RGA | Richard Grogan & ASSOCIATES

Keeping in Touch - December 2018*

Welcome to the December issue of Keeping in Touch.

The firm is now coming up to its 10th Anniversary. We thought that with this Anniversary coming up that we would look at the firm moving forward. There have been some changes. Natasha Hand has joined us as a Trainee Solicitor to finish her Traineeship.

Michelle Loughnane of this firm has taken on the job of preparing the firm for the launch of our new website. In addition, we have looked at changing our profile with a new logo, and new letterhead on our letters.

You will see in this newsletter correspondence to Ms Regina Doherty, Minister for Employment Rights and Social Protection. Due to a decision of the CJEU which issued on the 6th November. There is a serious issue in relation to the drafting of the Organisation of Working Time Act which needs immediate attention. We have proposed a method as to how this can be dealt with. You will also see a letter to Minister Flanagan as we are concerned that if this issue is not addressed immediately that issues are going to arise where cases may be brought to the High Court. With the current lack of judges in the High Court, this is something that we would want to see avoided.

We would like to thank all of our clients for their support and assistance during the year. We would particularly like to thank those colleagues who refer clients to us. We are delighted that they do so. We are very appreciative of the positive responses we have been receiving from colleagues where they have referred clients to us.

Finally, we would like to wish everyone a Happy Christmas and a Peaceful and Healthy New Year!

RGA | Richard Grogan & ASSOCIATES

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OUT AND ABOUT

Michelle Loughnane of this firm has been appointed a judge in the Brown Mosten International Client Counselling Competition. Michelle is a previous winner of this competition.

November was a busy month for Richard Grogan of this firm as regards lecturing. Richard gave a seminar to the Donegal Solicitors Bar Association on the 2nd November entitled "Acting in Employment Law cases - Tips and Traps." On the 27th November Richard presented a paper "Employment - Workplace Relations Commission - Bringing a case - Tips and Traps" and on 30th November Richard presented a seminar paper to the Southern Law Association entitled "The Organisation of Working Time Act 1997 - An Overview of the Act and Case Law." The seminar notes for this round to 113 pages.

On 3rd November Richard Grogan was quoted in the Times Irish Edition. In the Winter Edition of The Parchment being the official publication of the Dublin Solicitors Bar Association Richard had an article printed entitled "When €15,000 is worth more than €20,000" which article dealt with the benefits of settling cases in the WRC and the Labour Court as oppose to running them whether acting for employers or employees. Richard was also quoted in an Article in The Journal concerning the operation of the Workplace Relations Commission.

We have made submissions to the Minister for Employment Affairs & Social Protection Ms Regina Doherty in relation to the issue of bogus self-employed where the current section inserted is recognised by many as one which will be unenforceable and may delay the Employment (Miscellaneous Provisions) Bill 2017 being brought into force. We have put forward alternative drafting to put in place an interim solution to dealing with bogus self-employed contracts.

We have also made a detailed submission to the Minister along with Minister Charlie Flanagan arising out of an issue which arose in a case with the CJEU which correspondence is in this newsletter.

LETTER TO THE MINISTER FOR EMPLOYMENT AFFAIRS & SOCIAL PROTECTION

Private & Confidential
Ms Regina Doherty TD
Employment Affairs & Social Protection
Aras Mhic Dhiarmada
Store Street
Dublin 1

22 November 2018

RG/KR/RIC2/1

Richard Grogan

Re: Organisation of Working Time Act

Dear Minister,

I am writing to you in connection with three recent cases which issued from the CJEU on the 6th November 2018 being cases C-569/16, C-570/16 and C-684/16.

The case C-684/16 is probably the most important.

This case has confirmed that the Organisation of Working Time Act as regards the provisions of Sections 11, 12, 13, 15 and 19 of the Act effectively have direct effect as against private employers rather just against the State.

This now causes a problem.

The problem arises in relation to Section 12 of the Organisation of Working Time Act. Section 12 of the Organisation of Working Time Act provides that:

"An employer shall not require."

This is different than the provisions of the Directive which is, as regards taking rest breaks during the day, that the employer shall "ensure".

This raises now two probabilities.

1. The first is that the Labour Court will find it difficult to hold that the words "shall not require" is equal to the words "ensure". This means that certain cases may be declared "contra legum" as a result of which the Labour Court may not be able to take jurisdiction. In such cases then there was a Franchevic against the State.
2. There is now the real possibility that because the State has not properly implemented the Directive the claims for not receiving rest periods during the day will now have to be taken to the High Court for the purposes of having the Irish Legislation set aside and the European Legislation applied.

This is going to cause a significant cost for employers, in particular, if they have to defend cases in the High Court.

I thought it was reasonable to put you on notice of this.

On that basis, I think that there is a very strong reason to amend the Employment (Miscellaneous Provisions) Bill 2017 to put in a provision to amend Section 12 of the Organisation of Working Time Act 1997 to change the words: *"The employer shall not require"* to the words "*The employer shall ensure."*

It would be my view that the current drafting of Sections 11, 13, 15 and 19 are probably strong enough to be able to be read that those words in those Sections are equal to the word "ensure" so that the direct effect provision applies.

Kind regards,

Yours sincerely,

_____

Richard Grogan
Richard Grogan & Associates
Solicitors
9 Herbert Place
Dublin 2

C.C. Mr Charlie Flanagan, Minister for Justice and Equality

LETTER TO THE MINISTER FOR JUSTICE AND EQUALITY

Private & Confidential
Mr Charles Flanagan TD
Minister for Justice and Equality
Department of Justice and Equality
St. Stephen's Green
Dublin 2

22 November 2018

RG/KR/RIC2/1

Richard Grogan

Re: Organisation of Working Time Act

Dear Minister,

I am attaching a copy of a letter which I have sent to your colleague Ms Regina Doherty TD, Minister for Employment Affairs & Social Protection.

There is an issue which concerns me, namely that if this issue is not addressed there is the significant potential that claims under Section 12 of the Organisation of Working Time Act which should be taken in the WRC and on appeal to the Labour Court are now going to have to go to the High Court with potential appeals to the Court of Civil Appeal.

