This means that the employee received less but equally the employer is subject to paying USC also in respect of any taxable award. Therefore in setting the decision out the way the Adjudication Officer did the Adjudication Officer was fair to both the employer and the employee from a tax perspective.

What is an emanation of the State?

This is a bit of a mouthful. Effectively it relates to the issue of establishing liability of a member State for failure to transpose a Directive properly.

This issue arose in case C-413/15 being a case of Elaine Farrell and Allen Whitty and the Minister for the Environment Ireland and the Attorney General and the Motor Insurance Bureau of Ireland.

This is an opinion of the Advocate General.

The Advocate General has proposed that in determining whether a particular defendant is an emanation of the State for the purposes of direct effect of a Directive the National Court should have regard to the legal form of the body in question as an irrelevant factor. It is not necessary that the State should be in a position to exercise day to day control or direction of the bodies operations. The State owns or controls a body in question then that body should be considered to be an emanation of the State without it being necessary to consider whether other criteria are fulfilled.

The Advocate General was of the view that any municipal regional or local authority or equivalent body is automatically to be regarded as

an emanation of the State. The Adjudication Officer was of the view that the body need not be funded by the State. It was the Adjudication Officers view that if the State has both entrusted that body in question with a task of performing a public service which the State itself might otherwise need directly to perform and its equipped that body with some form of additional powers to enable it fulfil its mission effectively that body in question is in any event to be regarded as an emanation of the State.

The Advocate General was of the view that in conducting an analysis the National Court should have regard to the underlying fundamental principal that an individual may rely on precise and unconditional provisions of a Directive as against the State irrespective of the capacity in which the State is acting because it is necessary to prevent the State from taking advantage of its own failure to comply with EU law.

A decision of the European Court of Justice will issue in due course. It is usual that the opinion of the Advocate General will be followed by the Court.

Getting a complaint to the WRC Wrong

In ADJ5556 it appears that the employee in this case brought a claim under the Transfer of Undertaking Regulations. Rather than naming the transferor or transferee both of which were companies the employee appears to have described them by reference to a location being the building or place where the employee worked.

The Adjudication Officer found that the Adjudication Officer had no jurisdiction but to dismiss the claim for want of jurisdiction.

This case is a prime example of situations where employees require legal assistance. There is no entity within the WRC who will assist employees in putting in place claims.

The first thing that any Solicitor will ask an employee is “who is your employer?” and look for some evidence in respect of same.

It certainly will not be a site location.

We were promised a world-class service. A world-class service would mean that there would be people there in a position to assist employees in bringing proper claims. We have no idea whether the employee had a legitimate claim or not but to have a situation where a claim is dismissed because an employee cannot put in the correct name suggest to us that there is no world-class service in place and that employees require the assistance of Solicitors to help them bring claims.

Wrong Claim to the WRC

In ADJ4513 an employee brought a claim under the Employment Equality Legislation claiming that the employee was dismissed for discriminatory grounds.

The Adjudication Officer in this case found that while the employee may well have been treated in a manner of having been unfairly treated the employee was not able to show how any of the grounds could be brought under the Employment Equality Acts.

This is another prime example of employees bringing claims under the wrong piece of legislation. It would appear from the decision of the Adjudication Officer that if a claim had been brought under the Unfair Dismissal legislation it might well have been successful. This is a further case which indicates the requirement for individuals to get legal advice.

The running of cases before the WRC and the Labour Court

The legislation under the Workplace Relations Act as regards running cases before the WRC or the Labour Court provides that the WRC shall investigate matters. Funnily in respect of the Labour Court the legislation is silent in Section 44 but it can be assumed that effectively the Labour Court would apply the same procedures as under Section 41 of the Workplace Relations Act, as it would apply to the Workplace Relations Commission namely that they would investigate matters.

