Welcome to the October issue of Keeping in Touch.

INDEX *

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

INTRODUCTION*

Up until now we have moved from a quarterly to a bi-monthly publication. We are now moving to a monthly publication. The reason for this is that there is a considerable amount of developments in the area of Employment Law and we thought it is useful to produce a more user friendly publication with more up to date information on recent developments.

September which is normally a quiet time in many offices has been a busy time for this firm.

We have obtained three significant National Minimum Wage Act awards. Two of these were against O'Leary International Ltd and one against Baku GLS Ltd. In the cases against O'Leary International Ltd awards of €12,000 and €5,000 were made. The lower sum was in respect of an employee who for the second time issued proceedings against O'Leary International Ltd. Previously under the National Minimum Wage Act an award of over €15,000 by the same employee had been obtained.

In September Richard Grogan of this firm was interviewed on the "Pat Kenny Show", the "Last Word" with Matt Cooper and on "Drive Time". This arose at coverage of the case this office was involved in which was covered in "Irish Legal News", the "Irish Independent" and the "Irish Examiner" on the 8th September.

While this office has been busy over the last number of months we have been tracking the number of cases issuing to the Workplace Relations Commission. At the present time there appears to be somewhat less than 6,000 referrals to the WRC. This would indicate to us that there has been a substantial fall off in the number of employment cases. The last information which we have, show that the Labour Relations Commission in 2015 had 5,448 referrals. The

Employment Appeals Tribunal had 2,630 and the last figures for the Equality Tribunal which are for 2014 were 607, which is roughly 8,785. At the present time the Adjudication referral references are less than 6,000 and the CA referrals are somewhat less than 7,000. What this indicates is that there has been a significant reduction in the number of referrals. One would therefore have expected that claims would be disposed of far quicker. While WRC is stating in that the average time for getting a hearing is 77 days and a decision is 28 days, which actually appears what they claim is working days rather than actual days thought the Report does not make this clear, this is not the feedback that representatives are giving. There are considerable administrative difficulties in dealing with the system. This office has met with the Workplace Relations Commission and we have submitted a detailed note running to about seven pages to them as a result of that meeting with the issues which we identified which we have passed to the Minister and the WRC.

In our practise we have seen a shift. A significantly higher percentage of claims are now coming from middle and senior managers. Most of these claims do not get on for hearing and are resolved between the representatives of the employer and the employee. With the increase in activity in the workplace we anticipate there will be fewer Unfair Dismissal claims because employees will be able to minimise their loss by getting a new job. There are however some worrying trends. We are seeing a considerable increase in National Minimum Wage claims particularly in the haulage industry. There are well known schemes within the haulage industry. One of these involves disguising wages as expenses. The advantage for the employer is that the disguised wage element is not subject to employers PRSI and is not subject to USC and many of these schemes involved paying the employee a “net” pay per day or per week. Where this comes to light the employers in those circumstances are usually subject to a significant National Minimum Wage claim. In additional in the haulage industry there appears to be a failure to pay employees while they are on ferries. This applies to international drivers. Time spent of ferries is in fact time that must be paid as it is traveling time. This makes absolute logical sense as the employee is traveling on behalf of their employer and must undertake the travel. In the coming months we have two current cases before the High Court on Points of Law where decisions are due. Two further cases have issued and are returnable in November and we are involved in a Judicial Review where a significant award was obtained

by an employee who was employed by Nurendale trading as Panda Waste where Nurendale trading as Panda Waste has referred the matter to the High Court by way of Judicial Review.

In November Richard Grogan of this firm will be speaking at the Dublin Solicitors Bar Association on 15 November and at the Skillnet meeting in Cork on the 18th November on the new Workplace Relations Act. On the following Friday at a conference in Dublin we shall be presenting a paper on the Workplace Relations Act and the presenting of the claims before the Workplace Relations Commission which will be a full day course.

We hope that you find the new format useful and informative and we hope you will find it more user friendly and that the information provided is relevant to you.

We do appreciate the very positive feedback that we have been receiving in respect of this publication.

UNFAIR DISMISSALS ACT

An interesting case issued under ADJ1149. There are associated cases as well. In this case the employee started as a sales assistant with the Respondent in 2008. She was promoted to the Deputy Manager in 2009 and to Store Manager again with the same employer in 2011. She then applied for the position of a Visual Merchandiser with the second named Respondent in September 2011 and applied for the position of Visual Merchandiser with a third named Respondent in February 2015. She was terminated on the 4th May 2015. All three Respondents are part of a group which is controlled by a Spanish company. The Adjudicator held that there was no reference to the group in any contract of employment nor was there any reference to any transfer between the different employers.

This decision raises serious questions as to how employees are going to be protected under the Unfair Dismissal Act, 1977. It leaves open the option for employers to “promote” employees to different companies within a group and by doing so effectively ensure that the employees lose the protection of the Unfair Dismissal legislation. The

decision unfortunately does not set out the relevant terms of the contracts whether they particularly identified different companies.

The reality of matters is that most employees when they are in a group situation regard themselves as employed by the group. The legislation when it was introduced in 1977 worked on the basis that there is an employer and employee. Now the reality of matters is that many employees will move between different divisions and that those divisions can have separate legal entities.

Certainly there is a strong argument that the Unfair Dismissal legislation should be amended to protect employees in group companies so that they will be deemed to have continuous employment. Such protection is in the Redundancy Payments Acts and the latest employment legislation being the Paternity Leave and Benefit Act 2016.

We are not saying that the decision in this case was wrong but rather that it is one that has an unfortunate consequence where the legislation is not up to date to take account of the realities of business life.

PREGNANCY RELATED DISMISSAL

The issue of pregnancy related dismissal has been in the news recently.

A decision issued on 1st September from the WRC. In that case the employee was earning €27,500 per annum working 42 hours a weeks.

The employee was awarded €40,000 being nearly two years wages.

The Adjudication Officer in that case importantly said:

"The Court of Justice of the European Union had held in Webb -v- Emo Air Cargo (UK) Ltd, Case C-32/93 and in Brown -v- Rentokill Case C-394/96 that a woman has the full protection of Community Law for the duration of her pregnancy. This has been upheld by the Labour Court which has held that no employee can be dismissed while they are pregnant unless there are exceptional circumstances

unconnected with the pregnancy and those exceptional circumstances are noted to the employee in writing".

In this case the Adjudication Officer found that in September 2015 the day after the employee commenced her Annual Leave that the employer drew up a list of the employee's shortcoming. The Adjudication Officer held that there was clear evidence that the employee did not have any basis for allegedly extending the Complainant's trial probation period when they allegedly issued a letter to the Complainant on the 4th June 2015. It was further noted that the list contained issues that were not dated as to when they occurred and were so general as not to enable the employee to be in any position to respond to them. The Adjudication Officer confirmed that there was no meeting held with the employee prior to her summary dismissal.

The reference in this case is ADJ810.

PREGNANCY RELATED DISMISSALS

On the 8th September Richard Grogan of our firm was interviewed for articles in the Irish Independent and the Irish Examiner on 8th September. Richard Grogan of this firm pointed out that in his view pregnancy related dismissals were now at epidemic level but was an issue which was not always recognised because of the fact that so many of these cases settled before they ever went for hearing. This arose after this firm represented an employee before the Labour Court, whose decisions are made public and where names are disclosed.