This is due to some very sloppy drafting originally in relation to implementing the Working Time Directive.

The last thing we want is the Courts tied up with cases under the Organisation of Working Time Act because individuals will now have to bring claims to the High Court to have the legislation set aside so as to apply the Directive. Normally, a Directive only has direct effect against the State or a State body. The effect of the recent case is that because of the relevant Charter the CJEU have now determined that the Directive has effectively direct effect through the Charter against all employers including private employers whether individuals or companies.

Kind regards,

Yours sincerely,

Richard Grogan
Richard Grogan & Associates
Solicitors
9 Herbert Place
Dublin 2

ORGANISATION OF WORKING TIME ACT 1997 - A SEA CHANGE FOR EMPLOYERS AND EMPLOYEES

The case of Max - Planck - Gesellschaft zur Forderung der Wissenschaften e -v- Tetsuji Shimizu Case C-684/16 has completely changed the Employment Law landscape when it comes to claims under Sections 11, 12, 13, 15 and 19 of the Organisation of Working Time Act 1997. Some may rightly believe the CJEU is seriously pushing the boundaries of EU law to ensure States implement Directives properly. They are also radically altering the burden of proof and the duties of employers. So be it. The CJEU is the ultimate judicial body. Unless a Directive is changed their decisions are binding - like them or not.

It had always been taken that the Directive which was implemented in Ireland in the Organisation of Working Time Act 1997 only had direct effect against State entities. The decision of the CJEU has now changed this. The CJEU have determined that due to the provisions of Article 31 (2) of the Charter of Fundamental Rights of the European Union that a national court hearing a dispute between a worker and an employer who is a private individual must disapply the national legislation and ensure that should the employer not be able to show that it exercised all due diligence in enabling the worker actually to take one of the rights specified under Article 31(2), which in this particular case was Annual Leave, that the worker cannot be deprived of his acquired rights to that paid Annual Leave or effectively any corresponding provision which is covered under the Article. Article 31 (2) of the Charter covers not only Annual Leave but also Working Hours and Rest and Break Periods.

The judgment and the opinion of Advocate General Bot have huge importance for employers and employees going forward. It has been pointed out that the worker must be regarded as a weaker party in the employment relationship and that it is therefore necessary to prevent the employer being in a position to impose upon him a restriction of his rights (C Fub Case C-429/09). It was held that any practice or omission of an employer that may potentially deter a worker from taking his Annual Leave is equally incompatible with the purpose of the right to paid Annual Leave (Case C-214/16).

Because of dealing with Article 31 (2) of the Charter and when the case relates to paid Annual Leave it will equally apply to rest and break periods and excessive working hours.

In relation to Annual Leave and effectively also for any of the other rights this does not require an employer to force the worker to claim the rest periods due to them.

However, subject to that reservation, the obligation now appears to be placed on the employer which needs to be reflected in the system of rules of evidence under which, in the event of a dispute, it is for the employer to show that the employer took the appropriate measures to ensure that a worker was able actually to exercise that right.

Section 25 of our Act places the burden of proof on the employer. This has been interpreted by the Labour Court as requiring the employee to put forward effectively a stateable case or a minimum of prima facie case subject to the reservation that the employee can only be required to put in place such evidence as is in the employee's control. However, this decision now appears to have completely reversed that rationale and both, the evidential and legal burden will be on the employer at the start.

The argument that employees may not have requested particular rights has been effectively set aside by the decision in that Court has held that the requirement for an employee to request one of their rights is irrelevant.

In this case the CJEU held there could be no limitation on the right of an employee to go back to claim compensation for not obtaining their Annual Leave during the entire period of the employment. This puts the Irish Legislation in breach of the European Directive. The effect of this now is effectively that claims for unpaid Annual Leave, which may go back years, will now have to be taken to the High Court rather than to the WRC or on appeal to the Labour Court.

It is necessary now for an employer to show that the employer took the necessary steps and that in spite of the measures which were taken the worker declined deliberately and in an informed manner to exercise his or her rights.

The CJEU pointed out that "there would be an obligation on an employer to encourage the employee (…) formally if need to be, to do so, while informing him, accurately and in good time so as to ensure that the leave is still capable of ensuring for the person concerned the rest and relaxation to which it is supposed to contribute, that, if he does not take it, it will be lost at the end of the reference period or authorised carry over period".

The Court pointed out that if the employer is able to discharge the burden of proof in that regard and that appears that it was a deliberate and in full knowledge of the ensuing consequences that the worker refrained from taking the paid Annual Leave (or effectively any of the periods of rest and relaxation covered by Article 31 (2)) the Directive does not preclude the loss of that right.

The CJEU has held that unless an employer is able to show that it had exercised all due diligence in enabling a worker to take the relevant rest period then the worker cannot be deprived of his or her acquired rights.

This test of due diligence is going to place a significant burden on employers. The obligations are already there under the relevant statutory instruments to maintain records but employers are going to need to be a lot more diligent in checking these records and making sure that they are up to date for all rights under Sections 11, 12, 13, 15 and 19 of the Act. It will no longer be a defence for an employer to say "We advised the employee" or that the employee did not raise any grievance. It will be a matter for the employer to show that they applied due diligence in making sure that the employee obtained the relevant rights.

Because the legislation will now have direct effect, there is a problem with Section 12 of the Act. Section 12 of the Act of 1997 provides that an employer "shall not require" the employee to work for longer than specified period without taking a rest period which is the breaks at work being the 15 and 30-minute breaks. The Directive uses the word that the employee shall "ensure". The first issue is whether the word "ensure" is equal to the words "shall not require". If they are not then where employees bring claims, if the employer can show that they did not require the employee not to take the breaks then in those

circumstances there may well be a claim against the State by employers for failing to properly implement the Directive. The alternative would be that claims will have to be brought to the High Court. This creates significant cost for the unsuccessful party.

