Welcome to the September issue of Keeping in Touch.

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INTRODUCTION

The summer months have been a busy time for this office. We have already been involved in two Point of Law Appeals to the High Court in respect of decisions of the Labour Court. One of the cases deals with the Organisation of Working Time Act and the second deals with both, the Organisation of Working Time Act and Statutory Instrument 36 of 2012 which deals with mobile workers. In one case we have already been advised that the decision will issue on 7th October next.

This office has issued a further two claims to the High Court. One of the claims which is returnable for the 17th October relates to the Von Colson and Kamann decision as to how it is applied by the Labour Court. In addition the issue of Legal Advice Privilege has been included as part of the Point of Law Appeal. In the particular case, this office sought Witness Summonses against named individuals in Peninsula Business Services (Ireland) Limited relating to advices received and given from an employer Philmic Limited trading as Premier Linen Services. The issue of Litigation Advice Privilege while it was one where submissions were made by both parties including Peninsula Business Services (Ireland) Limited on behalf of the employer the issue of Litigation Advice Privilege was not addressed by the Labour Court. The Witness Summonses were not granted and this office was not permitted to examine in relation to advices received from Peninsula Business Services (Ireland) Limited when the representative of the company was giving evidence.

On a further case which has issued but cannot be served until October is a case involving the application of the law relating to the Terms of Employment (Information) Act and in particular Section 3, the issue of Von Colson and Kamann under Section 12 of the Organisation of Working Time Act.

In a case ADE16/26 being a case against BT Ward Limited trading as Subway this is a case where the Equality Officer awarded a sum of €5,000. The matter was appealed by both the employer and the employee. The matter came on before the Labour Court. The decision issued in August. The Labour Court determined that the employee had been discriminated against on the gender ground and had been victimised and increased the compensation to a sum of €10,000.

In cases DWT1653 and 1654 this office acted for an employee who successfully brought claims under the Organisation of Working Time Act against both Keegan Quarries Limited and Keegan Precast Limited. In this case there has been a question mark as to whom the correct employer was at all times as the employee had correspondence from both companies.

In DWT1646 this office was successful in winning a claim of penalisation against the company called First Glass Limited. This claim was brought under the Organisation of Working Time Act.

The office has been involved in a number of cases before the Workplace Relations Commission, where successful decisions were obtained. We have also seen a significant raise in the number of settlements being reached. The office is seeing a significant change in the type of cases which are being brought. A number of years ago invariably cases were brought by employees who had ceased employment. We are now finding a considerable number of claims being brought by employees who are still in employment. We are seeing a significant increase in the number of cases under the National Minimum Wage Act and at the same time a significant increase in the number of dismissal claims and claims under the Protection of Employees (Fixed-Term Work) Act and also the Organisation of Working Time Act for higher paid employees with many being at management level.

As we are very much at the cold face of cases before the WRC we are seeing a lot of the difficulties. As part of this we have been in contact with the Minister for Jobs, Enterprise and Innovation as a result of which a meeting was set up with representatives of the WRC. We have written to both the relevant individual who led the meeting and to the Minister with our notes as to what we said occurred and highlighting the problems there.

Some of these problems are:-

a) We did have an extremely good data base of decisions from the Labour Court which could be searched not only by way of name but also by way of section and subsection of an Act. It was even possible if you knew who the representatives were to track down a case. The new WRC website does not have these facilities.

b) We are coming across issues where claims are being attempted to be rejected by Carlow as part of the process. As a result we had to advise the Minister and Carlow that if this occurred again we will bring appropriate proceedings to the High Court. It is a matter for an Adjudication Officer to decide on a case. The Director General can determine that a claim is spurious and vexatious but it is not a matter for Carlow in processing claims to refuse to process the claim.

c) We are seeing difficulties in cases being adjourned and trying to get them re-listed. We have had one case where the other side looked for an adjournment, received same but we were not advised and turned up for the hearing. We are finding full copies of claims and submissions are not sent to Adjudicators.

d) We are encountering difficulties where there are claims against multiple employers as can occur or where there are follow on claims getting matters amalgamated together for one hearing. This was never a problem before the LRC but it is a problem now and is simply adding costs to both employers and employees and to the State in having unnecessary additional hearings.

e) There is an issue occurring now where cases or decisions issued are not being sent out on the day that they are dated. As there is only 42 days from the date the decision is dated, to appeal, there is an onus on the WRC to ensure that decision issues speedily. While this normally happens there are a number of occasions which we have come across where this has not happened.

f) We had pointed out that the time limits specified in the recent first report indicating the time limits for hearing dates and for getting decisions are at best economical with the truth in that they specify days but they do not specify that these are actually working days. For example being told that a hearing will issue within 77 days you would think that means a little over 2 moths but in fact it means closer to three months. By 77 days the WRC means "working days".

g) The WRC wishes to create a paperless procedure. We had pointed out to them that this is a practical nonsense. In cases involving Unfair Dismissal or claims under the Organisation of Working Time Act or even claims under the Protection of Employees (Fixed-Term Work) Act the reality of matters is that the amount of paper that must be produced for an Adjudicator is substantial. The computer system being used by the Workplace Relations Commission is not fit for purpose where there is a volume of paper that must be provided. In a Working Time case there can be 26 weeks of Working Time records. In an Unfair Dismissal case there will be the full investigation hearing documentation and the full dismissal documentation along with probably Contracts of Employment and Staff Handbooks dealing with procedures all of which are volume amounts of paper which it is virtually impossible under the current system that they have to enable an Adjudicator to properly process at a hearing.

These are just some of the issue that we had written to the Minister about.

The Labour Court continue to operate with their usual efficiency.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Richard Grogan of this firm has been asked to present a further course on the Workplace Relations Act to the Skillnet meeting in Cork on the 18th November and CMG Training on 24th November next. In addition Richard Grogan is due to present a paper on the Workplace Relations Act and its practical implications for those presenting and defending claim to the Dublin Solicitors Bar Association later this year.

There are significant developments in Employment Law in Ireland at the present time. The Law is becoming more complex and more difficult. Employment Law is becoming a far more specialist area of Law. We are seeing this in a day to day work. We would expect significant developments over the next number of months and in this publication we will try to keep you up to date with developments.

We do hope that those reading this publication find it useful, informative and helpful.

FIVE EMPLOYMENT LAW RISKS FOR EMPLOYERS

Employment Law can be complex. There are regular developments in Employment Law. We are setting out five common problems which employers can come across and need to be aware of.

1. HR policies and procedures.

Most employers will have policies and procedures dealing with disciplinary issues, performance management, grievance, equality and dignity at work. There are often challenges in making sure these policies are applied in a fair and consistent way. However, many employers do not have policies on such issues as whistleblowing, social media, email usage and the use of CCTV.

It is important that all employers should regularly check their employment policies. As an employer it is important to make sure that your policies and procedures are in line with changes in Employment Law.

2. Independent Contractors.

A new issue which is coming up regularly now is the issue of independent contractors. Where the relationship is more closely that of employer/employee then this can be costly for employers. If a person who is classified as an independent contractor is subsequently deemed to be an employee there can be issues relating to tax, pensions and significant legal issues. It is important that you as an employer make sure that you get appropriate legal advice before engaging anybody as an independent contractor. If considering taking on a person as an independent contractor there is a very useful Revenue Guide on this issue which sets out questions to be asked. Basically if more of the answers are on one side or the other the individual will be deemed to be an employee or a contractor. Simply calling somebody an independent contractor is not sufficient.

3. Contracts which are not fit for purpose.

Every employee is entitled to receive a document which complies with Section 3 of the Terms of Employment (Information) Act. However a contract is much more than this. Employers need to look at the issue of confidential information, intellectual property. They need to look at the issue of gardening leave, notice periods. Employers need to look at the issues such as restrictive covenants. These are complex areas and it is important that appropriate legal advice is obtained to make sure that your contracts are suitable for your company.

4. Retirement.

Employers must be aware that mandatory retirement ages are now difficult to enforce. As an employer you will need a clear policy on retirement ages and you must be able to show that there was an objective basis for putting that retirement age in at the time that you inserted the retirement age in the contract. It is therefore important that an appropriate document is put in place at that time. We have a separate article on this important issue in this publication.

5. Employees leaving employment.

Dismissing an employee in breach of contract or without following fair procedures is a common mistake and can result in significant claims against you as an employer. There are strong legal protections for employees in such circumstances. You may in the case of some employees, particularly higher paid employees in senior positions, not only face a prospect of a claim to the Workplace Relations Commission but also to the High Court.