Richard was subsequently interviewed by Matt Cooper on Today FM, on the Pat Kenny show on News Talk and with Mary Wilson on Drive Time on RTE.

The journalist who wrote the articles in both Newspapers was Gordon Deegan who is an investigative journalist. The article that was written by Mr. Deegan was also picked up by the Irish Legal News on 8th September.

We are delighted that this important topic has received some publicity. We regard the pregnancy related dismissal or any discrimination of pregnant women as abhorrent.

The case was that of Sandra Gegieckiene and BT Ward Limited trading as Subway. This office represented the employee. The case was reported in the Labour Court under reference EDA1625. This case was also covered in the Irish Examiner on Saturday 3rd September and in the Times Irish edition on Sunday 4th September.

The employee was awarded €10,000. This level of compensation may seem low but as the employee only worked 7 – 10 hours a week, and the maximum compensation is two years wages, the actual level of compensation was at the higher level. The decision does not set out the calculation of how the figure of €10,000 was arrived at.

CONSTRUCTIVE DISMISSAL

In the case ADJ1011 the adjudication officer dealt with a case of constructive dismissal.

The Adjudication Officer quoting UD1775/2010 stated,

"Except in very limited circumstances an employee must exhaust all avenues for dealing with his/her grievances before resigning".

It is absolutely imperative for employees who are involved in Unfair Dismissal cases where they have resigned to show that they have exhausted the internal grievance procedures. Many employees do not recognise this fact.

NATIONAL MINIMUM WAGE CLAIMS BACK ON THE AGENDA

We have received three recent decisions under the National Minimum Wage Act. We have a number of outstanding claims in the Workplace Relations Commission.

In the case of O'Leary International Ltd two awards were obtained by this office on behalf of clients' of ours in the sum of €12,000 and

€5,000 respectively. In respect of one of these the individuals who brought a claim against O'Leary International Limited this is the second time that claims have been brought by the particular employee against that employer. Previous decision issued under MWD15 where the employee had been awarded €15,180.75. The employees working for O'Leary International Ltd were paid the sum of €60.25 per day. Their contract documentation would have appeared to say that they were being paid €100 per day. The difference was made up with a non-taxable allowance. This is a perfectly legitimate payment to make to any employee. However, it is not wages. Allowances are not taken into account in calculating the National Minimum Wage. This makes perfect sense because of the fact that the allowances are not subject to employers' PRSI. They are not subject to tax and they are not subject to USC.

In a second case against Baku GLS Ltd a client of ours obtained an award of €3,000. In that case a significant amount of the argument related to time on ferries which the employer contended was not to be taken into account in calculating wages under the National Minimum Wage Act but where the Labour Court confirmed that time spent on ferries is to be taken into account in calculating the National Minimum Wage. It is time on official travel.

This office is involved in a number of significant National Minimum Wage claims against various employers particularly in the trucking industry before the Workplace Relations Commission.

All of these cases involve non-Irish National drivers. We believe that we are only seeing the tip of the iceberg in respect of the number of employees who are not paid correctly. Non-payment of the National Minimum Wage not only affects the employee. It also affects the State. The State loses Revenue in respect of USC. The State loses Revenue in respect of employer PRSI. Non-payment of the National Minimum Wage distorts business by creating a competitive advantage for those who are non-compliant compared to those who are compliant.

Unfortunately the legislation provides for no penalty other than the monetary loss for an employer who does not pay the National Minimum Wage. Therefore an employer who does not pay the National Minimum Wage runs very little risk other than having to pay out if a claim is brought.

In the UK the National Minimum Wage is policed by the UK Revenue. This makes sense as the Revenue are losing out if the National Minimum Wage is not paid particularly if the current schemes which we see being put in operation are used which can create a significant loss to the State.

In the UK they also have a "name and shame" provision whereby the UK Revenue publish the list of those employers whom they find underpaying the National Minimum Wage. We have no such system here in Ireland. The majority of employers are compliant. We do however have a worry that there is a significant level of non-compliance in the transport industry particularly in relation to trucking companies.

What is interesting in what we see is that the same schemes appear to be applied in different companies who in theory are in competition with each other.

A significant number of truck drivers now are Romanian. Many of these are not conversant with their rights. We are beginning to see these employees starting to come to us and therefore we believe that there is going to be a significant increase in claims under the National Minimum Wage Act over the next twelve to eighteen months.

NATIONAL MINIMUM WAGE ACT 2000 – 2015

The Minister for State in the Department of Jobs, Enterprise and Innovation has requested the Low Pay Commission to look at the issue of the amount which an employer can deduct for board and lodgings under the provisions of the National Minimum Wage Act.

These rates have remained unchanged for a number of years.

An issue which does not appear to have been referred to the Low Pay Commission is the issue as to should there be a difference where an employer offers accommodation as opposed to one where the employer requires the employee to live on the premises. The Low Pay Commission will be asked to report on this issue as regards the level of deduction from the National Minimum Wage which an employer can

make under the legislation for providing board and lodging or just board or just lodging.

TRAINEES AND THE MINIMUM WAGE

We are receiving a surprising number of calls from trainees whether they are solicitors or accountants in relation to their entitlements to be paid during a training contract.

We would have thought, particularly in the case of solicitor firms, that they would have been aware of the law which applies to trainee solicitors. The Law Society very clearly sets out on their website that trainees must be paid.

A trainee solicitor is entitled to be paid at the very minimum the National Minimum Wage for all hours they are contracted to work for. In addition where they are on training courses in the Law School of the Law Society they are entitled to be paid the National Minimum Wage.

We are coming across situations in particular in relation to trainee solicitors where they are paid nothing.

This not only leaves the employer open to claims under the National Minimum Wage Act but also under the Organisation of Working Time Act for claims for Holiday Pay, Public Holidays and various other employment claims.

Where, in particular, trainee solicitors raise issues with the law firm who has provided them with the traineeship the type of responses we are hearing back are that the trainee was lucky to get a traineeship and in some cases threats are made that if the trainee wishes to pursue matters then the firm will not sign their form to enable them to become solicitors or that seeking payment could be seen as a black mark against them as regards future employment. All of these can result in a penalisation claim which can be very expensive for the employer.

The issue of non-payment of trainee solicitors does not happen in the larger firms. The vast majority of solicitors firms who take on a trainee

not only pay the National Minimum Wage but often an excess of same. Solicitors who take on trainees generally see it as part and parcel of being a Solicitor that you offer traineeship to a future solicitor at various stages during your career. The vast majority of Solicitors' offices see having a trainee as an individual whom they are not only legally but morally obliged to make sure they are trained to the best of the firm's ability.

We are seeing similar situations arising in respect of accountancy firms but to a far lesser extent. In accountancy firms trainees can very quickly become fee earners. There are jobs that they can undertake during audits. In the case of trainee solicitors because so much of the legal work relates to giving advice, trainees are not entitled to do so. Saying this, persons who are trainee solicitors do undertake considerable amount of work often enabling another Solicitor in the firm to undertake more profitable work. For example trainee Solicitors will often appear with Counsel on motions or in the preparation of probate papers and the subsequent lodging of same.

There is no excuse for a trainee not being paid.

