Keeping in Touch - November 2018

Welcome to the November issue of Keeping in Touch

The firm has joined the National Solicitors Alliance. This is an alliance of specialist law firms situated in Ireland. We are delighted to be a founding member. There are approximately 50 firms involved. The membership will be limited to 100 firms throughout the country. We are delighted to join the National Solicitors Alliance as it enables us now to provide a full services facility to all our clients. As a specialist firm, in the area of Employment Law and Personal Injury work, we were not in a position to provide a full law firm service to all our client. Now we are, through our associated firms in the National Solicitors Alliance. You will be hearing more about this alliance from us over the coming months.

Richard Grogan of this firm will be undertaking lecturing to various Bar Associations in November. On 2nd November Richard is speaking to the Donegal Solicitors Bar Association on "Acting in employment cases - traps for the unwary".

On 23rd November Richard will be speaking at the Skillnet meeting for Solicitors from Carlow, Kilkenny, Waterford and Wexford on "Employment Law cases - tips and traps".

On Friday 30th November Richard will be speaking to the Southern Law Association on the "Organisation of Working Time Act - a review of the legislation and case law". The last lecture is an update from a lecture given by Richard in 2014 and will deal with all the relevant sections of the Organisation of Working Time Act from Section 11 to Section 25 inclusive with a review of the relevant case law on this topic.

Index

Out and About in October 2018

On the 1st October Richard Grogan was interviewed on the Pat Kenny Show on Newstalk in the Ask the Expert section of the show.

On 5th October Richard presented a course to the Limerick Solicitors Bar Association in the Dunraven Arms Hotel, Adare on the topic of "Employment Cases - Tips and traps in presenting and defending cases." In addition, Richard undertook a second session dealing with the Taxation of Employment Law Awards and Settlements.

As is usual, we were delighted to assist colleagues. It is a great honour to be invited to speak.

As is our standard practice, all fees received are payable not to us but to the Solicitors Benevolent Association and this has happened in relation to the presentation in Limerick.

In October Michelle Loughnane presented a tutorial in the Law Society on Legal Drafting.

Unpaid Interns

Earlier this year this office put forward an announcement that we would be taking certain cases for those who are on, what can be termed, an unpaid internship without charging any fee. We are delighted that we now see that the Workplace Relations Commission is actually advertising the fact that such actions are illegal and will be investigated by the WRC.

We are not saying that it was because of us that the WRC took up this as a topic themselves. It is in our view abhorrent that anybody would be asked to work without being paid.

There is a difference between a person who goes to an office or workplace and "shadows" somebody to see how a particular activity is done. If, however, the person is required to do any work then in those circumstances they must be paid.

It is unfortunate that there are still entities advertising for unpaid internships, including on Government websites.

Recently, on the Pat Kenny Show on Newstalk FM this is an issue that we did discuss as once the leaving cert results come out, this is the time that some of those preying on vulnerable individuals looking to get into certain industries seek to get unpaid interns. The industries where this is very prevalent are in IT start ups, the hospitality industry and also in the modelling industry.

The issue of unpaid internships does need to be addressed and in a very forthright way.

Letter to the Minister for Employment Rights

Private & Confidential
Ms Regina Doherty
Minister for Employment Rights
and Social Protection
Aras Mhic Dhiarmada
Store Street
Dublin 1

22 October 2018

Richard Grogan

Re: Workplace Relations Act, 2015 - Another Mess.

Dear Minister,

We now have a further mess in relation to this Act. I am attaching a copy of the decision of Mr Justice Humphreys in the case of Dunnes Stores and Mary Doyle Guidera.

Because of some pretty appalling drafting, the time limit for an appeal to the High Court and in Employment Equality case is that set out in Section 90 of the Act of 1998 and not Section 46 of the Workplace

Relations Act 2015. Therefore, the time limit under that Act is 21 days not 42 days. This is a dreadful mistake that was made in the drafting.

We were to have an appeal process that applied across all Acts.

You have the Employment (Miscellaneous Provisions) Bill, 2017. Perhaps that Bill could have an amendment put in at this stage to rectify this defect in the drafting of the original 2015 Act so that appeals under the Employment Equality Act on a Point of Law to the High Court can be taken within 42 days and not 21 days.

His Honour has pointed out the undesirable inconsistency in drafting practices where certain enactments are scheduled in Schedule 5 of the 2015 Act and others are added through deeming or applying provisions. Section 83 of the 1998 Act applies only Section 44 of the 2015 Act and not Section 46.

There is a number of ways in which this can be rectified, either:

1. Including the Employment Equality Act, 1998 as amended in Schedule 5 of the 2015 Act.
2. Amend Section 90 of the 1998 Act to provide that the appeal period set out in Section 46 of the 2015 Act applies.
3. In the alternative, that you ask the Minister for Justice to request the Rules Committee to amend Order 106 of the Rules of the Superior Court to increase the time limit from 21 days to 42 days.