We have written to the Minister for Employment Rights and Social Protection but also to the Minister for Justice. It is one thing if there are going to be claims against the State for failing to properly implement the Directive. It is an entirely different matter if claims are now going to have to be brought or could be brought to the High Court. This would mean that effectively, while our Section 12 Organisation of Working Time Act cases would go for a first instance hearing in the High Court with an appeal then to the Court of Civil Appeal. This concerns us. It would be a significant use of Court time which can be rectified very easily by the Organisation of Working Time Act in Section 12 being amended as a matter of urgency, to comply with the Directive, which we might add, it should have from day one.

REVIEW OF DECISIONS OF THE WRC

In this newsletter we do review Decision of the WRC on a regular basis.

We cannot review them all in a newsletter like this. We do however go through them all. In picking cases for review we look at those were we see interesting cases where specific legal issues are raised. There are many cases which turn on their particular facts. These are not cases which we review here even though they may be very interesting. In reviewing cases we do not generally speaking look at the value awarded but rather at the issue of legal principals. In reviewing decisions of the WRC, we do not even look at the names of the Adjudication Officers.

However, one particular issue is coming to light which is of concern. That is the number of cases which do not proceed because the employee does not turn up and in many cases the employer equally does not turn up.

The WRC to be fair have changed procedures to stop claims being put in on mobile devices. There was a concern, we believe that claims were

simply being put in with no real intention of pursuing them. However, what is clear to us is that there is a considerable number of cases which are not proceeding. Valuable WRC time is being set aside for these cases were nobody turns up. There is an issue that the procedures in the WRC need to be changed so as to ensure that cases are, for example dealt with by way of a call over which will minimise the potential for non-attendance as if individuals do not come to a call over then in those circumstances, cases could be put back until they do. This will mean that a significant number of cases can be dealt with on a call over on any particular day. Where submissions are put in it may not be necessary to deal with a formal call over for those cases but rather that the parties would be requested to give an indication as to how long they think the case is going to take so as for effective management. There are some day-to-day management issues that need to be addressed so as to avoid valuable time being allocated to cases which never go ahead. We would believe that all practitioners whether employer representatives, employee representatives or Unions or employee representative bodies would like to see a more streamlined system to avoid unnecessary costs and expenses where one or other party does not attend.

HOLDING DISCIPLINARY HEARINGS

The issue of fair procedures in disciplinary matters has recently been decided by the High Court in a judgment by Mr Justice Barton delivered on the 16th July 2018 in the case of Towerbrook Limited T/A Castle Durrow Country House Hotel and Eugene Young.

The facts of the case are interesting in themselves but what is probably more interesting for employment lawyers is the view of the Court in relation to the law on this matter.

The employer in this case had a number of policies including dignity and disciplinary policies and a grievance procedure. It was submitted on behalf of the employee that in the particular circumstances of the case the managing director should not have involved himself in conducting the investigation, making a determination and imposing a disciplinary sanction on foot of his own complaint particularly in

circumstances where he himself was a subject matter of a complaint of assault by the employee.

In setting out the law His Honour held that the High Court was bound by the decision in the case of Mooney -v- An Post 1998 4IR288.

His Honour set out that it was significant in the context of this case that the application of the rules of natural and constitutional justice which include the entitlement of an employee to the benefit of fair procedures to be informed of the charges of complaint against him and to be given an opportunity to respond and make submissions were broadly incorporated in the employer's grievance, disciplinary and dignity policies. It was pointed out that the judgment of Keane J in Mooney is particularly apposite of the circumstances of this case. While the Court pointed out while recognising the two great central principles - audi alterem partem and nemo iudex in causa sua cannot be applied in a uniform fashion to every set of facts and certainly not in a way which would result in an employer never being able to dismiss an employee the Court in that case went on to state:

"… where, however, natural justice requires a hearing by an impartial Tribunal before an employee is dismissed, the presence on the Tribunal of somebody who has hitherto being in a prosecution role may be a violation of the principles - see Connolly -v- McConnell 1983 IR 172 and O'Donohue -v- Veterinary Council 1975 IR398."

The employee in this case objected to attending a disciplinary process being conducted by a person whom the employee considered had subjected him to verbal and physical abuse.

The Solicitors for the employee had suggested an independent third party. The employer's Solicitors responded agreeing to this but put forward the idea that the employee would have to pay the portion of the costs. His Honour pointed out that this might not be an unreasonable condition. However, His Honour pointed out that taking account of the employee's strained financial circumstances it was likely to prove problematical for the employee and so it transpired. His Honour pointed out that in his judgment this betrayed a lack of bona fides on the part of the employer in the apparent acceptance of the proposition. His

Honour pointed out that it would have been possible probably to have reached some form of amicable arrangement in respect of same.

His Honour pointed out that he was satisfied that the investigations and disciplinary meeting which resulted in the dismissal was fundamentally flawed and contrary to the principles of natural justice to which the employer had expressly committed itself by its policies. His Honour pointed out that he was satisfied that the Court found that the investigation and ultimate decision-making process involved neither independent, thorough, impartial nor objective and it had to be if it were to comply with the policies the employer had adopted.

This case is extremely interesting in restating the importance of fair procedures.

It is a reminder to employers that where the employer is the moving party in relation to a particular complaint it is not appropriate for the employer to be involved in the process and that it is necessary that there would be an independent investigation by somebody who is independent of same particularly where there has been a complaint against the employer themselves that the employer has been in breach of their own policies relating to fair procedures or their dignity in workplace policies. This is an extremely important decision of the High Court.

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PREGNANCY RELATED DISMISSAL

In UDD1853 the Labour Court dealt with the case of Synergy Security Solutions Ltd and Anna Dudek.

In this case, there was no doubt that the employee was pregnant and that she was dismissed. In this case the Labour Court found on the basis of submission of the parties and the testimony given that on the balance of probabilities the Respondent employer had no knowledge of the pregnancy of the Appellant at the time of the dismissal. Consequently, the Court found that the Respondent had discharged the burden of proof which rested upon them and established that

pregnancy was not the reason for the dismissal and therefore the appeal failed.

An interesting issue then arises as to what the position would be if this case had been taken under Equality Legislation.

The relevant Directive would be Directive 92/85. Article 2 of that Directive in the definition states that for the purposes of the Directive:

"Pregnant worker shall mean a pregnant worker who informs her employer of her condition, in accordance with national legislation and or national practice."