We have written in previous issues of our newsletter relating to the requirement to pay interns. A trainee solicitor or a trainee accountant are most clearly employees under the National Minimum Wage Act, 2000-2015 and are entitled to be paid.

It is highly embarrassing for a solicitor firm to have to defend the claim under the National Minimum Wage Act. It is unfortunate that these cases are coming to our attention and we have huge sympathy for a trainee solicitor who is not being paid.

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACT, 1973

In case ADJ820 which issued on the 9th September the Adjudication Officer held that after there had been no financial loss the employee was not entitled to obtain Minimum Notice.

There are conflicting views on this. There are certainly EAT decisions on this point though they were not referred to in the decision being Lehane -v- Feeney UD868/1987 and Collins -v- Speranza Ltd

MN695/2001. In these cases the EAT appeared to take a view of the statutory entitlement to notice is not automatic. This would be contrary to the view taken in the UK. Lardner J in the High Court in Irish Shipping Limited -v- Byrne [1987] IR468 stated that the intentions behind Section 12 of the Minimum Notice and Terms of Employment Act, 1973 was that:

"Actual loss must be established and where, as here, there is no evidence of any actual loss because the Respondents were re-employed by the liquidator and paid their full wages for longer than the prescribed notice period, the Tribunal should have taken that fact into consideration. In these circumstances I think the Tribunal's decision in these cases was erroneous".

That decision sits uneasily alongside earlier judgments such as Barrington J in Irish Leathers Ltd –v- Minister for Labour 1986 IR177 who had held that the effective compensation should not be reduced by any Social Welfare payments the Claimant might have been receiving.

However, the decision of Mr Justice Lardner is one where a liquidator re-employed immediately. The issue of loss sits uneasily with cases where employees were either on Maternity Leave or out of work through pregnancy related illnesses at the time when their employment was terminated. The Employment Appeals Tribunal in Kelly -v- Wexford Electronics Limited MN1252/2002 was of the view that having a regard to the high level of protection given by various statutes to workers in this category and a special provision for terminating of employment in such cases then notice claims could be allowed. The issue however is whether the fact that an employee is unable to work is a reason for saying that they are excluded.

It will be interesting to see to approach that the Labour Court takes in matters such as this that go to the Labour Court.

PROTECTIVE DISCLOSURES ACT, 2014 - RECENT CASE

The case of Aidan and Henrietta McGrath Partnership and Anna Monaghan sets out the basis for the jurisdiction for making a claim under the Act.

The Court in that case pointed out that the Act is a new piece of legislation with limited case law. As regards penalisation the Court pointed out that they are broadly similar to those provided in the Safety, Health and Welfare at Work Act, 2005. The Court pointed out that in the case of O'Neill -v- Toni & Guy Blackrock Limited [2010] E.L.R. 21 it was clear from the language of Section 27 of the 2005 Act that in order to make out a complaint of penalisation it is necessary for the Complainant to establish that the detriment to which he or she complains was imposed "for" having complained of one of the acts protected by Section 27 (3) of the 2005 Act. The Court pointed out that the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the complainant having committed a protected act. The Court pointed out that this suggested that there is more than just one casual factor in the chain of events leading to the detriment complaint. The Court pointed out that the test would be "but for" the Complainant having committed the protected act he or she would not have suffered the detriment. The Court pointed out that this involves a consideration of the motives or reasons which influence the decision maker in imposing the impugned detriment.

The Court pointed out that while the Toni & Guy case involved penalisation under the 2005 Act the general principles enunciated in that case remain valid in the case under the Protected Disclosures Act, 2014.

This is an important decision from the Labour Court setting out what the law on this issue is.

The case of Toni & Guy was a case where this office represented the employee.

PROTECTED DISCLOSURE ACT 2014 – INJUNCTIONS

Recently two employees have successfully secured an injunction in the Circuit Court which prevents their dismissal. The case involves Lifeline Ambulance Services. Two former employees availed of the Act of 2014. Both employees stated they have made a Protected Disclosure to the Revenue Commissioners in January 2016 in relation to

financial matters and wrong doing within the company. In April 2016 they were informed following a review by external consultants that there role was at risk of redundancy and in June 2016 they were dismissed by reason of redundancy.

The Circuit Court held that while it was not satisfied the employees' dismissal was wholly and mainly due to the fact that they made a Protected Disclosure they had met the threshold of establishing there were substantial grounds for contending their dismissal was wholly and mainly due to the Protected Disclosure. The company did not agree to reinstate the employees. It offered to allow one remain on Garden Leave and the other to be reengaged as a paramedic, a role the employee had not been employed in since 2002. The Circuit Court found that the employees had reasonably rejected those offers and ordered that their salaries be paid until the hearing of their Unfair Dismissal claims by the WRC.

The case is interesting. For employers it is important that they are in the position to prove that the dismissal was in no way connected with any Protected Disclosure made. If the employer cannot they may be ordered to reinstate, reengage or pay a former employee until their Unfair Dismissal case is heard. Before the WRC an employer could be ordered to pay up to five years wages/salary as compensation.

However, for a claim to be made to get the protection of the Act the employee must make a Protected Disclosure which comes within the definition of same under the Act. Not every disclosure will be protected.

ORGANISATION OF WORKING TIME CLAIMS

In case ADJ1598 the Adjudication Officer in this case quoting the case of Circus Grabola Ltd -v- El Mostafa Chtabbou MWD1211 relying on Jakonas Antanas -v- Nolan Transport [2011] 22ELR311 held that as the employee had not raised a grievance relating to rest intervals at work that the employee could not bring a claim. The Adjudication Officer stated:

"I remain of the view that if this complaint was credible, a person of the complainant's position would have brought it to the HR managers'

attention. I also found his evidence to be vague and lacking a detail in terms of his attempts to bring the issue to the Head Chef's attention without any dates and specifics".

The legislation in relation to this is set out in Section 25. The case of Jakonas Antanas -v- Nolan Transport simply requires the employee to set out sufficient facts to enable the employer to know the complaint that is being made.

The Adjudication Officer in this case in the decision which issued on the 29th August 2016 appears to have gone further to state that there is a requirement on the employee to use the internal grievance procedures. There is no provision in the Workplace Relations Act nor the Organisation of Working Time Act to require this to be done.

The issue of using the internal grievance procedure was raised in the submission as part of the submissions sought before the Bill was put before the Oireachtas. The Minister rejected the requirement that an employee would have to go through grievance procedures before issuing a complaint.

An employee may go through the grievance procedure but they are not obliged to. The time limit runs from the date of complaint being received by the WRC back for six months and in limited circumstances can be extended to twelve months. We believe that the Adjudication Officer may have got the law wrong on this point. In this case however, there was an issue where the employee was required to notify the Department Head within one week of a break/rest period being due. This was in the Handbook.

There are exemptions from Section 25. This is the requirement to maintain records. These apply where the employer has an electronic record keeping facilities or the employer as opposed to electronic record keeping facilities have manual recording. The exemption only applies as regards Section 25 where the employer notifies the employee in writing of the rest periods and breaks referred to in Sections 11, 12 and 13 and that the employer puts in place and notifies in writing each employee of the procedures where the employee may notify in writing the employer of any rest or break periods referred to in Sections 11, 12 and 13 of the Act not received.