It is quite staggering the complete disregard that there has been for an effective and simple piece of legislation. The drafting which we have to deal with is appalling. Other mistakes are of course going to arise as matters proceed.

I would ask that you would at least consider getting this matter resolved now. I know that it has taken, at this stage, over 3 years to get the Section in the Bill put in place to allow us to get a witness summons in an Unfair Dismissal case in the WRC. Hopefully, it is not going to take you 3 years to get this matter rectified.

When this legislation was first brought in place, we were told that this was a world class service that we were going to get. Well, it is well short of a world class drafting service that we got.

On a completely different note, you really need to get the resources to put in place a consolidated piece of legislation so that this kind of appalling mess will not apply going forward. Of course, that is not going to happen because there is no appetite to put in place a robust and easy to follow legislative process so that ordinary people can actually understand what is going on. It is hard enough for lawyers but how could you expect somebody presenting their own case being a lay litigant to work out that the 2015 Act is so badly drafted that at least one Act is not covered properly under it.

There is a degree of frustration and that frustration is that this is a further example of really pathetic drafting.

Yours sincerely,

_____

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

Bullying and Harassment - Stress in the Workplace - The Duty of Care owed by Employers

In the September issue of our newsletter we looked at the issue of stress in the workplace.

We see many stress related claims coming to us. Unfortunately, there is a belief by many employees that because they have become stressed they have a claim. That is not always the position.

For example, we would get cases where people say that they have been dismissed or put through a disciplinary process and therefore they have suffered stress. That would be seen, in our opinion, by Court as, what might be termed, stress that no employer could take action to reasonably avoid. Some form of stress is inherent in the job that people do.

Before you can bring a claim, it is important to understand that employers are subject to a statutory duty towards employees. This is in relation to the protection of the safety, health and welfare of employees. An employer must take such steps as are reasonably practicable to prevent bullying and harassment in the workplace. We must stress the word "reasonably" here as that is the test which will be applied. In addition, it should be noted that the obligation in many cases will be higher on a large employer than they will be on a small employer.

There are a number of important cases in this area.

In the case of Catherine Hurley -v- An Post [2017] IEHC568 and [2018] IEHC166 Mr Justice McDermott set out that there is a Common Law duty, on an employer, to take all reasonable precautions, for the safety of the employees of that employer. This Common Law duty is not to expose an employee to a reasonably foreseeable risk of injury. An employer must act as a reasonably careful and prudent employer would act in the circumstances.

Issues often arise in relation to workplace bullying.

Part 5 of the Code of Practice which is part of the Industrial Relations Act, 1990 defines bullying as:

"Workplace bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others at the place of work and/or in the course of employment, which could reasonably be regarded as undermining individuals right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work, but as a once off incident, is not considered to be bullying."

In addition, Section (8)(2)(b) of the Health, Safety and Welfare at Work Act, 2005 creates a statutory duty on employers to manage the conduct of work activities in such a way as to prevent so far as is reasonably practicable any improper conduct of behaviour likely so put the safety, health or welfare at work of employees at risk.

So it is clear, there is a Common Law duty, there is a Statutory duty and there is a Code of Practice.

The issue which has to be looked at is what is going to be necessary for an employee to bring a claim of bullying.

In order to succeed in an action based on workplace bullying, where the employee is complaining that they have suffered stress, it will be necessary for the employee to show: -

1. That the behaviour shows a degree of inappropriateness and repetition which is different from workplace stress or occupational stress.
2. The conduct must be repeated.
3. The conduct must undermine the dignity of the employee.
4. It is not necessary for the employee to show that it was deliberate. It is not necessary for the employee to show that it was the intention of the person to undermine the dignity of the employee.
5. It is important that the conduct or actions being complained of must have taken place either at the workplace or in the course of employment. For example, it could occur at trade conferences or by way of phone calls or emails sent outside of work hours to an employee at their home address or on their own mobile or laptop.
6. The employee must show that they have suffered an injury to their health. It is important to understand that this is different than ordinary occupational stress. To prove this, a psychological assessment will be required from a consultant.
7. The injury that the employee is complaining of must be able to be shown to be due to the conduct of what occurred in the workplace or in the course of employment.
8. The harm suffered to the employee must be reasonably foreseeable by a reasonable employer in all the circumstances. The employer must be shown to have failed to take steps which are reasonable in the circumstances taking account of the degree of the risk of harm occurring, the gravity of the harm which might occur and the cost of preventing it and the justification of addressing it as regards any further risk. It might reasonably be stated, as set out by Mr Justice McDermott as:

"Bullying involves a repeated course of action designed to humiliate and belittle the victim. The conduct must be intended to reduce the persons sense of self-worth."