Conclusion

In dealing with Employment Law it is a specialist area of Law. It is important for you as an employer to make sure that you get advice from a specialist Employment Law firm. There are many such firms based around the country. Failing to obtain appropriate specialist advice can be more costly than getting appropriate advice and assistance from an employment lawyer at the start.

PATERNITY LEAVE AND BENEFIT BILL 2016

This office wrote to the Minister for Justice and Equality concerning Section 22 of the Bill. We proposed that the Minister would consider amending Section 22(1) of the Bill to add in after the word “penalise” the words “or threaten to penalise”.

We are delighted that the Minister for Justice and Equality accepted our amendment to the legislation.

BURDEN OF PROOF IN WORKING TIME CASES

Two recent decisions of the Labour Court being DWT1660 and DWT1661 while involving the same employer are useful in setting out the approach of the Labour Court where there are no records.

In that case the Court stated:

"The Court has examined the information provided for both sides. The Court is also aware that the Complainant did not keep records within a meaning of Section 25 of the Act. Accordingly the onus of proving compliance with the Act lays with the Respondent (the employer)".

In working time cases some representatives, for employers contend that following the case of Antanas and Nolan Transport Limited that the Burden of Proof is on the employee to set out times and dates. This is not our understanding of the Act or that decision. It is a matter, in that decision, for the employee bringing a claim to set out matters with sufficient particularity for the employer to know in broad terms what the complaint is.

It would be sufficient for an employee to say that normally about once or twice a week the employee did not receive an 11 hour rest between finishing and starting work the next day and this could happen on any day during the week. It would be sufficient for the employee to say that the employee on a regular or an irregular basis did not always receive a 30 minute break and to set out how often on a weekly or monthly basis this would not happen.

There is no obligation on an employee to maintain records. Some employees do. The employee bringing a claim can only produce such records or documents that they have themselves. The obligation to maintain records in accordance with Section 25 of the Act rests on the employer. The recent cases before the Labour Court have confirmed this.

WORKING TIME DECISION

In case C-178/15 the ECJ ruled that Article 7 of Directive 2003/88/EC concerning the organisation of working time must be interpreted as precluding national legislation or national practice under which a worker who is on Convalescence Leave granted in accordance with National Law during a period of Annual Leave scheduled in the leave roster of the establishment where he or she is employed may be refused, at the end of the Convalescence Leave the right to take paid Annual Leave in a subsequent period. This is provided as the purpose of the right of Convalescence Leave is

different from the right to Annual Leave which is a matter for the National Court to determine.

The effect of the decision is that effectively when an employee is recovering from an illness or injury this cannot be used for Annual Leave and is a separate and distinct from Annual Leave.

REST INTERVALS AT WORK

The provisions of Section 12 of the Organisation of Working Time Act can sometimes be difficult to comprehend.

The two most usual provision of Section 12 are Section 12(1) and (2) and these state,

(1) An employer shall not require an employee to work for a period of more than 4 hours and 30 minutes without allowing him or her a break of at least 15 minutes.

(2) An employer shall not require an employee to work for a period of more than 6 hours without allowing him or her a break of at least 30 minutes, such a break may include the break referred to in subsection (1).

There is a view expressed by some employers and their representatives that this means that after four and a half hours the employee must receive a 15 minute break and after a further one and half hours a further 15 minute break. This is not the position.

If an employer after 4 hours and 30 minutes provides the employee with a 15 minute break then after a further one hour and 30 minutes the employer must provide the employee with a 30 minute break.

If however the employer after 4 hours and 30 minutes provides the employee with a 30 minute break this complies with the provisions of subsection (1) and subsection (2).

The employee can then work for a further period of 4 hours and 30 minutes before the employer must provide the employee with a further 15 minute break.

Employers or their representatives in cases are now currently raising the argument that it is a matter for the employee to take their own breaks. That is not the position. The law requires the employer to ensure that the rest intervals at work are not only scheduled and that those rights are in some policy or other documentation but that those rights are actually observed.

BURDEN OF PROOF IN EQUALITY CASES

The Labour Court in a recent case EVA1618 involving Queally Pigs Slaughtering Limited trading as Dawn Pork and Bacon and Robert Tkac have set out a detailed overview of the law relating to the Burden of Proof in equality cases. It is not necessary to go into them in this but the decision is one that anybody representing an employer or an employee should have regard to. The Court looked at the provisions of Section 85 (A1). The Court referred to its own determinations in the Southern Health Board -v- Mitchell (2001) ELR201, Cork City Council and McCarthy EDA21/2008 and Melbury Developments Limited -v- Valpeters [2010] ELR64.

CONSTRUCTIVE DISMISSAL - LABOUR COURT CLARIFICATION

In the case of EXPD8 Ireland trading as Tradewins and Brian McGovern the Court in this case importantly stated:

"There is an onus on an employee contending that they have been constructively dismissed to demonstrate that they have made efforts to resolve the matter other than by termination of employment. In particular there is an onus on the employee to utilise all available procedures to address the issue with the employer".

This is an important reinstatement of the Law on Constructive Dismissal. The case reference is UDD1617.

The Court has properly, in our view, stressed the importance of an employee utilising all available procedures. This would mean for example using the grievance procedure. There may be occasions where an employee is, because of the activities of an employer, entitled to simply have deemed themselves to be constructively dismissed. However, it would be our view that employees need to be very careful as the Burden of Proof in a Constructive Dismissal case is on the employee rather than on the employer. Therefore the employee must be in a position to show that they used all reasonable efforts in the circumstances of the particular case.

WHO IS AN EMPLOYER?

The issue in Unfair Dismissal cases often arises. This arose in a case ADJ385. In this case the employee was hired by employer number 1. The employee was placed with the "end user" being employer number 2. The Adjudication Officer, quoted Section 30 of the Unfair Dismissal (Amendment) Act 1993, and held that employer number 2 was the correct name employer for the purposes outlined in the Act and not employer number 1.

In this case the employee had been paid and managed by employer number 1. It would be reasonable for an employee in such circumstances to believe that employer number 1 was in fact the employer. However, the provisions of Section 13 of the Unfair Dismissals (Amendment) Act 1993 are very specific and effectively it is the end user who is the employer.

This Decision has implications for employers and employees.

PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

In a recent case of the Department of Social Protection and Fiona McLoughlin, reference FTD1610, the Labour Court had to deal with a situation where there were a number of Fixed-Term Contracts. The Department sought to rely on the objective grounds. The Court in that case stated:

"The objective grounds relied upon in the Complainant's 2012 contract were vague and did not relate to 'precise and concrete circumstances characterising a given activity which are therefore capable in that particular context to justify the use of successive Fixed-Term Employment Contracts' ".

The Court in that case pointed out that the Labour Court has frequently held the test inherent in Section 7 (1) of the Act which relates to objective grounds and is derived from the jurisprudence of the ECJ and in particular from the judgement of the Court in the case C170/84. The Court also pointed out that the Labour Court in the case of Inoue -v- MGK Designs [2003] 14ELR98 that the Labour Court has said that the test requires that the employer show that the measures:

a) Corresponded to a real need on the part of the undertaking;
b) Are appropriate with a view to achieving the objective pursued; and
c) Are necessary to that end.

If relying on Section 7 (1) it is necessary for those objective grounds to be set out at the time that the further Fixed-Term Contract is provided. As the Court in this pointed out Section 8 (3) provides that such a statement is admissible in evidence. However, if it appears to an Adjudicator or the Labour Court that the employer has omitted to provide a written statement or that the written statement is evasive or equivical then an Adjudicator or the Labour Court may draw an inference as is just an equitable in the circumstances.

This decision of the Labour Court is a comprehensive decision which has set out the Law in detail. For everybody looking to review the issues relating to a Fixed-Term contract this is a decision which should be read. It importantly has a considerable amount of authority referred to therein which will be of assistance to anybody seeking to understand the nuances of this legislation.

It is extremely helpful to practitioners, IR and HR Professionals and employers that the Labour Court does in its decisions give detailed reasons as to the application of the Law. Fixed-Term Contracts are a particularly difficult area of legislation for all involved in Employment

Law and it is very useful to have detailed decisions which go through the Law, in depth, which this decision does.

EXCEPTIONAL CIRCUMSTANCES

The case of Sap Landscapes Limited and Shane Gutkin UDD166 being a Decision of the Labour Court has considered the provisions of Section 44 of the Workplace Relations Act 2015.