The exemptions under Section 25 are not a carte blanche for an employer not to schedule rest and break periods or to take no action to make sure that employees get them. It is only an exemption from the requirement to maintain records.

What is interesting in this case is that the Handbook provided for a complaint/grievance procedure but this only related to harassment and bullying. In this case also the submission for the employer clearly indicated that they did not use the clocking system for breaks and that where breaks were not taken they would be recorded on the rosters. The requirements of not maintaining records under Section 25 are absolutely clear and it would appear to us that an employer cannot rely upon an exemption if they do not strictly comply with same.

HOLIDAYS – RIGHTS OF EMPLOYEES

An issue is now arising in some employments due to what can be called employees feeling obliged to be present in the workplace that some employees are not taking their full annual leave entitlements.

There is also a misunderstanding as to what annual leave entitlements are.

The common view is that employees are entitled to 20 days leave per annum. This is factually incorrect. The legislation provides that the employee is entitled to four weeks leave. A week under the organisation of Working Time Act, 1997 is defined by virtue of the Interpretation Act as being a period from midnight on Saturday to midnight on the following Saturday. Effectively it is a Sunday to Saturday period. There is a provision in Section 19 that an employee is entitled to four working weeks in a leave year where they work a minimum of 1365 hours.

For employees who would work a 37.5 hour week (excluding breaks and rest periods) this would mean that an employee who works for 36 weeks in a leave year would be entitled to the full leave entitlements.

Subsection (3) provides that where an employee works for 8 or more months in a leave year subject to the provisions of any Employment

Regulation Order, Registered Employment Agreement, Collective Agreement or any agreement between the employee and his/her employer shall include an unbroken period of 2 weeks. This issue recently arose in a case involving Noonan Services Limited which is heading to the High Court. The Labour Court refused the employees application on the basis that they held that there had been an agreement between the employee and her employer to take a lesser period. The Labour Court quoted …

"Any agreement between the employee and his/her employer".

They did not refer to the full provisions of Subsection (3). The employee in question is a lady with very limited English. The contract which she was provided with stated she could not take more than ten days at a time.

Two issues are going to be determined namely, where an employer does not advise the employee of their entitlement to take two weeks uninterrupted leave will that enable an employer to rely on the exemption in subsection (4) and secondly where an employee has very limited English and how is it going to be determined that the employee has given an informed consent. For employers it is important to understand that the issue of annual leave is a provision of health and safety. It is important that employers encourage employees to take their full entitlements. A second issue which is arising at the present time is that senior executives, in particular, are being instructed to be available to answer emails or take phone calls while on annual leave. That is perfectly acceptable where the leave is outside the four weeks specified by the legislation. The legislation however, as regards the four week period, is quite specific. It must be an unbroken period of leave. It would be reasonable for an employer, probably to provide that an employee in an emergency type situation would be available to take a mobile phone call or deal with emails but they would need to be compensated for that break in their holidays subsequently.

There is a management issue for managers who go on holidays. If a manager is not able to manage sufficiently so as they are able to take holidays then there is an issue with their ability to actually manage their staff. It is not good for the business.

What happens if a Manager gets ill?

Every business should have a plan to cover situations where a person is not available. A manager who is not able to delegate is not a manager.

The issue of people getting their annual leave is a problem which is going to become more prevalent. The basis of taking annual leave is to leave the workplace and be in a position to relax and recuperate. That is the very basis of a person taking holidays. If those holidays are interrupted by work then the ability to take a rest is impacted in a negative way. In our view the sign of a good manager is a person who can go on holidays and not be taking phone calls or responding to emails because they have been able to delegate properly and manage matters before going on holidays to deal with client and customer expectations. A manager who spends their entire time on holidays answering mobile phones and emails is a person who cannot manage their time and is not able to delegate.

An employer who requires an employee to be available while on holidays may face an employment claim.

COMPENSATION FOR NOT RECEIVING PUBLIC HOLIDAYS

A recent case of the Labour Court in the case of Cheshire Ireland and Margaret Gallagher is one where the Court has again set out the provisions of Section 21 of the Act relating to Public Holidays along with the provisions of Section 22.

In this case the employee was not paid her correct Public Holidays.

The economic loss for the employee over the reference period was €210.46. The Labour Court also awarded compensation of €1000 on top of this.

This case is an important reminder from the Labour Court of the importance of making sure that employees receive their proper public holiday pay and if they do not that claims for compensation can be made. The case reference is DWT1673. In a second case against the

same employer a similar claim was made where general compensation in that case also of €1000 was awarded.

ORGANISATION OF WORKING TIME ACT, 1997

A number of claims are going before Adjudicators at the present time in relation to Holidays Pay and Public Holidays. Some Adjudicators are giving awards of compensation. Some are simply giving the monetary value. The issue of compensation for not receiving Holidays or correct Holiday Pay derives from the Directive which was implemented by the Act of 1997. It is unclear as to the reasoning being applied. In the past the Labour Court has applied the Von Colson and Kamann decision to the issue of compensation under the Holiday Pay Section. In the case of C&F Tooling Limited the Labour Court moved back from the view stating that the Von Colson and Kamann principles would not automatically apply and that they applied to the circumstances of the Von Colson and Kamann case.

It is unclear from the decisions of the Adjudication Officers on what basis some are awarding compensation and some are simply awarding the economic loss and where economic loss is only being awarded why the Von Colson and Kamann principles are not being applied.

FIXED TERM WORK ACT

In the case of Ana D Deigo Poriis case C-596/14 the European Court of Justice has confirmed that Directive 1999/70/EEC must be interpreted as meaning that the concept of "employment conditions" covers the compensation that the employer must pay to an employee on account of the termination of his/her fixed term employment contract.

Effectively the effect of this ruling would appear to be to us that if an employer has for example a redundancy policy that this will apply to fixed term workers as it would apply to any permanent worker.

FIXED-TERM WORKERS

A recent case issued from the European Court of Justice being Florentina Martinez Andres -v- Servicio Vasco De Salud in the joint cases C-184/15 and C-197/15.

The case is interesting in that the decision of the ECJ refers to employees being penalised for the misuse of Successive Fixed-Term Contracts. The Court in considering question stated:

"Therefore, where abuse resulting from the use of successive Fixed-Term Employment Contracts or relationships has taken place, measure offering effective and equivalent guarantees for the protection of worker must be capable of being applied in order duly to penalise that abuse and nullify the consequences of the breach of EU Law".

What is interesting is while it relates to effectively local authorities and provides that the rules for those employed maybe different for those that are employed by authorities. Staff employed by those authorities under Administrative Law must have effective measures to penalise the abuse with regard to those who are employed by authorities under Administrative Laws. It also lays down the issue that where employees bring a claim they do not have to bring a second claim to determine the penalty where there has been abuse resulting from the use of successive Fixed-Term Employment Contracts. The decision of the European Court of Justice effectively raised the issue that penalisation is an inherent part of any determination of an abusive of Fixed-Term Contracts.

FIXED-TERM CONTRACTS - OBJECTIVE GROUNDS FOR RENEWAL

One issue which arises regularly where employees would normally be entitled to a Contract of Indefinite Duration is that objective grounds are raised by the employer for the extension of a fixed term.