For employers it is important that employers make sure they have proper policies in place in relation to bullying and harassment prevention. These policies should be updated regularly. These should be sent to all members of staff on a regular basis. The workplace should be monitored. Risk assessments should be carried out. Where these have not been done, it will be somewhat easier for an employee to be successful. Where they have been done, it is less likely an employee will be successful.

Since the case Ruffley -v- Board of Management of St Anne's School [2015] IECA287, the bar has been set at a very high level for an employee to successfully bring a bullying and harassment claim. We do see claims which could be successful and which are successful. However, there is a continuing misconception by some employees that simply because their GP has certified that they have been suffering from workplace stress that this is sufficient to bring a claim. It is far from the position. We have set out in this note the test that must be passed. We hope that it will be of assistance to those who may be considering bringing a claim to work out whether in fact they have a claim for stress as opposed to simple occupational stress. There are always going to be stressful jobs. That does not make for a successful Personal Injury claim. Stress caused by bullying and harassment must be one which the employee can prove that the tests set out above will be met.

Can a Union Official give legal advice?

In case ADJ-6034, the AO in this case held that a Union Official regardless of his/her legal qualification was quite capable of providing legal advice in respect of Employment Law issues and associated matters.

The issue arose in relation to whether the employee had obtained adequate legal advice for a settlement agreement in respect of which she waived certain legal rights. The agreement compromised:

"Any and all claims arising from the Complainant employment relationship."

In this case it is clear that the employee before the AO was represented by a Solicitor. The decision does not specify whom the Solicitor was. The Solicitor argued strongly that a Union could not give legal advice, certainly not independent legal advice.

This case raises a number of interesting issues.

The first is of course the issue of a settlement agreement. It is now well settled that a settlement agreement needs to specify all and every Act for which the employee is waiving rights. It is not acceptable any longer to simply have a disclaimer relating to "any and all claims from the Complainant's employment relationship". It is of course possible to include all the relevant Acts which is reasonable straight forward and the important Regulations along with any claim under Common Law for Personal Injury or breach of contract.

The second interesting issue is the question as to whether or not a Union can give legal advice. Legal advice is giving of a professional or formal opinion regarding the substance of procedure of the law in relation to a particular factual situation. Legal advice is distinguished from legal information which is the reiteration of legal fact. Legal information can be conveyed by anyone. It can equally even be conveyed by way of a sign. A speed limit sign is in fact legal information.

A Union has full protection, under the law, for any actions undertaken by a Union as part and parcel of their normal Union activities, which is subject to some legal restrictions such as a ballot for a strike.

It is an interesting issue as to whether Union Officials give legal advice or whether it is simply legal information. Legal information included in manuals etc. are not something that somebody can sue on. Legal advice which is incorrect is something that a person can sue on.

The case raises an interesting issue. The first is whether a Union Official is giving legal advice or legal information. Secondly, if they are giving legal advice and it is incorrect, is it part and parcel of the normal activities of a Union in which case it is exempt from being sued on, if it is wrong, or is it outside the remit of the normal activities of a Union in which case, if it is incorrect, it can be sued upon.

It is of course accepted on a day to day basis that Union Officials give legal information. In this case the Union Official was not called to give evidence. The issue is whether the Union Official would have claimed that they were simply giving legal information as opposed to legal advice. This is an interesting issue which may evolve. In our opinion, Unions are giving legal information, not legal advice.

In relation to any settlement agreement, it is always advisable to ensure that the employee has been given the opportunity to get independent legal advice from a Solicitor. It is now becoming quite normal that a figure of between €300 and €400 together with VAT will as part of any agreement be payable to the legal advisor by the employer subject to obtaining a VAT invoice addressed to the employee but marked "payable by" the employer. It is now also usual that the agreement would specify the name of the legal advisor and the Solicitor firm and that the legal advisor witnesses the signature. This is the safest course of action.

The AO in this case raised an interesting issue. It will probably be one that is going to be litigated upon in the Courts in due course.

Published in Irish Legal News 24 October 2018

Jurisdiction of the WRC and the Labour Court.

The case of the Minister for Justice and Equality and another and the Workplace Relations Commission and Notice Party - Ronald Boyle and 2 others is an issue where the Supreme Court referred a matter for a preliminary ruling to the European Court of Justice. This case has been quoted quite extensively here in Ireland but one of the issues related to the fact that there was no jurisdiction for the WRC to hear cases requiring the disapplication of National Legislation which is in conflict with the EU Law. The opinion of the Advocate General Wahl was delivered on the 11th September under Case C-378/17. The issue in this case was effectively where the claim should have been brought. The Supreme Court in Ireland held that there was no right for the WRC to disapply National Legislation. The Advocate General has given a very detailed opinion in relation to this case. It is well worth reading. The conclusion, however, supports the view of the Supreme Court that a rule of jurisdiction which divides jurisdiction in specific cases between

a statutory body and the ordinary courts on the basis of the nature of the complaint made is not precluded by Irish Law. This effectively means that in cases where there is going to be an application to disapply a provision of Irish Legislation which is in conflict with the EU Law the claim will have to be brought to the High Court. The opinion of the Advocate General, however, is important in that the Advocate General has stated that this is provided that no concurrent jurisdiction may arise within the same complaint. Effectively, this means that if a person is bringing a claim against an employer, they cannot be in a situation where part of that claim must be heard by the WRC and part by the High Court where it relates to the same complaint.