The case in question is one where on the 2nd of October 2015 a Notice of Appeal was placed among the correspondence. A postal strike took place on that date and the Applicant thought that the Notice would issue when the strike concluded. It subsequently transpired that this did not happen until sometime outside the appeal period. The Respondent submitted that they had contacted the Applicants Trade Union on the 4th of November and at that stage the Trade Union representative expected to receive the instructions to appeal. There is an issue as to when the decision to appeal actually was made.

Leaving that aside what is interesting is that the Court looked at the case of Joyce Fitzsimons Markey v. Gael Scoil Thulach Na nOg [2004] ELR110 where the Labour Court gave extensive consideration to the expression "exceptional circumstances". In that case the Court stated it as follows,

"The question for determination in this case is whether the Applicant was prevented by exceptional circumstances from bringing her claim within the time limit prescribed by Section 77(6) of the Act. That is pre-eminently a question of fact and degree. Each case was to be decided on its own circumstances and the improbability of any two cases falling under the same set of circumstances makes it unlikely that the Decision in any one case can be more than a rough guide to the decision in another".

The Court went on to state,

"The Court must first consider if the circumstances relied upon by the Applicant can be regarded as exceptional. If it answers the question in the affirmative the Court must then go on to consider if those

circumstances operated so as to prevent the Applicant from lodging her claim in time".

While it is not set out in the Decision it would appear that following the rationale in relation to the issue of an appeal on a point of law to the High Court that there must at least be an intention to appeal. This issue was not covered in the Decision of the Court.

The Court however helpfully went on to state,

"That when seeking an extension or relying on the issue of exceptional circumstances then the burden of proof rests on the Applicant".

SETTLEMENT DISCUSSIONS

There is a difference between a "Without Prejudice" discussion and a "Protected Conversation".

Under the "Without Prejudice" rule details of a settlement offer made are not normally allowed to be disclosed in a Court or Tribunal. However, the rule only applies when the parties are already in dispute.

Some employers believe that they can use the "Without Prejudice" rule to negotiate an amicable exit of an employee. The simple answer is they cannot.

Some employers might have read some UK commentaries. In the UK a concept of a "Pre-termination Negotiation" which is also known as a "Protected Conversation" allows parties to hold settlement discussions before a dispute has arisen and this cannot be referred to in Unfair Dismissal proceedings unless there has been improper behaviour.

Employers reading commentaries from the UK need to be very careful that they might believe that they can have a protected conversation with an employee in Ireland to negotiate an amicable exit which cannot be subsequently referred to by the employee. The simple answer is that they cannot.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

GIBBS -v- LEEDS UNITED

Leeds United had to pay STG £330,000 for a breach of contract.

The UK High Court held that the presence of commercial exit discussions between a Football Club and an Assistant Manager during discussions did not prevent the Club from committing a breach of contract.

Mr Gibbs was employed as an Assistant Manager at the Club. When the Manager left there were discussions about Mr Gibbs's departure. There were discussions about him taking on the rule of Head Coach. Mr Gibbs indicated that he was interested in that role. He never stated he intended or expected to leave. Mr Gibbs was given a letter confirming that he was to remain in his role as Assistant Manager. He then asked to return to work with immediate effect. This was despite the fact that he had normally been given holidays at the end of the football season. Mr Gibbs complained about this. Discussions took place regarding his potential exit from the Club. The negotiations broke down when a financial package could not be agreed. A few days later another individual was announced as the new Head Coach. The duties which Mr Gibbs undertook were gradually eroded. He was excluded from football staff meetings. He was not asked to take part in first team training and he was given no instructions as to what he should do. He was not issued with his usual training schedule. He was not told to go with the first team to a pre-season friendly. When he asked for a training kit for the coming season he was issued with the previous season's kit instead. Matters came to a head when he received an email from the Club stating that with immediate effect his role was to be restricted to working with the Club's junior and other non-first team members. He then resigned. The High Court met with the defence that Mr Gibbs had intended to leave all along. The Club quoted various discussions that had taken place between the parties. The UK High Court did not accept that this was relevant to the issue of liability. The Court confirmed that the issue to be determined was whether or not the Club was in breach and whether or not the breach was repudiatory and that Mr Gibbs had resigned because of this. The UK High Court held that he had been constructively dismissed. It had held that requiring him to have no contact with the first team that the Club no longer intended to be bound by his Contract of Employment

and that amounted to a breach of repudiatory breach of Contract. The Court was of the view that the fact that Mr Gibbs had expressed that he was prepared to leave the Club was "beside the point". They held that did not prevent the future conduct of the Club from being in breach.

A key point for the Court was that Mr Gibbs had remained ready and willing to fulfil his duties.

While this is a UK case it provides an important reminder that the existence of commercial exit discussions between parties does not prevent a breach of contract. It is important that employers take care not to replace or undermine the rule of an employee before the exit terms have been agreed and signed off by way of a settlement agreement. Employers who do otherwise, run the risk that if negotiations break down they may be faced with a Constructive Dismissal case.

THE IMPORTANCE OF CONSIDERING APPROPRIATE SANCTIONS FOR INAPPROPRIATE CONDUCT IN THE WORKPLACE

In a recent decision by the Employment Appeals Tribunal (the "EAT") the EAT found that the dismissal of an employee who put in derogatory comments on Facebook about a colleague was unfair.

In this case the employee admitted that the actions were rude and demeaning. It was accepted that the employee put his hands up and provided the employee with a full apology.

The employee in this case had a good employment record. In this case the employer acknowledged that it did not consider any other sanctions as the comment had been on Facebook which was a public forum.

The EAT determined that there were flaws in the employer's policies and procedures that rendered the dismissal unfair and an award of €5,000 was made but the EAT also determined that the employee had significantly contributed to his own dismissals as his actions were offensive and inappropriate.

This recent decision is important as:

1. It confirms that Irish Law allows employers to take an employee's use of social media into account in disciplinary matters.

2. It is vital that employers set ground rules in relation to the use of social media. Therefore employers should have an appropriate social media policy. The policy should set out acceptable usage.

3. Any policy and procedures and procedure should deal with bullying, harassment and sexual harassment to include where such issues arise in a virtual sense. By this we mean the use of any form of social media.

4. An employer in considering disciplining an employee for inappropriate social media use must make sure there is a sufficient link between their activity on social media and their employment.

5. Before any disciplinary action particularly relating to dismissal is taken it is important that employers consider whether other sanctions are appropriate.

PAYMENT OF WAGES ACT - BONUS PAYMENTS AND ALLOWANCES

In the recent case of Sandra Cleary and others and B&Q Ireland Limited the employees sought to challenge an Employment Appeals Tribunal decision which overturned the Rights Commissioner decision that the Respondent employer had wrongly refused to pay a Winter/Summer Bonus and a Zone Allowance and which ruled that the Appellants were entitled to compensation for the unlawful deduction.

The company argued that the Contract of Employment was clear. They claimed that the bonus payments were discretionary and therefore it has the power to review or withdraw the bonus schemes at any time.

The Court in this case held that an employer can withdraw a discretionary bonus scheme but that once a bonus had crystallised there was a contractual obligation to pay it.

Effectively this decision is that an employer provides that an employee will earn a bonus once the bonus has been "earned" the bonus cannot be subsequently withdrawn. However, the employer can withdraw the bonus scheme going forward from the time that the bonus scheme is withdrawn.

One part of the decision which has not received a lot of attention is that relating to allowances. The Court held that in this case a Zone Allowance which was compensation for working in a particular area was properly regarded as an expense and the withdrawal of a Zone Allowance was the same as an expense allowance. Allowances are not covered by Section 1 (1) (i) of the Payment of Wages Act, 1991 and therefore a claim under the Payment of Wages Act cannot be made in respect of allowances.

I DON'T BELIEVE IT - DRESS CODES

It might sound strange but the WRC recently ruled that a self-proclaimed "Pastafarain" was not discriminated against. The WRC held that it was not discrimination when he was refused an Irish driving licence due to him wearing a colander on his head in his photograph.

You might ask what is a "Pastafarian". Pastafarianism is a religion. It appears that they believe in a deity called the Flying Spaghetti Monster. It appears that they also believe that heaven contains beer volcanoes, stripper factories and that every Friday is a religious holiday. This is not a spoof. In the United States a number of States have issued driving licences to Pastafarians showing photographs of the individuals with a colander on their head.