That appears to be what the legislations says. However when you look at the recent case of Minster for Justice Equality and Law Reform applicants and the Workplace Relations Commission respondent and Boyle and Others the notice party being a judgement of Mr Justice Clarke delivered on 15th June 2017 under reference 2017 IESC43. In that judgement, while it related to the Equality Tribunal, Mr Justice Clarke at paragraph 7/12 stated;

"In that context it is also said, correctly so far as it goes that the procedure before the Tribunal is inquisitorial whereas the procedure before the High Court is adversarial.

"Significantly at paragraph 7.12 of the Judgement His Honour referred to the fact that the legislation provided for the investigation of complaints and conferred significant investigative powers.

In our opinion if the matter is inquisitorial this is a much higher duty on the WRC and the Labour Court than merely investigative powers.

The Labour Court certainly at the present time has significant extra investigative powers than the WRC possess. For example the Labour Court can require an Inspector to go out and obtain records, produce a report and furnish that to the Labour Court which will then be subject to being examined by the Court and the parties subsequently. The WRC do not have this investigative power. We believe that this is because of probably sloppy drafting of the Act and that they were supposed to have it. The Labour Court can require witness summonses in all cases including Unfair Dismissal. The WRC do not have the power particularly in Unfair Dismissal cases. This is an acknowledged defect in the legislation which has not been rectified for over two years.

The very fact that the Supreme Court have stated that the system is inquisitorial is in our opinion significant clarification of what the duties of the WRC and the Labour Court are. How they are going to deal with this is quite frankly beyond us. It is going to require significant additional time and responses and by that we mean personnel to move from what is currently fast becoming more an adversarial procedure to this procedure as indicated by the Supreme Court. Currently in cases for example under the Organisation of Working Time Act where an employee claims that they did not get

their proper rest and break periods the employee will regularly be met with the defence that the employee must set out the times and dates etc. The alternative, as the Labour Court applies, is only where records are produced in the statutory form must the employee go that far. When these did not happen. If the approach of the Supreme Court is accepted by the WRC and the Labour Court then in those circumstances once the employee says that the employee did not get their breaks at the right time for example indicates that this would happen once or twice a week. For example when the lunch break was late then in those circumstances effectively it is over to the WRC or the Labour Court to have an inquisitorial process. This would mean getting the records and going through them. The issue is whether the WRC and the Labour Court can direct discovery of documentation. In the case of Galway Mayo Institute of Technology, the Employment Appeals Tribunal respond and Helena Pidgeon and Another notice party being a judgement of Mr. Justice Charleton 2007 IEHC210 the Learned Judge in that case did in paragraph 3 of his judgement confirm that effectively in certain cases a Tribunal may need to adopt all the measures inherent in a plenary hearing or a criminal trial. He went on to state that fundamental to any procedure however it is the duty of the tribunal to identify the issues which it is tasked with deciding and to make available to the parties the means which can be variable whereby they may address that issue. This would appear to indicate that that means that the WRC and the Labour Court are entitled to direct documentation be produced and the type of documentation to be produced and when it be produced.

The decision of the Supreme Court we believe has had fundamental implications for how employment law cases in the WRC and the Labour Court going forward are going to be addressed.

We would expect that this issue will be argued sooner rather than later before the Labour Court and this office did make a submission in relation to same on 12th July. In addition a submission was made in relation to the issue of litigation advice privilege before the Labour Court.

A decision from the Court is awaited at this time.

Representation in the Labour Court

This office is at the present time involved in a number of cases where the issue of litigation advice privilege is being raised.

This office is raising issues under Section 44 of the Workplace Relations Act before the Labour Court and similarly under Section 41 before the Workplace Relations Commission where we are seeking discovery of documentation or at least full disclosure of documentation which is not being furnished because of arguments of litigation advice privilege or confidentiality by persons who are not Solicitors or Barristers, are not bodies who represent employers by which we mean those with a negotiating licence or trade unions that they must, in accordance with the legislation be given a right to present. We don't object to their right to present just that the WRC and the Labour Court must grant then that right of representation and in accordance with the legislation must record same in the decision. When it comes to litigation advice privilege as none of these individuals will be practicing Solicitors or practicing Barristers once the relevant determination is made it is clear that they do not come within that category and therefore we can pursue the claim for the documentation which they seek to exclude from us under the litigation advice privilege rule.