In a case of Maria Elena Perez Lopez -v- Servico Madrileno De Salud case C/16/15 is a case where the ECJ held that Clause 5 (1) (a) of the Frame Work Directive being Directive 1999/70/EC of 28th June 1999 must be interpreted as precluding the application of national legislation by authorities of the member state concerned in such a way that the renewal of successive Fixed-Term Employment Contracts in the Public Health sector is deemed to be justified by "objective ground" within the meaning of that Clause, on the ground that these contracts are founded on legal provisions allowing them to be renewed in order to ensure the provisions of certain services of a temporary, auxiliary or extraordinary nature when in fact those needs are fixed and permanent. The Court went on to say that there is no obligation on an authority to create an additional permanent post in order to bring to an end the employment of occasional regulated staff and it is permitted to fill the permanent post created by hiring "temporary staff so that a precarious situation of workers is perpetuated, where there is a structure defect of regulated staff post in that sector in a Member State concerned".

What is interesting in the body of the case is that the Court stated:

"In order for Clause 5 (1) (a) of the frame work Directive to be complied with it must therefore be specifically verified that the renewal of successive Fixed-Term Employment Contracts or relationships is intended to cover temporary needs and national provision such as that at issue in the main proceedings is not, in fact, being used to meet fixeded and permanent staff needs of the employer".

The Court stated that the renewal of Fixed-Term Employment Contracts or relationships in order to cover needs which in fact are not temporary in nature but, on the contrary, fix and permanent is not justified for the purposes of Clause 5 (1) (a) of Directive 1999/70/EC. The Court pointed out that as regards the existence of objective grounds it follows from the case law of the ECJ that the concept must be understood as referring to precise and concrete circumstances characterises given activity which are capable of justifying the use of successive Fixed-Term Employment Contracts. The Court pointed out that a National Provision which merely authorises recourse to successive Fixed-Term Contracts in a general and abstract manner by rule of statute or secondary legislation does not accord with the requirements stated in their decision.

This case is specific to the health service but it is interesting that the Court again in this case stated that where there is abuse of the use of Successive Fixed-Term Contracts or relationships has taken place a measure offering effective and equivalent guarantees for the protection of workers must be capable of being applied in order duly to penalise that abuse and nullify the consequences of the breach of EU Law. Effectively the ECJ are saying that hand in hand with an employee obtaining a Contract of Indefinite Duration the employer who abuses same must be penalised. They have effectively said they go hand in hand.

REDUNDANCY

A recent case under ADJ1830 issued on 2nd September 2016.

The employer in this case contended that the employee had not sent the appropriate RP9. The Adjudication Officer found that the employer did not issue a RP9 to the employee in the first instance and therefore the Adjudication Officer found a statement by the Respondent now to attribute the failure of the complainant to submit a RP9 form was not a credible reason for rejection of a Redundancy claim.

The Adjudication Officer also pointed out that the employer is in a position of knowledge as to the state of the business and that this knowledge should be imparted in a timely fashion to a complainant. The Adjudication Officer found that the employee had been placed on extended layoff so as to retain a good worker in the event that the economic crisis would abate. The Adjudication Officer awarded Redundancy.

What is interesting in relation to this case also is that the Adjudication Officer took the time to set out the law. He quoted the case of St. Ledger -v- Front Line Distributers Ireland Ltd [1995] ELR160 being a case where the EAT held that the “impersonality and change” are two important characteristics of redundancy and that “redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job”.

The issue of impersonality is often overlooked by employers. Selection for redundancy must be on the basis of the job only and not on any other reason.

REDUNDANCY PAYMENTS ACT, 1967

Two decisions under ADJ1830 and 2224 have issued dealing with Redundancy which warrant comment. In the case ADJ1830 the Adjudication Officer took what was clearly considerable time in setting out a review of the legislation. An interesting issue which was addressed was the issue of lay off. The Adjudication Officer referred to the case of William Berry -v- Revenue Commissioners [2011] 22 ELR 137 where the employer would need to give notice that if it is its belief that the cessation of employment will not be permanent but that such notice can be "actual, constructive or imputed". The decision points out that Section 13 of the Act provides the statutory framework to guide the response of an employer to a claim from a lay off/short time situation. The Adjudication Officer held that in this case the employer did not follow these times scales as there was a 20 day calendar day gap in time from when the notification of intention to claim was met and the rejection of the claim for a redundancy. The employer did not make an offer of work to mirror the complainants previous 45 hour week over a 13 week period. The Adjudication Officer therefore held that the decision states that the "Complainant, cannot rely on the protection". This appears to be a typographical statement and should read the Respondent or employer. This is evident from the determination later on. The Adjudication Officer also pointed out in that case that the employer has not sent a Form RP9. Redundancy was awarded.

In ADJ2224 the Adjudication Officer found that the offer of alternative work was not similar to the work that the employee had been doing previously and held an entitlement to claim redundancy.

MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACT, 1973

In case ADJ820 which issued on the 9th September the Adjudication Officer held that after there had been no financial loss the employee was not entitled to obtain Minimum Notice.

There are conflicting views on this. There are certainly EAT decisions on this point though they were not referred to in the decision being Lehane -v- Feeney UD868/1987 and Collins -v- Speranza Ltd MN695/2001. In these cases the EAT appeared to take a view of the statutory entitlement to notice is not automatic. This would be contrary to the view taken in the UK. Lardner J in the High Court in Irish Shipping Limited -v- Byrne [1987] IR468 stated that the intentions behind Section 12 of the Minimum Notice and Terms of Employment Act, 1973 was that:

"Actual loss must be established and where, as here, there is no evidence of any actual loss because the Respondents were re-employed by the liquidator and paid their full wages for longer than the prescribed notice period, the Tribunal should have taken that fact into consideration. In these circumstances I think the Tribunal's decision in these cases was erroneous".

That decision sits uneasily alongside earlier judgments such as Barrington J in Irish Leathers Ltd –v- Minister for Labour 1986 IR177 who had held that the effective compensation should not be reduced by any Social Welfare payments the Claimant might have been receiving.

However, the decision of Mr Justice Lardner is one where a liquidator re-employed immediately. The issue of loss sits uneasily with cases where employees were either on Maternity Leave or out of work through pregnancy related illnesses at the time when their employment was terminated. The Employment Appeals Tribunal in Kelly -v- Wexford Electronics Limited MN1252/2002 was of the view that having a regard to the high level of protection given by various statutes to workers in this category and a special provision for terminating of employment in such cases then notice claims could be allowed. The issue however is whether the fact that an employee is unable to work is a reason for saying that they are excluded.

It will be interesting to see to approach that the Labour Court takes in matters such as this that go to the Labour Court.

EMPLOYMENT EQUALITY ACTS - EQUAL PAY

An interesting case came before the High Court recently in a case of Dr Sylvie Lannegrand and others and the National University of Ireland, Galway. In that case judgment was delivered on the 26th July 2016.

This case is interesting in that this is a preliminary issue which will go for preliminary trial. The issue involves whether an employee can bring a claim under Contract on the basis of an implied contractual right to gender equality and whether it confers on a Plaintiff and independent cause of action at Common Law for breach of contract as opposed to being obliged to bring a claim under the Employment Equality Acts.

The decision in this will be one which will be of extreme interest to Employment Solicitors as it has the potential to impact on other areas of law in the employment field.