The case in question was one brought against the Road Safety Authority on the basis of religious discrimination pursuant to the Equal Status Act. The individual alleged that the colander is an integral part of his religious attire. The Adjudicator determined that

this does not fall within the definition of religion and/or religious beliefs and therefore failed.

This may be an extreme example. However the case raises the issue of what should employers do when faced with requests from employees to deviate from normal workplace dress code where this is based on a religious belief? We all remember the case in the UK of an individual where the employee was not entitled to wear a plain sliver cross over a uniform unless it was a mandatory religious requirement. In the UK in 2015 legislation was specifically introduced to allow Sikh employees to wear turbans.

The difficulty we have in Ireland is that we do not have specific legislation. What is an employer to do where they have a dress code and a Sikh employee advises that they wish to wear a turban? Will it be religious discrimination if the employer refuses?

The issue of dress code is of particular importance. It is important that employers have a dress code. They must then also be able to justify the reason for same. It must be an objective rather than a subjective reason. It is relatively easy in a professional firm to require that employees will wear a suit. However, what happens if you have dress down Friday or a casual Friday. Is it a matter in such circumstances of anything goes?

It is our advice that employers would have a dress code. The dress code would set out the reason why a particular dress code for particular categories of workers is required. It needs to set out the reason for same. If you have casual Fridays or a casual dress attire then equally it is important that you set out what they are and the parameters of casual dress. In relation to the wearing of jewellery or religious symbols then again it is important that the policy sets out exactly what is and what is not allowed and why this is such.

The issue is certainly going to arise in the workplace at some stage when a Pastafarian arrives wearing a colander on his or her head. Unless the employer has a dress code that deals with attire to be objectively justified then the employer may be in difficulties. It must also be remembered that any dress code must be applied equally in respect of all employees.

KEEPING IN TOUCH

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POSTED WORKERS IN IRELAND

On the 27th July 2016 the new Statutory Instrument being SI 412 of 2016 issued. The Statutory Instrument transposes the EU Directive on the better enforcement of the Posting of Workers Framework Directive.

From the 27th July the new measures strengthen the enforcement of employment rights for posted workers. The regulations are there to ensure that foreign service providers respect labour standards which are applicable in Ireland.

The key measures which have been introduced include,-

1) There is a new requirement on foreign service providers when posting workers to Ireland to notify the Workplace Relations Commission. They must provide the information which will allow the WRC to monitor posting activity and to ensure compliance with the posting rules.

2) There is a new subcontracting liability in the construction sector to guard against posted workers being paid less than their minimum entitlements where a posted worker in construction is not paid the applicable statutory rate of pay by the direct employer the contractor one step of the supply chain can also be held liable.

3) There is the creation of a right for a posted worker to refer a complaint to the Director General of the WRC naming both the employer and the contractor one step up as respondents.

4) There is the introduction of the defence of due diligence for the contractor in any claim before the WRC.

5) New measures which allow for the enforcement of cross border financial administration penalties and fines.

The relevant Directives are 2014/67/EC and 96/71/EC.

The rate of pay which must be paid to a posted worker will be the National Minimum Wage or as fixed under Section 42 of the Industrial Relations Act 1946 as inserted by Section 12 of the Industrial Relations (Amendment) Act, 2012 or payable under Registered Employment Agreement or Sectoral Employment Order within the meaning of the Industrial Relations (Amendment) Act, 2015.

A posted worker is a worker who normally works in another Member State of the EU but for a limited period carries out his or her work in the State.

Regulation 7 provides that where a claim is made it could be made by the posted worker against the party who is posting him or the subcontractor of a contractor. The difficulty is that the claim can only be brought one stage up. For example if there is a main contractor on site, a subcontractor, and that subcontractor subcontracts to a further subcontractor part of the work and that subcontractor obtains posted workers then in those circumstances it is only the bottom two who can be sued. The difficulty with this is that it is easy to envisage that schemes were put in place, fairly quickly, to put in effectively a company with little or no assets between the main contractor on site and their subcontractors so as to avoid liability if a posted worker brings a claim. We see this as a defect in the regulations.

There is a defence in Regulation 8 for a due diligence. Effectively this is a monthly review.

Claims which will be sent to the WRC will be sent under Section 20 (2) of the Protection of Employees (Part-Time Work) Act, 2001, Sections 14,15, 16 of the National Minimum Wage Act, 2000, Section 42 C of the Industrial Relations Act, 1946, any registered employment agreement or any sectoral employment order.

While the relevant Statutory Instrument was put in place on the 27th July there is no form produced by the WRC to enable a complaint to be made under this particular Regulation. When the new Statutory Instrument SI 417 of 2015 and 418 of 2015 relating to the Security Industry and the Catering Industry in Ireland was made it took until July for the WRC to issue new complaint forms. Hopefully the WRC will issue new complaint forms to cover claims under these Regulations quickly. In the interim those who wish to bring a claim

will have to effectively amend one of the existing forms that the WRC uses to institute a claim.

REASONABLE ACCOMMODATION FOR A DISABLED EMPLOYEE

The case of Queally Pigs Slaughtering Limited and Robert Tkac EDA1618 which we referred to previously has some very useful restatements of the law on this matter where the Court, in this case, referred to the case of a Worker -v- An Employer [2005] ELR159.

The Court also referred to the recent cases of Marie Daly -v- Nano Nagle School [2015] IEHC785 which affirmed the consistent construction of Section 16 of the Act in the determinations of the Labour Court and the Labour Court's interpretation of the scope of the obligations placed by Section 16 of the Act on an employer to consider what reasonable accommodation can be made for an employee with the disability within the meaning of the Act.

UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Mr. Finian McGrath TD Minister of State with Special Responsibility for Disability Issues has stated that the Convention will be ratified by Christmas.

The Convention obliges States which are a party to it to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity".

It was announced last year by Minister for Justice Frances Fitzgerald that they would be dealing with all outstanding issues. This included the issue of the deprivation of liberty in a nursing home for persons with for example symptoms of dementia there would be health and safety issues relating to the law which would require clarity on their status and whether or not a patient should not be allowed to leave for health and safety reasons. Changes would be required to the Electoral Acts to change the assumption that a person with a mental disability lacks the capacity to perform as a member of the Dail. Similar

changes will be required to the Juries Act. Currently there is a blanket ineligibility of persons with a mental illness serving on a jury.

It is very welcome that the Convention will be ratified. However, it must be acknowledged that there will be a considerable about of work which will have to be undertaken, for it practical implementation in Irish Law.

SETTING A MANDATORY RETIREMENT AGE FOR WORKERS

Some employers wish to have a Mandatory Retirement Age for employees. A Mandatory Retirement Age must be capable of being reasonably and objectively justified if they are challenged by employees as being discriminatory on grounds of age.

The issue of objective justification is one that causes problems. We thought it might be useful to set out some of the main points that an employer might consider.

1. Health and Safety concerns.

It is justifiable to have a mandatory retirement age for, for example, workers who are drivers, pilots or who would work in jobs which are very physically demanding. However, a lot of workplaces do not have these high risks to health and safety. Employers would need to be in a position to demonstrate by way of hazard identification and risk analysis exercise that they have looked at the particular work environment in setting a mandatory retirement age rather than simply following what was historically done. This needs to be done at the time that the retirement age is set not when you get a claim. This means that it will be necessary to do these evaluations on a fairly regular basis and to amend Mandatory Retirement Ages, and this would mean normally upwards.

2. Succession planning.

All employers need to plan for the future. They need to have right people in place with the required skills and experience for the business.

It is legitimate where you have a retirement age which is there to promote opportunities for younger employees who may have different skill sets and experience. However, again this must be able to be objectively justified.

3. Encouraging the recruitment and promotion of younger people.

It would appear that employers can have a Mandatory Retirement Age which is necessary to encourage employees to stay and progress within an organisation and motivate employees with a prospect of being promoted to more senior roles.

Terminating the employment contracts of employees who have reached their retirement age makes it easier for other workers to get promotion.

4. Age balance.

If an employer can show that there is a benefit for having a balanced level of experience in the organisation where there is a wider mix of skills and experience and allowing for the recruitment of people with newer and different skill sets and experience, then this can be a ground.