The issue of litigation advice privilege has been before the High Court but on very restricted grounds. The Labour Court has yet to rule on the issue of litigation advice privilege. The case that went to the High Court was one where the Labour Court did not rule the issue of litigation advice privilege.

There is certainly interesting times ahead. For those who are not practicing Solicitors or practicing Barristers, who are not members of a trade union and are not members of an employer body with a negotiating licence who appear opposite us in the WRC or the Labour Court there is nothing personal when we are moving these applications. It is just business. However there is a huge difference between being represented by a practicing Solicitor or practicing Barrister who have both ethical and professional standards which

must be upheld and is one of the reasons why we have litigation advice privilege and those who do not come into that category.

We will be interested to see how matters develop.

Recent Decisions where we have been involved

While we have a large number of cases that go before the WRC and the Labour Court we have recently been involved in some interesting cases. In the first involving case under TED1716 and DWT1717 involving a claim by a client of ours against Medfit Wellness Limited. The case involved an appeal from the Adjudication Officer. The Adjudication Officer had awarded compensation of €500 for not receiving a document that complied with Section 3 and €250 for breach of the Organisation of Working Time Act as regards rest intervals at work.

One of the grounds of appeal was that the Adjudication Officer had held that the case of Von Colson and Kamann 1984 ECR1891 being an ECJ decision only applied to equality cases. This was held in the Adjudication Officer decision AdJ4633. As part of the appeal it was submitted by this office that the provisions of Von Colson and Kamann did apply to both Acts and had to deal with the issue of having a deterrent effect. While the issues were fully canvassed before the Labour Court the Court in the case of the claim under the Terms of Employment (Information) Act increased the compensation to €750. As regards to breach of Section 12 the Von Colson and Kamann issue was also pleaded. The issue that was also pleaded was the issue of Section 25 (4) of the Organisation of Working Time Act and the Court held that the employer had failed to credibly rebut the evidence given by the complainant that she did not always receive rest intervals at work increased the compensation to €3,250 being equivalent to six weeks salary. This case highlights the importance of employers maintaining appropriate records which were not maintained in this particular case.

In a case of Ala Berghie and Johnston Garden Centre being a case ADE/16/64 we represented the employee and the employer was represented by Counsel. This is a case which the employee lost at first instance before the Adjudication Officer. The employee in this case

complained that there was number of serious incidents of comments being made which were of a racist nature. The employee in this case resigned.

The Labour Court found that a case of discrimination has been made out and award €4,000 for the comments complained of. However as regards the employees decision to resign the Court pointed out that the employee had undertaken to furnish a written statement of her complaints and had failed to do so. It was not reasonable for her to deem herself to be constructively dismissed.

The case is interesting in the facts but also in relation to the case law which is being set out by the Court at some length. At the present time we have a number of cases, four in total, where we are awaiting correcting orders from the WRC. These have been outstanding now for some time. We have other cases before the WRC where further submissions are required or where decisions are awaited.

We have now seen a significant increase in the percentage of our cases going on appeal to the Labour Court and over the coming months we have a number of cases listed for hearing dates and others where hearing dates are awaited. We do not intend to comment on cases we have been involved in which are subject to an appeal either by us or by the other party. We do not believe it is reasonable for us to do so.

In cases before the WRC which are reported where we are not noted on the decision on the WRC website as being the representative of the employer or employee again we do not comment on those cases in such a way as would indicate that we were involved in the case. Again, we believe that that is reasonable.

For those reviewing decisions of the WRC we believe that it is useful where the WRC indicate that the parties were represented and who the representatives were. It is clear from some decisions even though it is not stated that parties were represented that it is clear that one or other were. It is however useful that in reviewing decision it is known whether neither party was represented or one party was represented and the other wasn't or that both parties were represented and by whom they were represented. Where parties are represented by recognised employment law specialist Solicitors or Barristers they are

cases which indicate that probably matters were fully fought. This is useful for colleagues reviewing decisions.