DISCRIMINATION

In the case of Diana Byrne -v- Minister for Defence and others 2016, EIHC464 the Applicant made an application for Judicial Review. The Applicant contended that the Respondent failed to promote her from the rank of a Captain to a Commandant was in breach of the Respondent's statutory and contractual duties. The Respondent contended that the Applicant should have pursued her claim for unequal treatment through the internal Defence Force procedures.

The High Court granted a declaration that the Applicant was qualified for fixed promotion from the rank of a Captain to a Commandant in accordance with the Defence Force Regulations (DFR) A15. The Court found that was a failure by the Respondent to comply with the provisions which excluded the Applicant from fixed promotion. The Court held that there was an unequal treatment of the Applicant based on her gender as she was excluded from the promotion process because of her being on Maternity Leave. The Court observed that Judicial Review was an appropriate remedy in such cases as the internal Defence Force dispute mechanism could offer little help to the Applicant.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

NO DISCRIMINATION WHERE AN APPLICANT APPLIES FOR A JOB SOLELY TO BRING A CLAIM

In the case of Kratzer –v- R & V Allgemeine Versicherung the employee applied for a job with the Respondent. The application was through an automated application system.

His applicant details had all the relevant experience. His application was refused. He complained to the Respondent and claimed compensation for age discrimination. The Respondent then invited him for an interview on the basis that his application had been refused automatically by mistake. He refused to attend the interview and pursued a claim.

The European Court of Justice (ECJ) held that where an individual applied for a job only in order to seek compensation for discrimination and not to obtain employment they will not receive the benefit of the relevant legislation which provides protection from discrimination. The ECJ set out that he was not a "job seeker" who was protected from discrimination as he was not seeking a job.

This decision does provide employers with comfort where it comes to spurious discrimination claims. The important part of this case from an employer's point of view is that the Respondent employer in this case did invite the Applicant for an interview.

The case also highlights the risks involved in using automated systems to review Applicants.

PAYMENT OF WAGES ACT, 1991 - DEDUCTIONS

In a case ADJ2436 an issue involved deductions from the wages of five employees. The employer in this case was a Government Department.

The Department relied on a circular. The Adjudication Officer dealt with the canon of construction of Ejusdem Generis refers to Dodd in "Statutory Interpretation in Ireland". The Adjudication Officer in this

case applying the Canon of Construction found that the word "other document" must be construed as limited to documents akin to circulars. The Adjudication Officer pointed out that:

"Circulars and the rest of the family are not law. This would follow from the fundamental character of the common law. If delegated legislation which is, at least, contemplated in primary legislation cannot make law which goes beyond the principles laid down in the parent Act, then the same restriction must certainly apply in the case of circulars. As a consequence, it is axiomatic that the public authority which issued such a circular may not rely on the circular as against private citizens in order to affect or prejudice his statutory rights nor may such a circular be relied on by one citizen against another".

The Adjudication Officer had quoted a passage from Hogan and Morgan "Administrative Law in Ireland" Forth Edition at 2-144.

The case is very interesting into the level that the Adjudication Officer went in making the determination and the review of the legislation which was undertaken.

TERMS OF EMPLOYMENT (INFORMATION) ACT

A recent decision under reference ADJ2560 is a case where the Adjudication Officer ordered a sum of €3,000 for an employee failing to receive a Contract of Employment. The Adjudication Officer pointed out that the employee had different roles and that no statement was provided regarding the part time marketing assistant role nor in regard to the full time in temporary office assistant role. The Adjudication Officer held that the Complainant was entitled to know when the full time role would come to an end and how performance issues would be addressed in relation to the marketing role.

COMPANIES ACT 2014 – CHANGE OF NAME REQUIREMENTS

Under the Act unless exempted all companies must include their company type in their company name. For some companies this will

not have any immediate effect. For others it will require a changed name to comply with this requirement. The types of companies which will be affected are;

1. Companies Limited by guarantee. In such cases the words "Company Limited by guarantee" or the Irish equivalent must replace "Limited".
2. In the case of unlimited companies the words "unlimited company" or the Irish equivalent must be inserted after the existing company name.

This requirement will apply from 30th November 2016.

The Companies Registration Office had advised that once 30 November 2016 has passed it will not accept any documentation featuring the incorrect form of company name.

In employment law cases this could have a significant issue for employers. Once 30th November comes companies will be obliged to use, in the case of unlimited companies, the words "unlimited company". This is effectively a change of name. Therefore a company that has issued contracts will, once the 30th November comes, need to issue a new document or letter to employees advising of the new company name. For example, up to now the contracts have been in the name, in the case of an unlimited company of "AB". It will now have to be in the name of "AB Unlimited Company". Employers need to be aware of this name change as if they do not they do run the risk of employees bringing a claim under Section 5 of the Terms of Employment (Information) Act, seeking compensation for not being advised of the new provisions.

GENDER PAY GAP

A recent report in the UK from the Institute for Fiscal Studies found that the Gender Pay Gap is wider for women returning from maternity leave. It found that on average women earn 18% less than men partly because women who return to work often do so in a part time capacity or miss out on opportunities for promotion.

In the UK, the draft Equality Act 2010 (Gender Pay Gap Information) Regulation 2016 to come into force by April 2017 will introduce an obligation for large employers being those with 250 employees or more to publish annual data reports on their gender pay gap. We will have to see how effective that is going to be. Similar regulations will be brought into place here in Ireland but for companies of 50 employees or more.

SALARY SACRIFICE

In the UK the Revenue have launched a consultation in relation to a proposed restriction on the use of salary sacrifice for the exchange of non-cash benefits. Salary sacrifice is the agreement between an employer and an employee to reduce the employee's entitlements to cash pay in return for some form of non-cash benefit. The advantage for both employers and employees is that less tax is paid. The UK Revenue are seeking to limit the use of these arrangements.

Similar benefits apply here in Ireland.

The UK review will not impact on pension contributions, employer provided pension advice, employer supported child care provision of workplace nurseries, cycles and cyclist's safety equipment. The UK cycle to work scheme will be unaffected by the proposed changes.

It will be interesting to see how this develops as usually the Irish Revenue tends to follow UK precedents in this area.

NEW LABOUR COURT RULES

At the start of September the Labour Court issued new rules which revoked the 2015 rules.

It is interesting that the 2015 rules are not even in the archived documentation on the WRC website.

The main change in the rules is that the ability to lodge submissions online has been revoked. Now employers and employees in cases will have to lodge six hard copies. In equality cases there will be a

requirement to serve the other side. Unless the other side has consented to the documentation being sent by email it will have to be served on them or their representatives. The method of service will be by registered post.

These new rules are going to create significant additional costs for employers and employees.

The change in rules may well result in claims being brought by employees in relation to the costs of having to lodge the documentation in this new way.

Under the Von Colson and Kamann rules an employee in claims coming from EU legislation cannot receive compensation that merely covers the economic cost of them bringing a claim. It cannot effectively be notional. Where an employee brings a claim under legislation which derives from EU directives or Regulations then a claim may well be made for the costs. The Labour Court does not award costs. However, I anticipate that claims will be brought on the basis of the economic cost of having to copy a submission six times. Depending on the type of case there can be a considerable amount of paperwork that is going to have to be included. As a matter of practice the Labour Court, if you are quoting case law, want to see cases produced. This can mean that there can be a substantial volume of paperwork that has to be copied.