Conclusion

It is important that employers understand that if a Mandatory Retirement Age is discriminatory on the age ground that the Workplace Relations Commission or the Labour Court can look to the requirements and circumstances of each organisation when determining whether a Mandatory Retirement Age constitutes age discrimination. Therefore employers will need to be able to demonstrate that they consider their individual Mandatory Retirement Age carefully taking into account particular requirements of their own organisations and the roles carried out by their employees in order to objectively justify a Mandatory Retirement Age. This means that there need to be a paper trail created at the time which can be reviewed.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

RETIREMENT AND ANNUAL LEAVE

In case C-341/15 being a decision of the European Court of Justice they have stated that a worker who's employment is ended on retirement is entitled to an allowance in lieu of paid Annual Leave not taken because the employee was prevented from working due to sickness.

WORKPLACE RELATIONS ACT 2015

There are a number of defects in the legislation which are now coming to light. These are,

1. There is no provision for a witness summons to issue in Unfair Dismissal Cases. This was simply a mistake made in the drafting.

2. As regards implementing decisions which have to go to the District Court, no District Court rules setting out the relevant forms to be used have issued despite the Act now being a year old.

3. There is no Fees Order for an application to the District Court which means that an employee bringing a claim for implementation in the District Court will even be able to recover their stamp duty (Government Duty) costs.

4. There is no provision for the Labour Court to order Discovery. This means that Witness Summonses are going to have to issue instead which means that documentation for the first time might be seen by the employee before the Labour Court which is simply going to create unnecessary delays in the processing of cases.

This office wrote to the Minister for Jobs Enterprise and Innovation Ms. Mary Mitchell O Connor about these issues.

It may well be that if these issues are not addressed quickly that applications will be made to the Courts particularly under Article 6 and 13 of the European Convention of Human Rights which would be

an unnecessary cost to the State which could be avoided by the State taking the appropriate action to implement matters.

The Minister has replied to us to state that legislation will be issued to provide for witnesses summonses. The Minister has advised that claims to the District Court can be made under Order 40C of the District Court Rules. The Minister will be asking the Minister for Justice and Equality to make an appropriate Costs Order.

WRC HARD COPY COMPLAINT FORM

It has recently come to our attention that there is a hard copy complaint form for the WRC. This document is not one that you will find on the WRC Website.

We have placed a copy of the new form and guidelines in the information section of our website www.grogansolicitors.ie

The hard copy version is in our view a lot easier for practitioners to use. The guidance notes are very good. We will be using this version in future. By using this version it does not mean that it cannot be sent to the WRC by email. All that needs to be done is that the documents, once completed are scanned and sent by email to secure.email@workplacerelations.ie

This form is a lot more useful in that it clearly identifies what the claims are by simply putting an "x" on them. The document is signed by the person making the claim and dated.

In respect of the online form, unless it is printed off, scanned and sent in that way the copy as lodged with the WRC does not go to the other side. Instead an extract only goes to the employer. At some stage a claim is going to be made by an employer that they have not received the full document as completed and sent by email. They will claim that they have only received an extract and they will look to see the original. The current procedures in the WRC do not enable them to extract the full form as sent in. Unless this is rectified I can see this issue going to the High Court at some stage in that an employer is entitled to a full copy of the form as actually completed.

This is why I would encourage practitioners lodging claims on behalf of employees and employees lodging their own claims to use the hard copy form. If scanned and emailed the full copy is sent to the other side. They can still scan it and send it in or alternatively they can send it to the Workplace Relations Commission, O Brien Road, Carlow. For those who are in the Document Exchange the DX number is 271001 Carlow 2.

TIME LIMIT FOR APPEALS TO THE LABOUR COURT

The case of Aiseiri Limited -and- Mary McCormack PTW/16/3 decision PTD163 concerns the issue of an appeal which was lodged 43 days from the date of the Rights Commissioner's decision.

The Court in this case considered the provisions of Section 18 (h) Interpretation Act, 2005. The Court also looked at the High Court case of McGuinness -v- Armstrong Patents Limited [1980] 1IR 289 in which case McMahon J held that in enacting Section 11 (h) the Oireachtas had opted for a different approach than that of the well-established law in England. Whereby when a period of time prescribed by Statute is defined as a period "from" a particular event the day of the event is excluded in computing the period. In that judgment he pointed out that he would have adopted this construction but he did not see how it could be done. The Court held that as the appeal had been lodged on the 43rd day from the date of the Rights Commissioner's decision following Section 44 of the Workplace Relations Act as the appeal had to be lodged not later than 42 days from the date the decision concerned the appeal in this particular case was out of time.

This is an important judgement of the Court and confirms the very strict time limits.

Currently there have been some issues arising in relation to decisions issuing form the WRC. We are aware of cases where the date of the decision significantly predates the date that the decision is received and predates by a significant length of time the actual covering letter sending out the said decision. This may give rise to difficulties and potential applications to the Court for extension of time in exceptional

circumstances going forward. It is hoped that the procedures in the WRC will be rectified to ensure that decisions issue in a timely manner after the date that they are dated. Our understanding of the procedures in the WRC is that the decision is submitted by the Adjudication Officer but is not dated. The document is then dated and is sent out. The practice in the LRC was that the day that the decision was sent out was the day it was dated. What appears to be happening in the WRC is that documents are dated and then sent out. We have had occasion where we have received a decision which was dated after the date that we have actually received it and which is dated after the date of the covering letter.

Because of the strict time limits it is important for the WRC to get these procedures properly in place to make sure that decisions issue on the day that they are dated but in addition unfortunately practitioners are now going to have to make sure that the double check dates of decisions which are received to take account of the very strict time limits.

If a colleague gets a decision late they may not have an opportunity to get a client in to sign the appeal form. In such circumstances it would be our view that the Solicitors can sign the appeal form and if there was significant issue on times that to do a covering letter and even a hand written letter to the Labour Court attaching the decision and stating:

“The employer/employee wishes to appeal the decision in full”.

This has been accepted by the Labour Court in the past. If this is to be done it would be useful to make sure that the full appeal documentation is completed and sent in as soon as possible thereafter and, if possible, writing to the Labour Court to explain what has happened so that they are aware. It is useful now also in employment cases because of this issue arising to make sure that the Solicitor has an appropriate Power of Attorney or Authorisation from their client to sign any appeal documentation on their behalf. Such an Authorisation can be included in an engagement letter.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

CONSENT ORDERS IN THE LABOUR COURT AND THE WRC

Currently the legislation under the Workplace Relations Act, 2015 does not provide for Consent Orders.

I understand that currently the WRC, are going to be making it far more difficult for parties to get an adjournment. An argument has been raised that parties should resolve matters well in advance of the hearing date and therefore adjournments will not be needed. I do not disagree with this approach. However, the reality of matters in employment rights cases is that settlement negotiations, for various reasons do not often take place until the hearing date. Many cases settle well in advance but a significant number only settle on the day.

There are various reasons for this. It can be that the employer has had a limited opportunity to give detailed instructions to their representatives, that the employer does not believe that the employee will go ahead with the claim or, that the employer believes that the claim has no validity. Employers also, often believe that the value of the claim is less than they would be advised by their representatives of what the representatives believe it is worth. In relation to employee equally there are issues relating to unrealistic expectations as to the value of their cases. There are times where both employers and employees wish to have the case run to vindicate their rights or their approach. However, when the day of the hearing comes often cooler heads prevail.

Equally there are many cases where a party feels that it is necessary to set out how badly they have been treated or how bad the employee was or their version of events. Once they had an opportunity to do so then often they are prepared to settle.

The WRC, in their approach to settlements have not taken account of the realities as to how cases are fought in Ireland. A significant number of cases from the District Court right up to the High Court do not settle until the case is at the steps of the Court. They should not expect a dramatic change in attitude in employment rights cases. For those representing employees the difficulties in withdrawing a case before a settlement has been implemented is that the enforcement provisions of a settlement agreement are in the Circuit Court which are expensive. The benefits of the Insolvency Legislation, as it applies

to companies or individuals who going to liquidation, receivership or bankruptcy, do not apply to settlements. We are writing to the Minister for Jobs, Enterprise and Innovation with draft legislation requesting that she would consider amending the legislation to enable settlement agreements to be put in place. We have proposed that they would be confidential and not published. We have proposed that the same confidential rules as apply to a mediations agreement under Equality Legislation would apply, namely that it would be a criminal offence to disclose the agreement and that there would be no publication of the settlement agreement save and except if there was non-implementation of same the party seeking to enforce the agreement could do so in the normal way before the District Court and that the settlement agreement would have the same status as a Decision.