This is only an opinion from Advocate General. The full decision of the European Court of Justice will finalise matters. However, there are worrying signs here that we could have a situation where an employee may have to make a determination as to whether a claim is going to be brought in the WRC or the High Court. For employees there will be a cost. There most definitely will be cost for an employer if they lose a case.

The practice in Ireland has been that a Directive will be applied if it can be applied without doing effectively an injustice or rewriting of the legislation. The issue which is going to arise is whether the WRC and the Labour Court going forward can even go that far. In such circumstances, a significant number of cases may have to actually be brought in the High Court. The issue in such cases is who will be the Defendant. Will it be an employer or will it be the State or will it be both? If the WRC or the Labour Court cannot disapply a provision of the Act which is contrary to EU Legislation then in those circumstances, the claim would appear, to us, to have to be commenced in the High Court. This will apply regardless as to the monetary value of the case.

Let us take a very simple matter under the Organisation of Working Time Act. Section 19 of the Organisation of Working Time Act in providing for Annual Leave provides that one of those entitlements will be “four working weeks in a leave year”. The Directive being Directive 2003/88/EC states that a worker will be entitled to “paid annual leave of at least 4 weeks”. The Act in Section 19 in reference to a working week, states that it will be construed as reference to the number of days

that the employee concerned usually works in a week. However, the Directive does not say that. Our Interpretation Act refers to a week as a period commencing at midnight on Saturday and finishing at midnight on the following Saturday.

The issue is whether our legislation has effectively sought to convert holidays from being weeks to days. Is that in line with the Directive. We also have the complete mismatch in Section 19(3) which provides that an employee who works for 8 months or more in a leave year is entitled to an unbroken period of 2 weeks. That is not 2 working weeks but 2 week which would be defined under the Interpretation Act.

Let us take a situation where an employee received 20 days holidays in a year. Will they be entitled to bring a claim to the High Court now to say that under the Directive they were entitled to 4 weeks holidays and did not receive their holiday entitlement because they only received days. If they are bringing a claim that they did not receive their holiday entitlement of 4 weeks that would be under the provisions of Section 19(1). However, if there was a separate claim that they did not receive 2 weeks uninterrupted leave at the same time under Section 19(3), the second claim could clearly be brought in the WRC. It would appear, if the Advocate General's opinion is upheld, that they would have to bring both claims in the High Court because the claims would have related to the same thing but effectively under different subsections. It would be the same issue of holidays. The problem I envisage for those involved in Employment Law, and for employees and for employers, together with the WRC and the Labour Court, that because we have such badly drafted legislation, we are now going to convert our Employment Law very quickly into very expensive litigation in the Superior Courts unless the Government give the WRC and the Labour Court the right to disapply Irish Legislation which is in conflict with the Directive. There is, however, it would appear to us to be a potential constitutional prohibition on same as they are not Courts set up under the Constitution. This means that the alternative is that the Government look at all the Directives as they apply to Employment Law and make sure that our legislation is in compliance with same. Realistically, that is not going to happen. The WRC was set up so as to avoid claims having to be brought in different forums. If this decision of the Advocate

General is upheld, we are going to see situations where claims, for example under the Unfair Dismissal Legislation, will be brought to the WRC. Cases where the Directive on a particular Section has been properly implemented will be brought to the WRC but other portions of claims where a Directive has not been properly implemented will have to be brought to the High Court. Will that be the position, or if the opinion of the Advocate General is applied, will it be that all claims relating to that particular employment will now need to be brought to the High Court other than those which do not arise under a Directive. There are going to be interesting times ahead for those involved in Employment Law.

Dismissal due to incapacity

The issue in relation to dismissing an employee whom it is contended is not capable of undertaking work is one that is fraught with danger for an employer.

In case ADJ-3160 it was accepted by all that at the time that the employee was dismissed, the employee was not capable of returning to work.