Settling Cases

We were recently involved in a case where it would be unfair of us to name the Adjudication Officer, the other party, their representatives or whom we acted for. However, it is a case where the particular Adjudication Officer deserves praise for the manner in which the case was dealt with by that Adjudication Officer. In this case both the employer and the employees were represented. There was a Solicitor on one side and a Solicitor and Barrister on the other side. The Adjudication Officer at the start of the case set out very clearly what their role was namely to hear the case and make a determination. As the case progressed issues arose in relation to the records and in respect of which there was an issue that more detailed records would be needed. Certain records were reviewed by the Adjudication Officer on the day. The Adjudication Officer determined that the matter would need to be adjourned for additional records to be produced. Now under the new Workplace Relations Commission rules the Adjudication Officer, unlike a Rights Commissioner or even a division of the Employment Appeals Tribunal is precluded from having any part in seeking to have matters resolved. We have commented upon this before and we have our reservations in respect of same. It is not necessary to repeat them. Saying this, the Adjudication Officer at the time that the matter was being Adjourned did speak in the presence of the legal representatives the employer and employees and did state quite fairly that there were certain claims by the employees which on the basis of the records produced, but subject to more detailed records being provided did appear to indicate breaches or any that there were in respect of some of the claims were set out by the employees in evidence reasonably limited breaches. The Adjudication Officer equally pointed out on the basis of the documentation produced and against subject to further documentation that there were other claims which would appear at first sight to have been fully made out. It was then pointed out, and the Adjudication Officer went no further than seeing that the parties might usefully use the time between that date and any adjourned date and said no more. That both sides were represented by experienced Solicitors and an experienced Barrister in employment law. All of us were able to read

between the lines. Equally, the employer for the first time probably recognised that they had issues where they would have been advised of these but were certain that they were not ones that warranted compensation. Equally the employees appear to accept that their claims were not as strong in all respects as they had originally thought. The result was that a degree of pragmatism descended on both the employer and the employees. Because there were experiences Solicitors and Barristers involved the parties were able to resolve their difficulties within a short time scale of a matter of hours. The settlement was reached within 45 minutes. The only issue was the time scale of the payment.

The Adjudication Officer in this case said nothing specific about any particular claim however the Adjudication Officer was experienced enough to be able to convey a view without actually saying anything specific about any specific claim or whether the Adjudication Officer would be upholding it or not upholding it. The outcome was that matters resolved between the parties in an amicable way. We do not see anything wrong in the manner in which the Adjudication Officer dealt with this case. The converse is the position. The Adjudication Officer dealt with it in a way that the representatives were able to read what we might call body language and tone addressed both sides. The parties, both importantly felt that they had had an opportunity of putting forward their case. They both felt that they had been heard. They both felt that resolution now rather than continuing proceedings was the best course for each of them. Both representatives were of the same view.

What happened in this case is that what could have ended up as a further day of hearings and possibly an appeal to the Labour Court were resolved in a way without the Adjudication Officer actually becoming involved. In cases before the District Court, the Circuit Court and the High Court it is quite regular that judges of those Courts will say to the parties or their representatives that the parties might seriously consider going outside and seeing could matters be resolved. In many cases in the Courts the Judge will indicate to the parties who are in difficulties. This is not a determination of matters it is simply indicating matters.

Abraham Lincoln once said that a good settlement is better than a good case. We agree with that. We would also be of the view that a

good settlement which is fairly negotiated between the representatives of both sides is better for both parties than a decision. Of course there will be cases where that is not possible and a good Adjudicator as would happen in the Courts see that very early on. Equally there are cases where parties really need to get matters off their chest, be given an opportunity for employees to tell an Adjudication Officer how bad their employer was and for an employer to tell the Adjudication Officer how good an employer they were. Once that is done very often the parties are quite happy to resolve matters. We believe that it will take some time in the WRC for Adjudication Officers to have the confidence to indicate matters to parties. Luckily we have some of the newer Adjudication Officers who are experienced enough along with a number of the former Rights Commissioners and those who would have been in the other forums to be able to give an indication which often if the parties were given a few minutes can result in a resolution.