The next issue is the issue of having to lodge and file submissions. There is an economic cost in this as well. Where it relates to simply setting out the facts the cost may be relatively small. Where however it involves the interpretation of legislation where an employee could not reasonably be expected to understand the law to be able to present full legal arguments then in those circumstances there appears to be a reasonable argument that under the Von Colson and Kamann Rules the employee will be able to claim the cost of same. The Labour Court has consistently said that in cases before them they deal with matters on the basis of the matters that are argued before them. Therefore if a legal argument is not put forward or a legal defence is not put forward it is not the role of the Labour Court, according to them, to raise a defence or an argument supporting a claim. Of course the Labour Court if an employee or employer is not represented will assist but in cases where both parties are represented it is the duty of the

representative to put forward the legal arguments if there are legal issues to be determined.

It would be our view that this issue is going to be argued before the Labour Court. We would fully expect that the matter may ultimately go to the High Court on a Point of Law for this issue to be determined. It may even have to go to Europe.

The decision of the Labour Court to revoke the ability to lodge online was communicated to this office on the grounds of it being a requirement for "administrative and organisational reasons". The decision of the Labour Court to take this approach which flies in the face of Government policy to promote e-commerce is simply going to create additional costs for employers and employees. We have a suspicion that the reason why this has happened is that inadequate investment has been made in a case management system in the Labour Court.

When the Workplace Relations Act 2015 was being debated the whole basis of the legislation was to create a system that was going to be cheaper and more effective for employers and employees. That effectively has been abandoned. In addition, because of the way the new rules have been introduced, the time limits have not been increased to take account of the time it takes to photocopy documentation nor to have it delivered.

Clearly no cost issue can arise under Von Colson and Kamann legislation that does not come from Europe. Therefore the cost of putting in documentation in an Unfair Dismissal case or a Payment of Wages case would not of course be covered nor in the National Minimum Wage Act 2000-2015 case. The National Minimum Wage Act 2000 – 2015 does have an interesting element in it. Section 26 (1) (a) (ii) allows the reasonable expenses of an employee in connection with a dispute. The term reasonable expenses have not been defined but there may well be an argument that this would include the cost of representation. It will be interesting to see how matters develop. It is however unfortunate that the Labour Court has taken this step backwards which initially is going to cause significant additional costs and expenses to employers and employees. There will be no method for an employer to recover costs even if they win relating to having to lodge six copies of submissions

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

COSTS ORDERS AND THE EMPLOYMENT APPEALS TRIBUNAL

The Supreme Court in the case of Paul Burke –v- Stephen Miley, and Devil's Glen Equestrian Central Limited and Devil's Glen Partnership which decision was delivered in May of this year is one where the issue of costs in respect of a Judicial Review against the Employment Appeals Tribunal (EAT) was considered.

In the case in question the EAT held in favour of Mr. Burke determining that he had been unfairly dismissed and he was awarded compensation. However, the EAT did not determine as to who was Mr. Burke's employer.

The respondents in the EAT case applied to the High Court for Judicial Review of the EAT's decision. The High Court quashed that determination and awarded the costs of the Judicial Review proceedings to the respondent. The matter was then sent back to the EAT for a new hearing. The EAT applied the decision of the High Court to the Supreme Court in relation to the issue of costs that were awarded against the EAT.

The Supreme Court considered whether costs immunity does extend to administrative decision making Tribunals. The Supreme Court determined that the EAT was a decision making Institution.

The Supreme Court applied the laws laid down in the case of McIlwraith –v- His Honour Judge Fawsitt. That case set out that judicial bodies were immune from cost orders unless it can be shown that they acted mala fides or impropriety had occurred. The Supreme Court pointed out that the EAT did not file opposition papers to the application for Judicial Review. The EAT did not participate in the High Court proceedings until the application of costs was made against it. The Supreme Court held it was not therefore a "legitimus contradictor". The use of this Latin phrase means in effect that they were not a party which should have costs awarded against them. The Supreme Court accepted that the hearing in the EAT was unsatisfactory. They concluded that it was not conducted to the standards that are expected of such a body. The Supreme Court however ruled that the conduct did not give rise to "wholly unfit

proceedings" which would constitute mala fides or impropriety in the legal sense. It was contended by the respondents that they were denied a tangible remedy and a fair trial which was contrary to Article 6 of the European Convention on Human Rights. The Supreme Court held that the right to recovery of costs was not an essential feature of the convention and this would only be breached in exceptional circumstances. The Supreme Court held that as a matter of public policy the EAT should have immunity from cost orders except in cases where there was clear evidence of mala fides or impropriety.

This Supreme Court decision is an important clarification of the law in relation to the issue of Judicial Review proceedings. It must bem, however, remembered that in Point of Law Appeals the unsuccessful party which will either be the employer or the employee depending on who brings the Point of Law Appeal, will bear the costs even if they do not defend the proceedings.

TAXATION OF EMPLOYMENT LAW AWARDS

In 2015 Richard Grogan of this office made a presentation to the new Adjudicators on the Taxation of Employment Law Awards.

It is interesting to note that the Adjudicators now are setting out in their decisions whether an award is compensation which is not subject to tax or whether it amounts to a monetary sum which is subject to tax. This is most helpful for employers, employees and representatives. Adjudicators are also, where there is compensation subject to tax and an amount that is not subject to tax, setting out which element is and is not subject to tax. They must be congratulated on this.

WHY EMPLOYEES NEED ADVICE FROM AN EMPLOYMENT SOLICITOR?

The case recently before the WRC under ADJ1792 is the prime example as to why employees need to get advice from an Employment Solicitor.

In this case the employee had just one week's service less than a year. The employee brought a claim under the Industrial Relations Acts. She was awarded €2,000. Awards under the Industrial Relations Acts are not enforceable, normally.

The employee in this case was dismissed. If she had been represented by an Employment Law Solicitor it is probable that she would be able to structure matters in a submission for Unfair Dismissal to bring her within the 12 month rule.

The employee was dismissed. The employee had just less than one year of service. She would have been entitled to Minimum Notice. That Minimum Notice would have brought her up to the one year. On that basis she would have had a claim under the Unfair Dismissal legislation.

She would then have had a case which was enforceable.

When the Workplace Relations Act 2015 was going through the Dail we were told that there would be a world class service with a world class resource. We certainly do not have the world class research facility. There is no procedure whatsoever for employees bringing claims to get advice as to what claims they should bring.

The system seems very easy. You lodge your claim online. Some people wonder why they would need a Solicitor. The case that we have highlighted is the case just why employees need advice from a Solicitor. The employee in this case would have also had a claim under the Terms of Employment (Information) Act for not having received a statement. From the facts outlined the employee would also have had claims under the Organisation of Working Time Act 1997.

Instead of the employee having enforceable claims the employee now has an award which the employer does not have to pay.

When getting involved in employment law, employees and employers are both getting involved in the law. The law is complex. Get it wrong and an employee can end up with no compensation that they can enforce in the Courts.

This is not an issue of us as Solicitors looking to drum up work for ourselves or for other Employment Law Solicitors. It is simply highlighting the fact that employees who bring their own claim can get it horribly wrong.