There may be some resistance to this. If there is then the reality on matters is that cases will go on for hearing even though they have been settled for the purposes of getting a decision so as to keep the case alive until the settlement is implemented. This is a complete waste of time for employers and employees. It is an unnecessary cost. It is an unnecessary cost not only for employers and employees but for the State. It is also a waste of valuable resources of the WRC. All this could be dealt with quite easily by having a provision that provided the WRC of one week notice that the matter would be dealt with by an Adjudication Officer siting on a particular date to receive settlements. To encourage settlements it could be a provision that if they are being entered into on the day without prior notice or that the case is asked to be adjourned to facilitate a settlement that in those circumstances the procedure will only apply if a fee was paid. That fee could be equivalent to the fee payable for a day rate for the Adjudicator. Such procedures may well facilitate earlier settlement. Hopefully our proposals to allow for Consent Orders will be accepted by the Minister.

THE LABOUR COURT ONLINE SUBMISSIONS

Currently the rules of the Labour Court provide that parties may lodge submissions online. In equality cases where they are lodged online it is a matter then for the Labour Court to send a copy to the other side. This would also apply in Unfair Dismissal cases. In all other cases the other party will be given a copy of the submission on the hearing date.

Currently the Labour Court is now writing to parties requesting hard copy submissions being submitted due to administrative issues in the Labour Court.

The new Labour Court (Employment Rights Enactment) Rules, which were introduced in 2015, place significant additional burdens on employers and employees as regards putting in submissions in a very short period of time. The cost saving of being able to send documentation by soft copy is proposed to be done away with.

The WRC is a member of a Document Exchange. The Labour Court is not. For regular practitioners the benefit of having the ability to send documentation by the DX where there is a standard fee for the year would be significantly increased where they have to send by post. Some of these submissions can be quite lengthy and there is a cost. Equally because of the very strict time limits being imposed by the Labour Court which we anticipate are not going to be extended to take account of postal issues means that representatives of employers and employees themselves will have to complete the relevant submission work far quicker. Requiring the parties to lodge hard copies of documentation is simply an unnecessary additional cost to employers and employees which is contrary to the ethos of the Act.

We regard this as a retrograde step. It may well be that the Labour Court computer system is not fit for purpose. It may well be that it would be announced that we will be able to lodge online once a proper computer system is put in place. The reality on matters is that if we have to go back to hard copy submissions it is unlikely that we will ever see a proper computer system installed.

There is a further issue which could arise. If an employee who has a claim under the Act which derives from the European Law is required to lodge hard copies then an issue which has simmered under the radar for some time may well arise. This is that this will be an economic cost to the employee. A claim may be made by an employee under the Von Colson and Kamann rules that, as this is an economic loss to the employee, the cost should be taken into account in assessing the compensation payment to the employee. What would this include? It would certainly include a page costing for each page. €0.20 to €0.25 per page would not be unreasonable. Where it has to be sent by post, the postal cost would be an actual cost. Being

required to send a copy to the other party in Equality cases and to produce evidence of same to the Labour Court would mean that where a party was represented it would be the time spent in going from the office to a post office to get the letter registered. That is an economic cost. There is the cost then of having somebody make six copies. That is the time cost that will be charged to the employee. Then there is the cost of checking the submissions to make sure that they have been properly copied and properly paginated and that all the submissions are exactly the same and include all documents to be attached. That is a time cost. The Labour Court traditionally have not awarded costs. This would then be a matter that would ultimately at some stage go to the High Court. If won, it would mean that there would be substantial additional costs imposed on an employer who loses.

All of this can be avoided by ensuring that submissions can continue to be lodged online.

It concerns this office that if the rules are changed that unnecessary additional costs will apply to both employers and employees simply in the cost of having to put the submissions together. When Mr Richard Bruton as Minister for Jobs, Enterprise and Innovation announced the Bill it was stated by him that this Bill would reduce costs to employers and employees. If the ability to lodge online is removed then that promise will be debunked.

If the WRC is able to accept documentation online and process same it is hard to understand how the Labour Court cannot do likewise.

SUBMISSION TO THE MINISTER FOR JOBS, ENTERPRISE AND INNOVATION ON THE WORKPLACE RELATIONS ACT 2015

This office has made a number of submissions to the Minister relating to the Workplace Relations Act.

In May of this year we wrote to the Minister about the fact that there is no provision in the legislation currently to enable a witness summons to issue in an Unfair Dismissal case. Witness summonses can issue in all other claims but not in an Unfair Dismissal case. The minister has confirmed this will be addressed.

We pointed out to the Minister that there are no District Court Fees Order or rules setting out as to how an application is brought for implementation, in the District Court, of a decision by an Adjudication Officer or the Labour Court. This does involve interaction between the Department and the Department of Justice and Equality but with the Act now nearly a year in operation this should have been put in place at this stage. The Minister has advised Order 40 C of the District Court Rules can be used and that she will request the Minister for Justice and Equality to issue a Fees Order.

We have pointed out that the Labour Court has no power to require discovery of documents. This means that effectively rather than having a discovery system which enables matters to be dealt with quickly and efficiently witness summonses are now going to have to be issued in cases requesting individuals to attend and bring documentation which will then have to be investigated before a hearing before the Labour Court simply extending the time of hearings and effectively being an additional cost to the State. The Minister has refused this.

In July of this year we wrote to the Minister about the provisions of Section 26 of the Organisation of Working Time Act, 1997. Safety, Health and Welfare at Work Act and the new Paternity Leave and Benefit Act, 2016 both protect an employee from the threat of penalisation. However, the Organisation of Working Time Act only protects an employee from being actually penalised rather than the threat of penalisation. We have asked Minister to consider amending the legislation to take account of this defect. We are awaiting a response on this issue.

THE RSA AND THE WRC

A Memorandum of Understanding between the Workplace Relations Commission and the Road Safety Authority has been put into place.

This new understanding will involve the exchange of information between the RSA and the WRC and will involve the sharing of even confidential information.

It made absolute sense that this would be put in place.

There are many claims before the WRC by, in particular, truck drivers where there are serious issues under the Road Safety Authority's jurisdiction such as breach of the rules relating to driving and rest times or the maintaining of tachograph records as just some examples.

In these kinds of cases going forward it is likely in the future that the cases that run before the WRC will result in the referral of information from the WRC to the RSA.

DATA PROTECTION LAWS

We thought it might be useful just to look at how the new Data Protection legislation issuing from the EU is going to affect companies.

The requirement for Data Protection Officers:

Any organisation whose core activity involves regular and systematic monitoring of individuals on a large scale or involves processing of large quantities of sensitive personal data must appoint a Data Protection Officer. These officers must be experts in Data Protection law and privacy. They must also be able to independently act and report directly to senior management within organisations. These new laws will significantly impact on larger employers who monitor staff.

Increased Penalties:

The legislation will provide for fines calculated by reference to annual turnovers. Companies can be fined up to €20 million or 4% of their annual global turnover, whichever is higher.

Privacy:

Data Controllers will need to make sure that privacy concerns a key part of their decision making. They will have to carry out a Privacy Impact Assessment for any action which may pose a high risk for data subjects' privacy rights.

Consent:

Data subjects must freely give specific informed and unambiguous consent to the processing of their data. Where a Data Controller collects personal data for one specific purpose the data subject will need to give additional consent for each additional processing application.

Breaches:

If a company suffers a data breach there will be mandatory obligations to notify the local data protection authority without delay.

EUROPEAN LAW - EFFECTIVE REMEDY

Obligation to state reasons on which a decision is based, and the right to an effective remedy.

The case of the Council of the European Union, 15th November 2012 Case C-417/11P is interesting. In that case ECJ held:

"According to a consistent body of case law the purpose of the obligation to state the reason on which an act adversely affecting an individual is based, which is a corollary of the principle of respect for the right of the defence, is, first to provide the person concerned with sufficient information to make it possible to ascertain whether the act is well founded or whether it is vitiated by a defect which may permit its legality to be contested before the European Union judicature and secondly to enable that judicature to review the legality of that Act".

They went on to state:

"The statement of reasons required by Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institutions which adopted the measures in such way as to enable the person concerned to ascertain the reasons for the measures and enable the Court to have jurisdiction to exercise its power review".

This view by the ECJ, which is now some six years old is a very reasoned approach to how Courts and Tribunals should deal with cases involving European Law when cases come before them.

USING AGENCY WORKERS FOR TEMPORARY POSITIONS IN GERMANY

On 1st June 2016 a new draft law regarding the German legislation on the Supply of Temporary Employees was adopted by the Federal Cabinet. The reforms are not expected to come into place until 1st January 2017.