Despite this an award of €15,000 was made. The AO in this case rightly set out the decision in EDA1838 where the Labour Court found in relation to complying with Section 16 of the Employment Equality Acts that:

"*The key matter for the Court is the question of the degree to which Section 16 of the Act imposed obligations on the Respondent to make an informed decision about the likely capacity or incapacity of the Complainant to perform the work for which she was employed in the proximate future or whether, if reasonable accommodation was given to her, she would be capable of undertaking the essential duties of her position.*"

In this case, the AO held that the failure of the employer to objectively evaluate whether reasonable adjustment to the work arrangements of the Claimant could be made so as to render him fully capable of

carrying out the duties and failing to refer the Complainant for an up to date independent consultant's assessment prior to his dismissal meant that this came within the ambit of the legislation and was therefore a discriminatory dismissal on the grounds of disability.

There are some important lessons for employers to learn in relation to this and we will deal with them later on. We think it is useful to set out the relevant cases being Toker Developments Limited and Edgars Grods EDA105, case EED037, case of Mr O -v- an Employer 2005 ILR113, the Court of Appeal case of Nano Nagle School -v- Daly, and Humphreys -v- Westwood Fitness Club. These are all relevant cases.

The very basis of matter now is an employer who is considering dismissing an individual because of incapacity or being incapable of undertaking the work has to look at whether the individual suffers from a disability.

If they suffer from a disability then in those circumstances the requirement of the legislation must be complied with. This means that:

1. The employer has undertaken a proper medical examination to ascertain the extent of the disability of the employee.
2. The employer has to ascertain whether there is a reasonable potential for the employee returning to work within a reasonable period of time.
3. The employer has to look to see, if reasonable accommodation can be made for the employee, would it be possible for the employee to return to work.

The issue of disability dismissals is becoming a lot more common. These cases are arising more often. The unfortunate fact from an employer's perspective is that even if an employer could show that if they had done all of these that there still would have been no alternative but to dismiss the employee is not in itself sufficient. The employer must be shown to have gone through these procedures as a minimum.

It is always advisable where an employer is considering these issues to give the employee the right to challenge any medical, or to produce their own medical documentation or to put forward any arguments on their own behalf.

We would anticipate in the future that the issue of disability-based discrimination claims under the Employment Equality Acts will arise more often.

Constructive Dismissal

In case ADJ-12879 the AO in this case has taken the time to set out some of the more important cases in relation to the issue of Constructive Dismissal.

Two very important cases which were pointed out were the cases of the Labour Court in Pat Bakery and Pantry Limited - Mrzijak DWT1468/2014 and the decision of Lord Denning in Western Excavating (ECC) -v- Sharp in 1978.

Redundancy

Case ADJ12935 is an extremely interesting case when it comes to the issue of a lay-off and the rights of an employee to claim redundancy and also the issue of wages.

In this case the company got into trading difficulties. However, it continued to operate and made plans to move to a new location but which required planning permission. It was expected that this would occur but it did not happen. The employee had been placed on temporary lay-off on August 25th. The employee in this case sent a letter stating that she had been on lay-off since the 28th August 2017 and that she was given notice to terminate her employment and stated her last day of employment was the 1st January 2018.

The AO in this case pointed out that the relevant provisions of Sections 11 and 12 of the Redundancy Payment Act as amended in Section 12 specifically provides that the employee must give the notice of intention to claim redundancy in respect of the lay-off or short time. Part B of the RP9 Notice Form, as the AO correctly pointed out, provides one means to do this. The employee in this case did not indicate a notice of intention to claim the redundancy payment. The AO had pointed out

that this is clear and a simple statement of intention to resign does not comply and indeed indicates a voluntary resignation. The AO in this case held against the employee under the claim for redundancy. The employee in this case may well have been able to bring a claim under Section 9 of the Redundancy Payment Acts if she had resigned without giving notice. It is an unusual provision. In the alternative, if the employee had given the employer the required notice in the RP9 Form, the employer would have had an option to give a counter notice within 7 days. If that counter notice had not been given then the employee would have been automatically entitled to the redundancy. If a counter notice had been given then after a period of 4 weeks the employer would have been obliged to give the employee 13-week continuous employment. If that was not done, the employee would have been able to lodge a further claim for redundancy and claim 13 weeks wages. This case is a prime example of why employees should use the relevant statutory forms. The redundancy legislation is complex. It is one where individuals do need assistance from somebody who is trained in Employment Law.

There is another aspect of this case which is interesting, and that is in relation to the issue of pay. The AO in this case quoted the case of Law -v- Irish County Meath (Pig Meats) Limited 1988 ELR266 which held that unless there is an expressed or implied term permitting the lay-off without pay then it is a breach of the employee's contract of employment to do so. An implied term would include Custom and Practice as was set out in the case of Petkevicius -v- Goode Concrete Limited, 2014 IEHC66. The AO set out that case related to the construction industry where there would be ups and downs rather than this type of industry. The AO held that there was no expressed term in the contract of employment allowing lay-off without pay. The AO set out the provisions of Section 5(1) and as there was no express term the AO held the employee was entitled to payment. The AO then turned to the issue in relation to the position of the employee during the notice period. The AO held that the deciding question was that the employee was still under a contract of employment so she was entitled to payment during this period also.