Article 10 of the Directive entitled "Prohibition on dismissal" provides that in order to guarantee workers within the meaning of Article 2 the exercise of their Health and Safety Protection Rights under the Article it is provided that Member States shall take the necessary measures to prohibit the dismissal of workers within the meaning of Article 2 during the period from the beginning of their pregnancy to the end of the Maternity Leave referred to in Article 8(1) save in exceptional cases not connected with the condition which are permitted under national legislation and practice, where applicable provided that the competent authority is given its consent.

This is where the problem arises if this case had been taken under the Equality Legislation. If you follow the rationale of the case of Jessica Porras Guisado and Bankiasa and others Case C/103/16.

Our Employment Equality Act does not provide in the definition of a worker who is protected from being dismissed because they are pregnant or recently given birth or who are breastfeeding a requirement that the employee informs her employer of her condition. There is not national legislation or national practice in respect of same. Equally, the provisions of Article 10 raise the issue as to whether the legislation in Ireland has been properly implemented as there is not competent authority to give consent.

In the case of Mulcahy -v- Minister for Justice, Equality and Law Reform 2002 ILR12 took the view that the mere fact of pregnancy or the existence of Maternity Leave is not sufficient to shift the burden of proof

to an employer where a woman is dismissed or treated less favourably during her pregnancy or Maternity Leave. The most recent decision from the European Court of Justice would appear to take a contrary view to that expressed in the High Court. It would appear that our legislation has not included a provision in the Equality Legislation that there is a requirement for an employee to inform her employer before she gets the benefit of the Employment Equality Act. Therefore, if this case had been taken under the Equality Legislation, there is an argument that the employee, once they are pregnant, get the protection of the Directive in Ireland as there is no statutory provision requiring the employee to inform her employer of her condition and the important words here are

"In accordance with national legislation and/or national practice."

There is no national legislation on informing an employer other than for the purposes of taking Maternity Leave and the time limits for same are well into the Maternity period and there is no national practice on how it has to be done.

The reason for raising this at this stage is that it may well be an appropriate case that if this arises that the claim would have to be taken not in the WRC but in the High Court. It is possible to take a pregnancy related dismissal claim in the Circuit Court. However, if there is an argument that the Directive has not been properly imposed in Ireland and an employee wished to rely on the Directive provisions then following the recent Supreme Court case, following the Workplace Relations Commission where the judgment was given by Mr Justice Frank Clarke as he was then and now the Chief Justice, the claim may well have to be taken in the High Court.

The alternative argument is that before the WRC and the Labour Court under the Employment Equality Legislation in interpreting that Act it has to be interpreted as far as practicable in line with the Directive save where it would involve disapplying national law or inserting something into national law which was not there. Then in those circumstances the argument that the employer would not have known may not be one that can arise as a defence. In addition, where you look at Article 10 on the issue of exceptional circumstances they would have to be exceptional

and for example the fact that there was a situation that, for example, the employee was not working out or did not have the necessary skills or some other ground that would justify normally a dismissal during a probation period may not come within the category of exceptional circumstances.

The recent European Court of Justice case where the Advocate General's opinion came out raised a number of concerns for Employment Law Solicitors and Barristers. We would be of the view that the decision now of the European Court of Justice has confirmed those fears. One of those is clearly that the legislation in Ireland is not in conformity with the Directive.

The next issue then is if a case has to be taken in the High Court, what is the time limit. Is it a six months period or is it some other period. If it is that the Directive is been properly implemented then it may well be that the six-month time limit which can be extended to twelve months in exceptional circumstances may not apply.

We are simply raising this case as a further example of the issue of legislation in Ireland not having been properly drafted. The issue of whether an employer knew or did not know of an employee's pregnancy is going to be litigated upon in Equality Legislation at some stage in the future.

It would be our view that if an employer becomes aware at any stage prior to the dismissal actually taking place that an employee is pregnant then the employer is going to be in significant difficulties if they proceed with the dismissal.

For employees who are pregnant, it would be our view that the employee should at the earliest possible stage advise the employer that she is pregnant. Once she does so, she is fully protected by the legislation from dismissal save in exceptional circumstances. The facts that the employee may not have 12 months service is irrelevant. Under the Equality Legislation (and under the Unfair Dismissal Acts) there is no service requirement. This is an interesting area of law which is going to develop in the next few years.

SELF-DISMISSAL

In case ADJ-11074 the AO in this case had to deal with a situation where the employer contended that the employee had effectively self-dismissed.

This is an excellent decision from the AO. The AO sets out the law relating to a resignation. The AO also sets out that there is no such thing as a self-dismissal. The AO pointed out, quoting from the book by Ms Francis Meenan on Employment Law that if an employer tells an employee that if they do not do something or do not come to work they will be deemed to have self-dismissed is incorrect as there is no such concept of self-dismissal in Irish Law. Either an employee resigns or is dismissed.

While it is not relevant to the particular case, of course an employee can abandon an employment but that is a situation over a period of time rather than a single occasion.

Many employers seem to work on the basis that an employee is obliged to do something and if they do not do it that they have effectively dismissed themselves. It is extremely useful that the AO in this case has clearly set out that this is not the law and has restated it.

CONSTRUCTIVE DISMISSAL

In the case ESPCA Animal Shelter Ltd and Duggan UDD1855 the Labour Court has again stressed that in a Constructive Dismissal case there is an obligation on an employee to raise her grievance with the employer. The Court in that case pointed out that the employee had taken no reasonable steps to raise the grievance. While it was not in the decision, the Court did not address the issue as to what would be reasonable. It would be our view that there would be cases where it would be quite reasonable for an employee to resign without going through a grievance procedure. For example, a case where an employee was subjected to a sexual assault or an assault by an employer. There could be cases where an employer is involved in an illegal activity or where an employee was asked to undertake something which might impact on their future for example a Solicitor being asked to breach a

provision of the Solicitors Regulations or an Accountant being asked to break or disregard Accountancy Rules. There would have to be a very serious issue for an employee not to go through the grievance procedures. In a vast majority of cases it will be necessary for an employee to show they act in a reasonable way that they go through the grievance procedure.