One swallow of course does not make a spring.

Case 1654 is the further example of claims being brought under the wrong legislation. In that case the employee brought a claim under the Equal Status Acts. The Adjudication Officer determined that the claim should have been brought under the Employment Equality Act and therefore dismissed the claim.

The decision issued on the 2nd September 2016. The claim was lodged on the 28th January 2016. Therefore the employee in this case was outside the six month period for bringing a claim under the Employment Equality Acts. There is of course provision to extend time. However ignorance of the law is not a ground for extending time.

PRIVATE SECURITY AUTHORITY

A memorandum of understanding between the Workplace Relations Commission and the Private Security Authority has been put in place. It effectively applies to the exchange of information. A number of these memorandums of understandings are currently being put in place.

NEW HIGH COURT RULES

S.I. 254/2016 being the Rules of the Superior Courts (Conduct of Trials) 2016 issued in October last year.

The Commercial Court deals with commercial disputes valued at more than €1 million. It has operated very efficiently and effectively. The High Court Rules which issued will now apply to Civil Claims including Professional Negligence cases but will not include Personal Injury claims.

The Rules are intended to avoid trial by ambush.

Where a party intends to offer expert evidence that party must disclose their intention to call an expert in their pleadings stating the expert's field of expertise and the matter on which the expert evidence is intended to be offered. Unless a judge orders otherwise a party intending to rely upon oral evidence of a factual or expert witness shall serve and file witness statements and expert reports. A Judge on his or her own initiative or an application of one of the parties made directly in the proceedings will be subject to case management and in that case the Judge will give directions for the conduct of the proceedings up to trial and a person may be appointed "to assist the Court in understanding or clarifying a matter" as an "assessor".

A number of Rule changes clarify the duties and obligations of an expert to assist the Court as to matters within his or her field of expertise. A Judge hearing a case now has a right to make a number of directions as to expert evidence and this would include for example that the expert may be directed to set out a written statement to identify areas agreed and not agreed. Experts may be examined at trial one after the other or by a debate among experts.

These new Rules must be welcomed in making litigation more effective and efficient.

High Court clarifies the issue relating to pre and post-accident medical reports being discovered.

In a recent case of Power –v- Tesco Ireland Limited [2016] IHC390 the Plaintiff was an employee of the Defendant working as a general retail assistant. She claimed that she was injured. The Defendant brought a discovery application.

Before the High Court Barrett J. distilled a number of principles from the decision in McGrory –v- ESB. This included that it encouraged the promotion of settlements. It was held that there is an authority for the Courts jurisdiction to stay proceedings in three separate circumstances specifically where the plaintiff refuses to submit to medical examination, or, refuses to disclose his medical records to the defendant or refuses to permit the Defendant to interview his treating Doctors.

Barrett. J. also noted that the Supreme Court in the McGrory case stated that a Plaintiff is not entitled to impede access to relevant material by withholding his consent to a treating Doctor giving information as to his condition when that information will in any event be available at a later stage and confirmed that the McGrory case confirmed a Defendant's right to have the plaintiff medically examined.

A very practical approach was taken by the Court in the case when it stated;

"hence it would seem to this Court that the correct position as a matter of law, when it comes to disclosure/ discovery in personal injury proceedings is that (a) there should be a medical examination of the plaintiff by the defendant's doctor with the usual right of the Court, as acknowledged in McGrory, to grant a stay, and (b) (i) if that examining Doctor forms the opinion that there is some pre –existing condition and/or (ii) there is some other evidential indicator that suggests a Plaintiffs prior medical history to be relevant, then in that instance access to prior medical history will typically be ordered, subject to any such time constraint as appears appropriate in the particular circumstances arising so as to ensure that only that which is relevant and necessary is discovered and oppression avoided.

The practice currently appears to be that discovery is generally limited to three years prior medical history however a shorter or longer period may be appropriate in particular cases.

The case clarifies issues in personal injury litigation and some conclusions appear evident.

1. For Defendants the decision confirms that they are not entitled to such records as a matter of course and will need to have the plaintiff examined by their expert before seeking pre accident records. The Defendant is entitled to discovery of medical records in two circumstances namely (a) where the expert advises such records are necessary in order to properly investigate the injury, or, (b) if the defendant can show the Court that there is some other evidential indicator which demonstrates to the Court that the records are of relevance for a Plaintiff then they must be aware that when starting

proceedings for personal injuries they may be ordered to provide the Defendant with extensive medical records which it may stretch back a number of years depending on the circumstances.

MEDIATION

In a recent Decision of the High Court in Grant and Others –v- Minister for Communications and Others [2016] IHC328 the High Court held that the nature of the proceedings were not appropriate to be dealt with by way of mediation.

The High Court in this case followed the approach taken by both the High Court and the Court of Appeal in Atlantic Shell Fish Limited and Another –v- The County Council of the County of Cork and Others.

In the recent case Costello J refers to the High Court in the Court of Appeal Decision in Atlantic Shell Fish in her Decision. She re-iterated that mediation is a two way process and that a party ought not to be forced to attend mediation. She also referred to the Decision of Irvine J. in the Court of Appeal that a Court shall not exercise its discretion if it considers it "appropriate to do so having regard to all the circumstances of the case".

In the recent case the relief was sought on the grounds that due to the complex issues involved in the proceedings they were not amenable to Mediation.

DATA PROTECTION COMMISSIONER – ANNUAL REPORT 2015

The Annual Report issued at Summer. There are important elements for employers.

1. Data Access Requests

Of the 932 complaints received by the Data Protection Commissioner ("DPC") in 2015 60% related to Data Access requests.

In the case of employment cases these were requests by current or former employees looking for HR material relating to them. The DPC noted that current or former employees are experiencing particular difficulties exercising the right of access. The DPC proposes to conduct an awareness campaign to highlight these issues in 2016. For employers it is important to be aware that a failure to comply with a Data Access Request can lead to an investigation by the DPC. Failure to properly deal with a Data Access request may attract significant penalties under the new EU General Data Protection Regulations which will be implemented in May 2018. This office, when acting for employees, have found difficulties in obtaining such records and would automatically then issue complaints.

2. Enforcing Subject Access Requests

An Enforced Subject Access request usually means that an employer or prospective employer requires a person to make a request about themselves from organisations such as An Garda Siochana or Credit Institutions. This has been outlawed since 2014. The DPC carried out an audit of 40 companies in 2015 to ascertain whether they were complying with this restriction. The DPC has stated it will continue to monitor organisations' compliance with this prohibition in 2016.

3. Privacy Audits

During 2015 the DPC carried out 52 Audits and inspections. Half of these were not scheduled. The themes identified included lack of data retention policies, lack of signage for CCTV policies, excessive use of CCTV systems and excessive use of bio metric time and attendance systems. The issue of CCTV is an issue which will be a focus of the DPC in the future. This is relevant for employers. There are updated guidance notes from December 2015 in relation to the use of CCTV.

4. Data Breaches

During 2015 the DPC received 2376 data breach notifications. Most of these were voluntary. They related to such matters as unauthorised disclosure such as postal or electronic disclosures. It should be noted by employers that the reporting of data breaches will become mandatory under new legislation from 2018.

***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.**