This part of the case raises a significant issue for employers. Contracts of Employment do need to cover the provision of lay-off without pay. If a contract has a provision that an employer is entitled to lay-off an employee without pay, then in those circumstances the employer is entitled not to pay. If the employer does not do so, the employer is obliged to pay. The case law referred to previously would, however, cover situation where an exceptional circumstance arose. This would be for example where premises flooded or was destroyed by fire or some other reason that was highly unusual then in those circumstances there would be a right to lay-off while repairs were put in place. Let us take a situation where a premises is damaged by flood. The employer is advised that it is going to take 4 weeks to dry out the premises and make them fit for business again. Of course, the employer in that case, even if there is no provision to lay-off without wages, is entitled to lay-off the staff and not to pay them because that would be an exceptional situation. If, however, the employer decides that instead of just drying out the premises and getting them back operational to put in place improvements that would take a further 6 weeks then that further 6 weeks would not be exceptional circumstances and the employees would be entailed to be paid.

Moonlighting - How to deal with it?

In August of this year the Workplace Relations Commission in a case decided that a Luas driver who had engaged in moonlighting and was dismissed that this was a fair dismissal in the circumstances. The AO found that the employee had been engaged in an unauthorised external employment.

The issue of moonlighting is full of difficulties.

Our advice to an employer, drafting a contract of employment, is to very clearly set out that the employee is not entitled to take up other employments nor to be engaged in any activity where the total time would exceed an average of 48 hours or where the employee would not receive the rest periods set out in Sections 11, 12, 13 and 19 of the Organisation of Working Time Act. These are the provisions relating to the 11-hour rest, the rest periods during the day, the weekly rest

periods and the Annual Leave provisions. Such a Clause should, of course, also provide that the employee will not engage in any activity which is in competition with the activities of the employer.

Some employers will seek to have a situation which provides that an employee cannot undertake any other work for any other entity including themselves. There are certain difficulties with this. There are restraint of trade issues and the right to earn a livelihood which employers must be aware of and take cognisance of. Therefore, clauses that completely restrict an employee taking up other employments may be difficult to enforce. There should be no difficulty enforcing a provision providing that the employee will not be involved in any activity which is in competition with that of the employer.

It would be our view that there is a reasonable right for an employer to provide that an employee will not work more than 48 hours averaged in a particular week and that the appropriate rest and break periods will be taken. The employer has a legitimate expectation that the employee would not work contrary to these provisions and are reasonable right, in our view, to enforce same. An employer has an obligation under the Safety, Health and Welfare at Work Act to create a healthy and safe workplace for not only that worker but for all other workers. Equally, the Labour Court has set out in many cases, that there is a positive duty on an employer to ensure that employees obtain the appropriate rest and break periods and do not work excessive hours. It is, however, necessary to point out that if an employee after finishing their normal daily work, for an employer, and say are working 39 or 40-hour week, that if they then engage in private activity, this is not covered by the provisions of the Organisation of Working Time Act. The definition of "work" and "working time" specifically provides that it is time that an employee is: -

a) At his or her place of work or at his or her employer's disposal, and
b) carrying on or performing the activities or duties of his or her work.

The word "work" is to be construed accordingly. Accordingly, it would appear that self-employed working is outside the remit of the

Organisation of Working Time Act. That is why it is not sufficient for an employer to simply say that an employee will not work contrary to the provisions of the Working Time Act and then seek to enforce a 48-hour rule as regards that employment and any other activity because time spent as self-employed will not count under the Organisation of Working Time Act. That is why we advise that employers are very clear in setting out that the employee will not work or engage in activities for more than 48 hours averaged and will ensure that they can obtain all their rest and break periods as specified in the Organisation of Working Time Act.

The Organisation of Working Time Act is defective when it comes to moonlighting, particularly, where the employee engages in a private activity. It is therefore important that employers protect themselves in those circumstances. It is equally important that they put those protections in place so as to ensure that employees do not put other employees at risk.

It would be much better if the Act was amended so as to cover moonlighting, if we can call it that, or undertaking a second job, but also being self-employed and employed that the employee in those circumstances as regards the times that they are working as self-employed must ensure that they get the appropriate rest and break periods and that the hours that they work as communitive do not exceed the maximum hours averaged.

Where an employer has an appropriately drafted contract, then that is a contractual obligation on the employer and the employee and the employer can enforce same against the employee.

Protection of Employees (Temporary Agency Work) Act, 2012

The case of Staff Line Recruitment Limited and John Fitzgerald is a case where the employee alleged that the employer being an employment agency did not comply with the Act in that he did not receive the same basic working and employment conditions as a direct hire employee as regards to his “pay”.

The case concerned the issue of, what is known as, the Swedish Derogation.