The new German legislation will provide for a maximum hire term of eighteen months. In future the same temporary employee may only work for the same hirer for a period of no longer than eighteen consecutive months. If this maximum period is exceeded an employment relationship between the temporary employee and the host business will be established automatically by law. Hire times prior to the entry into force of the legislation will be excluded. Where an agency supplies the same temporary employee to the same hirer interruptions of no longer than three months will be excluded. If however the deployment is interrupted for at least three months and one day the maximum period begins to start again and the previous deployments will not be taken into account. There will be provision for the maximum hire term to be extended by collective bargaining agreements or by way of Works Councils. Temporary workers will be entitled to equal pay no later than after nine months of starting. In the calculation of the nine month period for equal pay deployment periods will also be added up if the interruption is no longer than three months. In collective bargaining agreements the equal pay will apply only after fifteen months. However, the fifteen months period will only apply if there is a gradual accession process.

There will be anti-avoidance provisions to apply for bogus contracts.

There will be a requirement that temporary employees to be supplied in future will have to be designated by name prior to the supply of the employees and failure to do so will result in a fine of up to €30,000. Temporary employees will not be allowed to be taken on as strike

breakers. If there is such a breach a fine of up to €500,000 can be put on the host business.

The host business will have to provide any Works Council with the contract on which the hire of external temporary staff is based. Works Councils are more common in Germany than they would here in Ireland.

In future temporary employees have to be taken into account in the host business when determining thresholds for the purposes of co-determination rights of Works Councils. In Germany Works Councils in an operation generally having more than twenty employees must be given timely and comprehensive information about the planned operational change which may result in material detriment to the staff and are entitled to negotiate a reconciliation of interests and a social plan with the employer. The effect of temporary employees may increase a number of Works Council members. In addition under German law larger companies have to form a supervisory board with up to 50% of the seats to be filled by employee representatives.

TIPPING IN THE UK

The UK Government has recently announced a consultation on tipping. If you go to a restaurant maybe the issue of tipping is something you have considered. The stated objective of the proposals are that all discretionary payments for service should be voluntary to the consumer, all discretionary payments for services should be received, in full, by workers where appropriate; and the allocation of such payments are transparent to the consumer who makes them.

This consultation comes after evidence emerged last year to reduce the confusion which customers often face. How often have you asked yourself who ends up receiving the “service charge”? If you don’t get a good service should you have to pay it? If you do have a service charge on your bill does this go to the restaurant or to the worker who has served you and therefore should you leave cash as well?

All too often service charges can find their way not to the employees involved but to the owner of the business.

This whole issue of tipping is something which has actually been the subject of studies in the US. It appears that certain types of employees are more likely to get bigger tips than others. It appears that female workers receive more tips and bigger tips than their male counterparts. In the US there has been quite a lot of work done on what type of worker is likely to receive the greatest tip.

Leaving aside altogether who gets the most tips the issue is whether a tip which is left to a worker actually goes to that worker, is it shared between that worker and others in the restaurant or establishment and do the serving staff, for example in a restaurant receive the entire tips or is it shared with the kitchen staff and others.

The UK Government is looking to do a consultation to bring in legislation which will set out transparent rules which individuals in establishments will know in advance of giving a tip to whom the tip goes.

UK EMPLOYMENT TRIBUNAL DECISIONS

From August 2016 the Employment Tribunal Decisions in the UK will be available online. Up until now they have not been and anybody wishing to review the first instance decisions had to attend in person to obtain copies.

WOMEN WEARING HIGH HEELS

One would have thought in this enlightened era that an employee working on reception would not be told to go home because she came to work in “flats” rather than in high heels. This is what happened with an employee of a service company who provides services to a major accounting and taxation firm in the UK being PwC.

Of course employers can have a dress code. Of course an employer can provide in a dress code that employees will wear sensible or appropriate shoes. However, it is unlikely that an employer can dictate that female employers where high heels. An employer can direct that employees will wear business attire. They can direct that they will wear appropriate shoes appropriate to business attire which would be

applicable in an office environment. However, an employer could not direct that an employee wears high heels, in our view.

It would be interesting to see the argument that an employer could put forward saying that a particular group of employees have to wear a particular type of shoe. Of course it could be issues relating to functionality. This would include such matters as not wearing a pair of wellington boots if working in an office or if you are working on a building site that you would wear appropriate steel capped shoes.

We are now in the 21st Century really these days of dictating what could be inappropriate footwear is totally outmoded. The employee in the particular case was going to be standing for a considerable period of time. She was required to bring visitors to meeting rooms. This involved a considerable amount of walking. To expect an employee on an eight hour shift to wear high heels, at all times, just appears ridiculous.

When this story broke it was great to see that PwC immediately stepped in and ensured that their subcontractor changed their dress code rules. They should never have needed to but it is admirable that they did act so promptly.

A new twist has come into the whole discussion. At a recent Petition Committee Inquiry Ms Helen Sewell who has said that attitudes toward high heels could lead to a generation of women with serious health problems. A report has been produced claiming that the British economy is losing £260 million a year. This is on the basis of an expert report relating to absences associated with inappropriate footwear. The inquiry was set up after a petition of more than a 150,000 signatures was brought to Parliament. Some of the claims that have been made, and I am not an expert on it, sound a little bit outrageous. It has been claimed that wearing high heels physically restricts a women's ability to carry out public speaking effectively. It has been claimed that it impacts on the ability of women to think properly. It has been claimed that wearing high heels knocks a person off balance forcing part of their brain to concentrate on steadying themselves on tip toes rather than communicating with others. Some of the claims to the Petition Committee sound far-fetched. However the issue of absences associated with inappropriate footwear may have some credence.

It is important that women are comfortable in footwear. However, footwear in the workplace should be sensible to ensure that any form of injury is not caused in the long term.

DAMAGES FOR PERSONAL INJURIES

In the case of Payne v. Nugent which was delivered in November 2015 the Court of Appeal have set out general principles which should be applied by Trial Judges when assessing the appropriate level of general damages in personal injuries cases being,

- The Trial Judge must consider and set out the effect of the injuries sustained by the Plaintiff on the Plaintiff's lifestyle

- The Plaintiffs accuracy and reliability is very important as is his or her credibility. The Trial Judge should carefully evaluate the Plaintiffs evidence. This does not mean that the Judge should adopt a sceptical approach but he/she should bear in mind that the onus is on the Plaintiff to prove each particular element of the case.

- The Trial Judge should have regard to where the injuries fall within the entire spectrum of personal injury claims ranging from very modest claims to very serious claims.

- Any general damages awarded must be both reasonable with regard to the injuries sustained and proportionate to the awards usually made to Plaintiffs in respect of injuries which are of greater or lesser importance.

- Minor injuries should attract appropriately modest general damages with very serious injuries rising to around €450,000.

- This does not mean that the €450,000 is a limit for general damages but it is generally accepted that the upper range for compensation usually rests in or around that mark.

- Special damages being damages for loss of earnings medical expenses and out of pocket expenses should be assessed separately.

This Decision of the Court appears to have had a significant impact in High Court Judgements.

EUROPEAN COURT OF JUSTICE DECISION TO INCREASE INSURANCE COSTS

The case of Minister Finansow v. Aspiro SA has decided that claim handling services provided by a Polish outsourcing company are not exempt from VAT. This will have a significant impact for insurers and outsourcing companies.

Insurance companies are exempt from VAT. They are not zero rated. Because they are exempt from VAT they cannot claim any refund of VAT charged to them. They could if they were zero rated.

Up until now certain entities provided outsourcing services to Irish insurance companies did not charge VAT to the insurance company for such services. Following this decision they will have to.

The effect is that it will increase the cost of these services to the insurance companies. They will not be able to reclaim the VAT. Therefore, the VAT which they pay will have to be passed on as cost to customers.

Currently the Irish legislation on this matter is not in line with this European Court of Justice Decision. This decision should not come as a shock to insurance companies or the Government. In 2005 Arthur Andersen Management Consultants performed certain back office functions, including the management of claims. The ECJ in that case concluded that the services provided were not exempt from VAT.

To be exempt from VAT it is necessary for the service provider to show that they are either an insurance agent or broker. Outsourcing companies are normally not able to do so.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

INTERIM PAYMENT FOR MINOR PLAINTIFFS CARE COST

On the 19th April this year Mr. Justice Barr directed that the Plaintiff's future Care Costs and Therapy Costs would be dealt with on the basis of a periodic payment. This was despite the wish of the parents of the Plaintiff to deal with the whole claim in a lump sum.