The reality of matters is that in the vast majority of cases, employees see things from their own perspective. We fully understand that. However, before resigning legal advice should be obtained as it would be our view that in the vast majority of cases no employee will be able to justify a claim for Constructive Dismissal unless they have gone through the grievance procedures.

It is very helpful that the Labour Court have restated the law on this issue.

CONSTRUCTIVE DISMISSAL - NON-PAYMENT OF WAGES

In case ADJ-10695 the AO in this case quoted the case of Conway -v- Ulster Bank Limited where the Supreme Court stated:

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

The AO also quoted the case of Berber -v- Dunnes Stores and pointed out that the critical issue is the behaviour of the employer though the employee's behaviour must also be considered.

The AO in our view, most properly set out that in respect of a failure to pay wages there hardly be a more fundamental breach of the contract of employment and that this goes to the heart of the contract. At the time the employee resigned he was owed approximately 3 months wages. The AO held that applying the Berber test the Complainant could not be expected to endure that treatment for a moment longer and held in favour of the employee.

This is a case where the AO did not require the employee to go through the grievance procedure and it probably would have been unreasonable to expect the employee to do so before bringing a Constructive Dismissal case as there had been such a fundamental breach of the contract.

DISMISSAL - FIXED-TERM CONTRACTS

In case ADJ-13199 the AO in this case had to deal with an issue as to whether the employee was under a Fixed-Term Contract.

The AO helpfully set out the case of the Labour Court in the case of Malahide Community School and Dawn - Marie Conaty UDD1837 where the Labour Court stated:

"In this case the Respondent sought to rely on the exclusion contained in Section 2 (2)(b) of the Act which permits the non-application of the protection of the Act to a fixed-term contract which has been executed strictly in accordance with the four criteria set out in Section 2 (2)(b) namely

(a) The contract must be in writing
(b) The contract must be signed by or on behalf of the employer
(c) The contract must be signed by the employee
(d) The contract must provide that the Act shall not apply to a dismissal consisting only of the expiry of the fixed-terms or the cesser of the specified purpose.

In order for Section 2 (2)(b) to apply the contract must be a bona fide fixed term."

It is worth pointing out as set out by the AO that the conditions must be completely satisfied as held in the case of Sheehan -v- Dublin Tribune Limited 1992 ILR239 and O'Connor -v- Kilnamagh Family Recreation Centre Limited UD1102/1993.

This is a very useful decision for practitioners.

TAXATION OF EMPLOYMENT LAW AWARDS

Case ADJ-11852 is an interesting case from its facts but in particular the AO in this case awarded compensation under Section 8 of the unfair Dismissals Acts and Section 11 under the Minimum Notice under the Terms of Employment Act. The AO in this case held that the award is redress of statutory rights and therefore no subject to income tax as per Section 192 Taxes Consolidation Act, 1997 as amended by Section 7 Finance Act 2004. Any award of wages which is what a decision under Unfair Dismissal Act and the Minimum Notice of Terms of Employment Act is one which is subject to income tax and is not exempt in our view. They had claims under other Acts including the Employment Equality Acts which were not successful. If a decision had been made under the Employment Equality Act to award the amount even if it is specified in a sum equal to x number of weeks compensation that is still exempt from tax as that particular Act is covered by the provisions of Section 192 A.

There is confusion in relation to the taxation of Employment Law Awards and it is necessary to go back to when Section 192 A was implemented. Prior to that Section coming into play, the Revenue had sought to tax all Employment Law awards under every single Act. Following submissions from the Law Society the Revenue Commissioners in consultation with the Department of Finance and the Law Society set out provisions relating to exemptions. The Revenue and the Department of Finance were happy to exempt any payment provided it was not relating to loss of wages. Therefore, a claim under the Payment of Wages Act, the Unfair Dismissal Act, Minimum Notice are all ones which are for loss of wages. There is no “compensation” element in them as the legislation limits the claim to the actual economic loss. As regards matters where compensation could be awarded, regardless as to whether there was any economic loss or not, for example a claim under the Equality Legislation or the Organisation of Working Time Act for Excessive Hours, as simple examples, they are exempt from tax because it does not have to be any economic loss and compensation for up to two years wages can be awarded in those cases.

Unfortunately, there is confusion in this area and it is one were those acting for employers or employees despite what may be in a decision need to make sure that they obtain appropriate tax advice.

REDUNDANCY OR CONTINUITY OF SERVICE

Case ADJ-12161 dealt with an interesting issue. The facts are relevant.

The Complainant worked as a steel fixer for the Respondent company from 4th May 2015 to 19th May 2017 earning €700 net per week.

The Complainant outlined that his employment was transferred to an agency on the 19th May 2017. The employment terminated on the 11th August 2017. The employee applied for a lump sum redundancy payment from the Respondent company who have been, if we can call it like this, the first employer.

The employer in this case contended that the employee was offered new employment but refused it. The Respondent submitted that there was no cessation of employment to justify a claim for redundancy. The employer contended that the employee has gone from the Respondent to an Agency following a period of lay off followed without an application for Job Seeker Benefit and that he resigned from employment during the period of lay off which contravened the protection contained in Section 12 of the Redundancy Payment Acts.

The AO in this case looked at a situation where the employer contended that the employee had transferred seamlessly to the agency.

The AO in this case looked at Section 9(3) of the legislation which provides that an employee shall not be treated for the purposes of this part as having been dismissed if:

1. He is reengaged by another employer immediately on the termination of his previous employment. That would appear to have happened.
2. The reengagement takes place with the agreement of the employee, the previous employer and the new employer. There was an issue in the case as to whether this actually occurred but let us for argument sake say that it did.

3. Before the commencement of the period of employment with the new employer, the employee receives a statement in writing on behalf of the previous employer and the new employer which
    a) Sets out the terms and conditions of the employee's contract of employment with the new employer;
    b) Specifies that the employee's period of service with the previous employer will, for the purposes of this Act being the Redundancy Payment Acts be regarded by the new employer as service with the new employer;
    c) Contains statement as mentioned in (b) above;
    d) That the employee notifies in writing the new employer that the employee accepts the statement required by this subparagraph.