The Court set out Article 5 of the Directive, being 2008/104/EC, which was given effect in the Act by Section 6(2). That Section provides that the principle of Equal Treatment shall not apply to a permanent agency worker in respect of basic pay.

The Court set out that there are a number of conditions contained in the subsection which must be fulfilled before it takes effect. These are:

1. The agency worker must be employed by the agency on a contract of indefinite duration.
2. Before the agency worker enters into the contract the agency must notify him or her in writing that the right of equal pay with comparable workers in the end user undertaking will not apply to him or her.
3. The statement in writing must specify that during periods between assignments the agency worker will be paid not less than half the basic pay applicable to him or her in the most recent assignment provided that the amount paid is not less than the National Minimum Wage or such greater amount specified in any enactment or collective agreement applicable to him or her.

In this case the Court determined that the employee was one to whom the Swedish Derogation applied.

It must be noted that the employee may not be paid less than the National Minimum Wage.

The case is a further case which highlights this what is called the Swedish Derogation. It is one that there must be, in our view, significant concerns about. The Protection of Employees (Temporary Agency Work) Act, 2012 can be easily circumvented as regards the basic trust of the Act by simply putting in place this simple avoidance scheme so as to ensure that agency workers do not get the same rate of pay as comparable workers. It effectively is a field of opportunity for agencies to create significant work for themselves by putting in place these procedures. In this case the Labour Court, in our opinion, absolutely

correctly applied the law. That is the role of the Labour Court. However, we are entitled to comment on the Act.

In this case the employee represented himself. This is a case where the employee could have done any better if he had been represented as the Swedish Derogation is well known. Unfortunately, the only people who do not really seem to understand it are those directly affected by it.

Cases which we see, which come to our office, from employees are ones where it comes as a surprise to them that this is in their contract. This is usually because of the fact that they have never read their contract properly.

Payment of Wages Act awards

In ADJ-13988, the AO, in our view, in this case got the decision absolutely right as regards the Payment of Wages claim. The award was made on the net amount of wages.

While it has nothing to do with this particular case, because of the way the tax system works, that sum is again subject to tax. Because the employee is no longer in employment, the rate of tax will be effectively 52%.

There is a disengagement between the tax law and the Payment of Wages Act. This has been around for many years. Despite it being a matter, which has been commented upon many times, nothing appears to be happening.

Under the Act, an AO can only award the net loss. There is no argument on that. However, the effect of same is that the tax law then treats this as a gross payment which is then subject to tax. This is of course completely inequitable. However, there is no equity in tax. We are simply raising this issue to bring it to the attention of those dealing with these types of cases.

Where a case is settled then this is treated as a termination payment and would come under the general exemptions on a termination payment but the exemptions do not apply where an award is made.

That may sound crazy but that is the law. Unfortunately, those who draft the employment legislation and those who draft the tax legislation do not seem to speak to each other even through it would be the same office of the Government actually drafting the legislation.

Payment of Wages - Time Limits

In ADJ-11985 the AO in this case held that the employee came within LCR19995. The employee in this case contended that between 2012 and May 2016 he worked regular overtime. This was rostered overtime an argued it came within the provisions of the relevant LCR. They stopped in May 2016.

The AO under the relevant LCR properly calculated that the annual loss was a little over €5,000 and applied the multiple of 1,5. This we absolutely agree with. However, the loss came to light in May 2016. The claim was not lodged until November 2017, therefore, in our opinion this is a case where the claim was outside the 6 months' time limit.

Minimum Notice - not always payable, even on a Redundancy

Case ADJ-12168 is a very interesting case for highlighting a little-known provision in relation to Minimum Notice.

In this case, the AO held that the employee was not entitled to Minimum Notice because of the fact that the employee was not able to work due to illness. The Second Schedule of the Minimum Notice and Terms of Employment Act, 1973, in paragraph 2(a)(i) provides that an employee shall be paid by his employer in respect of any time during his normal working hours where he is ready and willing to work but no work is provided for him by his employer. This is the provision relating to Minimum Notice. It means that the employee must be available to work.

It should be noted that if an employee has been on lay off and is then made redundant, the employee provided the employee is not sick or ill,

will still be entitled to Minimum Notice following the case of Irish Leaders Limited -v- Minister for Labour 1986 IR177.

The importance of Contracts of Employment in Redundancy cases

Case ADJ-13084 is a prime example as to why proper contracts of employment should be put in place. In this case the employee was originally engaged to work 18 hours a week. She was with the company for some time. Less than a year before issuing a claim, the employee's hours were reduced to 9 hours a week.

The AO in this case held that a redundancy arose and awarded the employee redundancy.

The AO in this case helpfully pointed out that there was no contract of employment in place which would have allowed for flexibility. If there had, the employee may well have been unable to get redundancy.