The case is Jude Miley a minor suing by her father an next-friend -v- Lorcan Birthistle being a High Court decision under 2013/7674P. There was no dispute in respect of the future life expectancy of the child. The issue between the parties was that the Plaintiff had submitted a claim for future care which stated that two carers will be needed from age 18 upwards because of the behavioural difficulties which, it was claimed, the Plaintiff child who was 4 would exhibit at that time. The Defendants argued that where doctors had advised that should the child have Behavioural Management Therapy there was a good chance that she might make significant improvement and a need for two carers may not arise at all. The Defendants argued that a payment of a lump sum award which could cause an injustice to the Defendant, who might be asked to pay for the future cost care at a level that may not prove to be necessary. Mr. Justice Barr agreed to adjourn the claim for therapy and care cost for a period of time on the basis of Order 26, Rule 34 of the Rules of the Superior Courts. He further pointed out that even if he was incorrect in his interpretation he was satisfied the Court had jurisdiction to make this Order in order to do justice in the case.

His Honour noted that the content of the Plaintiff and Defendant medical reports all indicated an improvement in behaviour. He held that had been accepted by the medical and care experts that the Plaintiff would have to be reviewed again in the future to finally access his needs due to his young age.

His Honour in this case found that there would be a real risk of doing a great injustice to the Defendant to force the action to be dealt with by way of a lump sum award in damages for future care costs at a time without giving the treatment which has been recommended to the Plaintiff a chance to work.

The issue of interim payments is a significant issue which does need to be addressed.

Tel: 6177856 | **Fax:** 6177857 | **Email:** info@grogansolicitors.ie | **www.grogansolicitors.ie**

Lump sum payments can cause injustice to both Plaintiffs and to Defendants. A far better approach is always going to be that interim orders can be made particularly in the case of serious injuries.

CALDERBANK OFFERS

The issue of Calderbank offers is well established in Irish litigation. In the case of N-M (Cost)[2005]4IR476 this was endorsed by the Supreme Court.

A Calderbank offer is a written offer made without prejudice save as to the issue of costs to satisfy the whole or part of the opposing party's claim or counter claim or appeal. Where the offer is not accepted and the Plaintiff or Appellant fairs worse at trial or at the appeal hearing then this letter can be opened to the Court in support of an application to fix the Plaintiff with costs on the basis that the trial or appeal was unnecessary because of sufficient offers to compensate had previously been made.

The form of any such letter would be headed "Strictly Without Prejudice Save as to the Issue of Costs".

SI12 of 2008 being the rules of the Superior Courts (Costs) Order requires Irish Superior Courts in considering the award of costs following the determination of a trial or an appeal to have regard to the terms of any Calderbank offer. These offers are not available in first instance cases where a Defendant would be able to make a lodgement or tender in lieu of a lodgement with its Defence.

If you are making a Calderbank offer it is necessary to do so sufficiently in advance of the trial or appeal to give the other side a fair opportunity. This was clearly set out in the case of Murnaghan v. Markland Holdings Limited [2004] IEHC406.

In the case of Shannon v. O Sullivan [2016] IECA105 which was a Judgment given on the 13th of April 2015 the Court of appeal considered the effect of a Calderbank offer where the Plaintiff had succeeded in their claim to the High Court but the damages awarded had been reduced on appeal. The Calderbank offers were opened in support of the application by the Defendants who were the Appellants

to fix the Plaintiffs with all of the costs subsequent to the latest date for their acceptance.

The Court of Appeal accepted the Plaintiffs who received excessive awards from a Court in first instance are in a difficult position. They point out that they obtain a Court order for payment of a sum that is likely to be set aside on appeal with the effect that they will usually have to pay the costs of that appeal unless they can point to some special circumstances which would render that approach unjust. In many such cases a Defendant can be confident of the likely outcome of appeal and may not give the Plaintiff the opportunity of settling for a lesser sum of that awarded by the High Court. This therefore denies them the opportunity of avoiding the costs of the appeal. However, in this case the Defendant by making the Calderbank offer gave the Plaintiff the opportunity to avoid the consequences of a costs order being visited on them should they recover less than the sum awarded by the High Court. The Court of Appeal concluded that harsh as it may be it would not be fair to the Defendant who made such offers which had they been accepted would have protected the Plaintiff from the risks of incurring costs on this appeal to be affixed with paying their own costs in respect of two appeals which they considered were unwarranted having regard to the offer which they made. The Court awarded the costs of the appeal to the Defendant and directed that those costs be set off against the award of costs in the Plaintiffs favour in the High Court.

This decision is important.

What was not considered however is what would happen where a Plaintiff receives an excessive award from a Court of first instance, recognises it as such and in effect puts in their own Calderbank offer to accept a reduced sum subject to the Defendant not progressing with the appeal. This is something that Plaintiffs may have to consider going forward.

At a very minimum if they receive a Calderbank offer that they must seriously consider same.

These forms of offers are not usual but they are not uncommon.

KEEPING IN TOUCH

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SECURITY OF COSTS

When it comes to an issue of company and security of costs, this issue was addressed in the case of Mary and Joseph O Brien Developments Limited (In Liquidation) v. Sobol and Others [2016] IECA133. In that case the Court referred to Section 390 which provides that,

"Where a Limited Company is a Plaintiff in any action or other legal proceedings, any Judge having jurisdiction in the matter, may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the Defendant if successful in his Defence, requires sufficient security to be given for those costs and may stay all proceedings until security is given".

The Court confirmed that the principle governing the proper interpretation of Section 390 of the Act is not in dispute and has been rehearsed in many Decisions including that of Clarke J in Connaughton Road Construction Limited v. Lang O'Rourke Ireland Limited [2009] IEHC7 where the Judge in that case referred to the Supreme Court's adoption of the test set out by Morris P in Interfinance Group/KMPG Pete Marwick [Unreported High Court 29 June 1998] in Usk and District Residents Association Limited v. The Environmental Protection Agency [Unreported Supreme Court 13 January 2006] where it was held as follows,

"(1) In order to succeed in obtaining security for costs the initial rests upon the moving party to establish,
(a) That he has a prima facia Defence to the Plaintiff's claim and,
(b) That the Plaintiff will not be able to pay the moving parties costs if the moving party is successful,
(2) In the event that the above two facts are established, then security ought to be required unless it can be shown that there are specific circumstances in the case which ought to cause the Court to exercise its discretion not to make the Order sought. In this regard, the onus rests on the party resisting the Order".

This is an important Decision for restating the law on this issue of security of costs.

Tel: 6177856 | **Fax:** 6177857 | **Email:** info@grogansolicitors.ie | **www.grogansolicitors.ie**

COSTS IN JUDICIAL REVIEW PROCEEDINGS

A recent decision has issued in the case of Stephen Miley and Other Applicants, the Employment Appeals Tribunal Respondent, Paul Burke Notice Party and the Attorney General, Notice Party. The case is under citation [2016] IESC20 which was delivered on the 10th May 2016. The Decision of the Court was delivered by the Chief Justice Ms. Denham.

The case confirms that in relation to costs concerning a quasi-Judicial Tribunal such as the EAT the costs in Judicial Review proceedings should not be awarded where the Tribunal does not act as legitimate contractor. This means that where the Tribunal does not oppose the review. It confirms that if the Tribunal acts mala fides or with impropriety then costs can be awarded.

The case is also interesting in that the Supreme Court did look at the issue of Article 6 of the European Convention of Human Rights, what discounted it as being applicable where the case is undefended by either the Tribunal or the Notice Party as the Court has held in such circumstances the costs are limited.

NOTICE OF MOTION IN DEFAULT OF DEFENCE

Where a Notice of Motion is to issue in Default of Defence it is important that certain warning letters are sent. The party sending the warning letter must notify the other side of the intention to issue a Motion for judgment in default of defence and give the other party a period of 14 days in which to file a Defence. It cannot be stressed too much that the other party must be advised of the “intention” to issue the Motion as failure to do so can result in the Motion being struck out. The intention to issue the Motion will not be implied into the letter unless it is specifically set out therein.

In Personal Injuries cases, it is also required that an Affidavit of Verification, verifying the contents of the replies to particulars, is served and filed before the warning letter of intention to issue a motion for judgment in Default of Defence is issued. Circuit Court cases require a 14 day warning letter. High Court cases require a 21 day warning letter.

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

Before acting or refraining from acting on anything in this newsletter professional advice from a solicitor should always be obtained. This publication does not purport to be legal advice rather our observations on legal issues.