What is clear, is that this did not occur.

In this case only a P45 issued. If there is to be a transfer to avoid the claim by an employee bringing a claim under the Redundancy Payment Acts then all of these conditions in Section 9 subsection 3 of the Redundancy Payment Acts must be complied with. Where they are not, as it was found in this particular case, the employee is entitled to redundancy. In this case from the time that he started with the Respondent employer up to the date his employment transferred to the agency.

This is a particularly important decision from the AO in this case and for those interested in redundancy law, this is an excellent decision to read.

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REDUNDANCY PAYMENT CASES IN THE WRC

We are finding, from reviewing cases three different approaches by AO's to such cases.

The first, and it is the method which we believe is the correct way of setting matters out, is that it sets out the date of commencement, the date of cessation, the date of birth of the Complainant, the rate of pay

being gross per week and particulars of any lay off periods or break in service if applicable.

There are two other methods by which decisions are being set out.

One of these gives the calculation of the amount due. These decisions can be broken down into two groups. The first does set out, in the body of the decision the relevant information as set out above. Therefore, the calculation is an additional service provided by the WRC which is helpful but not necessary. The second simply sets out the calculation. This causes difficulties in applying redundancy because the relevant information for producing the documentation for the redundancy calculation as per the Department's Redundancy Calculator cannot be replicated from the decision.

The third group simply states that redundancy is due in accordance with the Redundancy Payment Acts without setting out any information from which the Redundancy could be calculated. We have come across one decision which gave a start and finishing day but did not even give the rate of pay.

It is our view, and we have stated on a number of occasions, that the best method of setting decisions out is in line with how the EAT used to set matters out.

We do have a concern where decisions are set out in such a way that the Department cannot check the information. If in cases, where all the relevant information is not set out, and the Department refuse to pay, in those cases if the matter came back to an Adjudication Officer they would have to review matters in light of the matters set out in the previous decision and they will be limited to same rather than entering into a new investigation. The same would be in the Labour Court. Therefore, it is advisable, in our view, that the method used by the EAT would be adopted and the matter of course within the WRC.

CAN EMPLOYERS STOP WORKPLACE BULLYING? - THE ANSWER IS YES

The level of bullying in the workplace is somewhat hard to classify. A 2017 report by the Workplace Bullying Institute entitled "US Workplace Bullying Survey" would indicate that a little over 37% of the US workforce was affected by workplace bullying. There are no comparable figures for Ireland. However, it is clear that workplace bullying is an issue.

Some workplace bullying can result in Personal Injury claims against employers. However, leaving that aside where there are workers who believe that that they have been bullied this can impact on productivity and morale. The opposite is that by reducing workplace bullying this can boost morale. It creates loyalty in the employer company. It helps create a more productive environment. It reduces sick leave. Therefore, there are benefits for an employer in attempting to address workplace bullying.

So, what can an employer do?

There are probably five minimums that an employer should do.

1. Raise awareness.

   The easiest way to reduce workplace bullying is to make sure employees understand what workplace bullying is. This should involve employers, managers, supervisors and the employees. By encouraging employees to report bullying this helps to reduce the incidents of bullying.

2. Training.

   It is only through training that managers, supervisors and employees can recognise what bullying actually is, how to address issues of bullying, how to report issues of bullying, what can be done to mitigate against bullying arising. As many bullying claims arise against managers, it is important that the procedures for reporting bullying do not involve their direct line managers and a separate reporting channel should be put in

place with individuals to whom employees can bring issues either formally or on an informal basis. It is much better that employers create an atmosphere where employees can feel comfortable through training to address issues and often they will want to address them on an informal basis.

3. Understand what employees want.

   The reality on it is that employees who are bullied, normally simply just want it to stop. Therefore, creating a culture which avoids bullying in the first place means that issues will not arise.

4. Protect those who report bullying

   It is imperative for any bullying procedure to be very clear in setting out that a person who reports bullying will be protected. It is however also important to ensure that if somebody reports matters which are not bullying for the purpose of affecting another employee that this itself can be bullying and can result in disciplinary action.

5. Comply with the Law
   Every single policy relating to bullying must comply with the law. There is a Code of Practice in this area. Equally, you need to be aware of Data Protection issues.

Conclusion

A bullying claim against an employer can result in either a Personal Injury claim or matters going to the WRC or possibly the Labour Court. It can also have a detrimental effect on the operation of a company and affect staff morale. This can affect productivity and thereby profit. It therefore makes good business sense for employers to take steps to address bullying.

TRANSFER OF UNDERTAKING REGULATIONS

In case ADJ-10845 being a complaint by an Inbound Transport Coordinator and a Reefer Logistics and Shipping Company, the issue related to the Transfer of Undertaking Regulations being SI 131 of 2003.

The decision indicates that the parties were represented by experienced practitioners.

A number of interesting cases are quoted. The first is the case of Abler -v- Sodexo MM Catering GmbH and Sanrest Case 340/01. That case entails the outsourcing of a catering function from within the hospital to the first named Respondent after having terminated their contract with the second named Respondent company. The ECJ found that Article 1 of Directive 77/187 did not apply as the first Respondent took over the tangible assets of the hospital kitchen which contributed significantly to the performance of the activity. There was a takeover of customers. There was a closed group of customers, the hospital staff and patients, who remained the same pre and post transfer and the Court found that the transfer had occurred. The case of Schmidt -v- Spar Case C-392/9 of 1994 is one where Article 5 (1) of the Directive provided that the transfer of an undertaking of business or part of an undertaking of business shall not of itself constitute grounds for dismissal.

The AO in this case quoted Regulation 3 (1) and also Regulation 3 (2) which defines a transfer as a transfer of an economic entity which retains its identity.

In this case the AO helpfully set out some Irish cases on this matter but also pointed out that pursuant to Article 3 (1) of the Directive 2001/23/EC that on the date of the transfer the transferor's rights and obligations automatically transfer by operation of law to the transferee. Therefore, any claim goes against the new employer. This would be so even if the old employer made the dismissal in advance of the transfer.