Resolution of cases is far better than decisions.

In this case both firms of Solicitors and Counsel involved felt that the Adjudication Officer had performed their duty with admirable skill and expertise. All parties were more than satisfied with the way in which the case had been run and everybody was prepared to compromise. That we regarded as a good result for the employer and the employees.

In some cases employees accept their representative's advice. In others they don't. In some cases employers accept their representative's advice and in others they don't. In the cases where they don't sometimes a little push from an independent party can let the parties see the light.

It would not be fair to mention the Adjudication Officer in this case but what I can say is that the parties got a fantastic service, in that case, from that Adjudication Officer.

Before the Labour Court I know of no division that has not at some stage asked the parties would they like to take some time to see could matters be resolved. Often even at that stage matters get resolved. For all of us who are involved in the contentious side of employment law it is my personal belief that every single one of us believes that compromise and settlement, where possible, is the preferred route. When cases have to fight they have to fight but fighting a case should

be a last resort where compromise and settlement is possible. I know that the WRC may well say that there is mediation service and there is. However, often parties have to get to the door of a hearing or actually into the hearing before that eureka moment arrives where settlement becomes a realistic option.

Review of decisions of the WRC and the Labour Court and the Courts

There is a huge volume of case law coming from the WRC, the Labour Court and the Courts in the area of employment law.

In a publication such as this which is gone from when it commenced from being a couple of pages to now at times being quite a bulky document there is a limit to the number of cases we can review.

From a practical point of view we do not review decisions under the Industrial Relations Acts. This is not that we do not regard them as important but simply that the reality is that under the law these decisions cannot be enforced. Saying that, they have significant persuasive authority. For those who are involved in industrial relations and Human Responses we would strongly recommend that you read the Industrial Relations Act decisions of the WRC and the Labour Court.

In reviewing Decisions of the Labour Court and the WRC because of the time involved in producing this publication we have to be selective, We approach matters by extracting the cases which we think are the most relevant and where we believe there is an issue which will be of general interest to practitioners whether Solicitors, Barristers, HR or IR practitioners. We also seek to review decisions which would be of interest to employers and employees.

We must to an extent be selective.

In selecting decisions for this publication we tend to deal with them in the following order namely decisions of the Courts. The reason for this is that they are binding on both the Labour Court and the WRC.

We secondly then look at decisions of the Labour Court. Such decisions of the Labour Court are binding on Adjudicators in the WRC. We next try to look at decisions from the European Court of Justice. This is because of their importance for everybody involved in employment law. Finally, we look at decisions of the WRC. This is not because we regard them as any less important. Decisions of the Courts, the Labour Court, The ECJ and the WRC are in our view equally important for those involved in employment law to read and comprehend. There are excellent decisions from the WRC. We have to be selective and this therefore is the selection process which we have applied.

A publication like this can never be comprehensive. We do not claim that it is. That would be impractical for an office like ours to try to give fully comprehensive reports. What we try to do is extract those cases which we think are important and relevant. Sometimes we will be wrong. Sometimes we will be right. We are sure that there are important decisions which we may well have overlooked.

We understand that the WRC website is t be upgraded. This will hopefully ease our workload in trying to trying to keep you up to date with developments. Hopefully the new website will be very similar to the old Labour Court website. That was an excellent website where you could check cases by way of the names of the representatives. You could check by way of Act, section and subsection or by the name of the parties. The inability currently to check by way of Act, section and subsection is a major defect in the WRC Website. It is one that we have been harping on about for some time now but hopefully we will get that service sooner rather than later as it is a requirement for any world-class service.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**