The AO in this case also had to deal with the issue of consultation and refer to the case of J Donohue Beverages Limited -v- Elizabeth Collins TUD183/2008 which concerned the failure to consult and Regulation 8 applied to the Complainant's contract of employment a provision which

entitles him or her to a period of information and consultation through their chosen/elected representatives prior to the occurrence of the transfer and Regulation 4 (1) provides that the remedy is against effectively the new employer rather than often the employer who failed to consult.

In this case compensation of over €26,000 was awarded.

In cases involving the Transfer of Undertaking Regulation parties often sue the wrong entity. It is important to understand that in a majority of cases the claim will be against the transferee rather than the transferor even when the transferor is the party that was in breach.

STRUCTURING EMPLOYMENT CASES

An interesting case arose in the High Court where a decision of Mr Justice Meenan was delivered on the 12th July 2018 in the case of Prince Adekoya and IBM International Holdings Limited 2018 IEHC 592. The case is interesting in itself but what is particularly interesting is the issue where an employee is claiming an entitlement to a long-term disability claim.

The Court in this case took the view that where an individual brings a Personal Injury claim it is necessary as part of that claim to bring a claim to be entitled to a Long-Term Disability Benefit as that is a separate claim by way of a contract.

Where the employee is dismissed, however, there is an issue as to what claim should be brought in the EAT (as it was at that stage but now the WRC). From this judgment it would appear that rather than bringing a claim for compensation the claim should be for reinstatement or reengagement as it would be a requirement to claim a Long-Term Disability Benefit and that the employee is still an employee. By claiming reinstatement or reengagement, effectively this can keep the option open to an employee to be able to claim under a Long-Term Disability Scheme. However, where the employee simply seeks compensation that acknowledged effectively that the contract is at an end.

The case in itself is interesting but it certainly is a reminder for those involved in litigation that it is important where there is an Employment claim and a Personal Injury claim and a claim under a Pension Scheme or a Long Term Disability Scheme that what may happen in one claim can have a significant impact on a separate claim and therefore it is necessary to ensure that the representatives dealing with different parts of claims take cognisance of same and look at what the effect of one particular claim could have on other claims. There is no question in this case that there were Solicitors or Barristers in various cases acting independently of others but this case does indicate the importance of ensuring that where there are overlapping claims that those involved in the claims take cognisance of same.

VICTIMISATION UNDER THE EMPLOYMENT EQUALITY ACT 1998

Case ADJ10567 is a very helpful case in dealing with the issue of what victimisation is.

The AO quoted the case of Tom Barrett v. The Department of Defence EDA1017 where section 74 (2) sets out that the complainant must be subjected to adverse treatment by his or her employer and the adverse treatment must be in reaction to the protected Act having being taken by the employee.

The AO also helpfully set out the case of Roy Mackarel v. Monaghan Co. Council EDA1213 where the Labour Court held:

"*Both the Act and the Directive provide that victimisation occurs where a detriment is imposed on a worker as a reaction to a complaint or other protected Act. The use of the expression as a reaction to connotes that the making of a complaint or other protection act must be an influencing factor in the decision to impose the impugned detriment although it need not be the only or indeed the principal reason for the decision. It is, in the Courts view, sufficient if the making of the complaint was an operative factor in the sense of being anything other than a trivial influence, operating on the mind of the decision maker. (see by analogy the dictum of Peter Gibson LJ in Wong v. Igen Limited and others 2005 IRLR258 in*

relation to the degree of connection required between rate and the impugned act or admission necessary to make out a claim of discrimination)"

Helpfully in this case the AO has taken the time to set out the relevant legislation and case law and has very helpfully set out at the end of the decision the relevant references.

SAFETY HEALTH AND WELFARE AT WORK ACT 2005 BURDEN OF PROOF

In cases ADJ13705 the AO had to deal with the issue as to the burden of proof in such cases.

The AO pointed out that the Act is silent on the question of how the burden of proof should be allocated. The AO quoted the case of the Labour Court in the Department of Justice Equality and Law Reform and Philip Kirwan, Determination HSD082 where the Labour Court held,

"It is clear however that in the absence of any contrary statutory provision, the legal burden of proof lies on the person who asserts that a particular fact in issue is true."

They went on to say that later in Fergal Brodigan T/A FB Groundworks and Juris Dubina Determination HAD0810 the Court in qualifying the statement in the Kirwan case stated,

"It is, however, settled law that in civil matters there is an exception to this rule known as the peculiar knowledge principal. This is a rule of evidence which provides that where it is shown that a particular fact in issue is peculiar within the Defendants knowledge the onus of proving that fact rests on the Defendant."

In that case they said that the issue was the motive/reason for the Claimants dismissal and that is found in the thought process of the

decision maker at the time the decision to dismiss the claimant was taken. That is something which is peculiar to the knowledge of the respondent.

It is helpful that the AO in this case has set out the burden of proof.

PAYMENT OF HOLIDAY PAY IN ADVANCE

In case ADJ-14935 the employee brought a claim on the basis that she had not been paid her holiday pay in advance.

The AO in this case after hearing the case took the view, in accordance with the legislation that the AO would direct the employer going forward to put in place procedures so that the calculation of holiday pay could be undertaken easily so that employees could get their payment of their holiday pay in advance.

The employee in this case was paid monthly in arears. The Organisation of Working Time Act 1998 specifically provides for a right to be paid holiday pay in advance.

To this extent, as regards the decision of the AO, we absolutely agree with the AO in how the AO has set out the remedy.

However, the AO in this case went on to state that compensation would not be warranted in this case as the employee had not lost out financially. There is no doubt that the employee did not lose out financially. However, the legislation specifically provides that an employee should receive their holiday pay and that they should receive it in advance. There is no requirement for the employee to suffer any economic loss. Where an employee is paid monthly, but does not get his or her holiday pay in advance, they will never suffer a financial loss. What they may however suffer is the ability to be in a position to take holidays. The Labour Court have commented on this in the past and we would be of the view that there is absolutely no need for an employee to show economic loss to be able to sustain and claim that he or she did not receive their holiday pay in advance.

CLAIMING ON THE DOUBLE

Case ADJ-6203 is a very useful decision.

In this case there was detailed legal arguments which the AO summarised as follows that the principles of duplication of litigation as an abuse of process was addressed in Henderson -v- Henderson. The AO pointed out that in the Court of Appeal the decision in Culkin -v- Sligo County Council Mr Justice Hogan held that Section 101 of the Employment Equality Act does not bar subsequent Personal Injury claims per se where an earlier discrimination claim before the Tribunal had failed. In that case Mr Justice Hogan stated:

"This issue is fundamentally an issue of law and it is governed by the interaction of the relevant statutory provisions namely Sections 77 and 101 of the Employment Equality Acts 1998 with standard legal principles such as res judicata and the rule in Henderson -v- Henderson."

The AO pointed out that there is no equivalent provision in Section 101 of the Employment Equality Act 1988 in the Unfair Dismissal Acts. The AO pointed out there was no decision of the Courts which prohibits the Complainant from bringing an Unfair Dismissal claim and the Personal Injury claim arising from the same or similar set of facts. Issues of causation and proof of injury arise in the context of Personal Injury claims but do not arise in the context of an Unfair Dismissal claims. The AO pointed out that the rule in Henderson -v- Henderson is essentially that you do not get two bites of the cherry. However, the AO pointed out that in this case the Respondent was seeking to prevent the employee from taking even a first bite.

This was a very helpful overview of the law by the AO in this particular case.

BRINGING CLAIMS UNDER THE WRONG ACT

Case ADJ-13649 is a prime example of a case which was brought under the wrong Act. Even though the employee was successful and was awarded a sum of a little over €500 this claim was brought under the wrong Act. The AO in this case pointed out that the AO was constrained

by the legislation to award a sum of 13 weeks wages being the economic loss. The employee in this case was self-represented and brought the claim under the Unfair Dismissal Acts relating to a pregnancy related dismissal rather than the Employment Equality Acts. The AO in this case was highly critical of the employer and the manner in which the dismissal took place and stated that:

"I would have awarded a significantly higher amount given the unfair treatment to which the Complainant was subjected."

If the employee in this had brought a claim under the Employment Equality Acts, the employee in this case could have obtained compensation up to a 104 weeks wages at a loss of €409.23 per week which would have acquainted to a figure of over €42,500.

We are simply pointing this out as an example of a case where, if the employee had been represented by an Employment Law Solicitor, it is likely that the claim would have issued under the Employment Equality Legislation and not under the Unfair Dismissal Legislation.

CLAIMS AGAINST AN EMBASSY

Case ADJ-11995 being a case of an Academic Advisor and an Embassy is an extremely useful decision for colleagues running to 11 pages which reviews the relevant case law as to who may bring a claim against an Embassy.

These cases are unusual often but we are simply mentioning this case as an excellent decision of the WRC which is well worth reading if anybody has such a claim.

ASSAULT AT WORK

At Richard Grogan & Associates, we come across many cases involving employees who have suffered both physical and psychological injuries* as a result of an assault during the course of employment. Sometimes the assault can be caused by a rogue employee or a burglar in a retail setting. However, the majority of these cases affect employees working

in healthcare who are dealing with patients suffering with significant physical and mental health difficulties and who can be volatile.

Simply because an employee's work exposes him/her to a risk on a daily basis or because there is a high risk associated with the type of work that they are doing does not mean that they cannot recover compensation for injuries* and losses if assaulted while carrying out their duties. An employer still has a legal duty to ensure an employee's health and safety at work and is obliged to limit, in so far as is reasonably practicable, an employee's exposure to a risk of injury*. This includes both physical and psychological injuries*. This should involve providing employees with appropriate task specific training, having proper policies and procedures in place to deal with any exposure to violence in the workplace as well as control measures to keep these exposures to an absolute minimum.

An employee who has been assaulted at work should: -

- **Remove** oneself from the danger immediately;
- Seek **medical treatment** from a GP or A & E Department immediately;
- **Report** the assault to a line manager;
- Complete an **incident report form**;
- Record the names of all **witnesses** to the assault;
- Speak to a solicitor with a specialism in both employment law and personal injuries* litigation and **seek legal advice**.

PSYCHOLOGICAL INJURY CLAIMS

With mental health issues now the most common illness in the workplace, we at Richard Grogan & Associates come across many claims* for psychological injuries* suffered as a result of some accident* or incident at work or because of how an employee was required to work. A psychological injury* is not always apparent in the immediate aftermath of an accident* or incident. It can take time to manifest itself and can take many different forms such as depression or post traumatic stress disorder. It can be the result of witnessing a particular traumatic event or as a result of having been bullied at work or being required to work excessive working hours. It can sometimes form part of the sequelae of a physical injury such as not coping with pain or the fact that you have suffered a serious and permanent physical injury. Psychological injuries* can have a long recovery period and can be life changing. It is important to remember that they are just as serious as any physical injury* and the symptoms cannot be ignored. Before embarking on any claim* for psychological injuries*, it is important that a person seek medical treatment from a specialist medical practitioner and have been diagnosed as suffering with a recognisable psychiatric injury. A person will only have a period of two years within which to bring a claim for this type of injury* so it is important that you seek legal advice, as soon as possible.

SPECIAL DAMAGES

What are special damages? In a case for personal injuries*, special damages is a term that is frequently mentioned. Special damages is the legal term given to out of pocket expenses caused by the accident* and/or injuries*. These expenses are usually sought in addition to a claim* for the injury. Some examples include:

- Doctor's fees.
- Physiotherapy fees.
- Expenses for medications.
- Fees for x-rays and/or scans.
- Travel expenses.

These out of pocket expenses can become very costly. In order to recover the cost, it is essential to keep all bills, invoices and/or receipts so that all out of pocket expenses can be included in the case. It is important to remember that losses can only be claimed for once so it is

important to include all expenses to ensure that the full value of the case is obtained.

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 as a proportion or percentage of any award or settlement.***