The employer in this case contended that it was not a redundancy but that the employee was being inflexible in relation to hours of work. It is vitally important in any employment that employees have a proper contract of employment in place, setting out what is required or the employee. It is sometimes said that a contract of employment can be a double edge sword as it can be used by the employee against the employer but where there is no contract in place, the employer cannot contend that something would be implied. An employer may be able to rely on custom and practice but, equally, an employee can be difficult in pursuing an employer by stating "this is how I was originally taken on to work and there is no right to vary the terms".

Payment of Wages Act - Issue of Compensation

In ADJ-11151 the issue of compensation arose where an agency worker had a period of time where there was an issue relating to payment of monies due to them when they left because of a communication issue.

The AO in this case held that there was no entitlement to obtain compensation.

Generally, this would be the situation. However, under Section 6(1) of the Payment of Wages Act, there is a provision to enable an employee to receive twice of the amount of any deduction.

Setting out decisions from a tax perspective

Case AD11509 is an extremely good example as to how an AO as set out decision so as to make it absolutely clear what portion of the award is subject to tax and what portion is exempt from tax as compensation for breach of a right.

The AO in this case set out the compensation by way of economic loss for two breaches and then set out separately the compensation for the breach of the right.

This makes it very easy for anybody going through the decision to work out how same should be dealt with from a tax perspective.

WRC Decisions

We have commented on this before but it appears to be ongoing, namely that there are some AO's who are making awards using phrases such as "one week's pay", or "one week's normal pay", or "one week's pay calculated over the average of a preceding period of time".

We have significant concerns with decisions that are written this way. The issue is how they can be enforced. They are not definitive amounts. Where any award is being made, it should be specified in a monetary sum. It is absolutely fine to say that an award of €X is awarded and this is equivalent to Y number of weeks. However, making an award of an average weekly wage where there are multiple of it or not is in our view a decision which cannot be enforced by the District Court. Therefore, it would be a case that would have to go on appeal to the Labour Court.

We may be wrong on this point but we do not see how any award which is not a definitive amount can actually be implemented. There may always be arguments as to what the figure actually is.

Terms of Employment (Information) Act, 1994 - Requirement to furnish a contract

In cases in the WRC, there is an argument being raised under Section 41 of the Workplace Relations Act, that an AO can only deal with cases where the complaint is lodged within 8 months of an employee commencing employment. Some AO's accept this argument. Others do not.

In ADJ-12491, the AO in this case has done a fantastic service to those who are considering this issue in that a very detailed and comprehensive decision has been issued relating to this very point and dealing with it in a very positive and pragmatic way. The AO in this case has taken the time to go through relevant Labour Court determinations and those of the ECJ and has determined that it is, effectively, a continuing breach where the employee does not receive any contract or there is a defect in the documentation.

This issue is going to the Labour Court in an unrelated matter where an AO had held that the matter was limited to 6 months.

It is very useful that such a comprehensive decision has issued.

WRC Hearings

When you go through the decisions of the WRC the number of no shows by parties is quite frightening. This is especially so in relation to employees. I do think that the WRC have taken the right attitude in relation to the online complaint form now to make it one that cannot be used on a mobile device. That does avoid individuals lodging claims when they get annoyed with an employer someday.

We do have a concern that resource time can be lost where people do not turn up.

There is a strong argument, which we have put to the WRC on many occasions that there should be call over days. If an employee does not appear at that it could be adjourned to a second one. If they do not appear at that then in those circumstances they are advised that their case will not be listed until they confirm that they will be attending a call over at which date the outline of cases can be dealt with and time allocated on that basis. If there was a call over, equally, issues relating to issues such as submissions and statutory records from employers could be dealt with. It will also enable reasonable allocation of time to be dealt with. It might also facilitate, if we could call it that, in cases where there are representatives, that those parties could get together to see what issues are or are not in dispute and to what extent they are in dispute. There may well be cases where all or part of the claim may be admitted and it may simply be a matter of quantum. I would also be strongly of the view that if there were call over days, it gets representatives meeting, that gets them talking. That increases the potential for parties seeking to get matters resolved. The very worst it does is that it gives a realistic outline of the time that is going to be involved and how many witnesses are going to be called or likely to be called can be dealt with so that scarce time can be more usefully allocated.

There is no reason on a call over day why 40 or 50 cases could not be called over. This would enable parties to specify if there were any particular dates that they were going to have difficulties in. It would enable dates to be fixed there and then. It would then be very exceptional circumstances for cases to be adjourned.

It is a concern when you read the decision the number of cases that are dismissed or are not proceeded with. For practitioners like us we often find that on the morning of a hearing the case suddenly settles. This means that allocated time could have been used in another case where if the parties have got together earlier cases could have been resolved.

I do appreciate that in Employment Law sometimes the issue of settlement does not really come in to the mind of an employer until they actually see the door of a Court or a Tribunal. This may be one of the advantages of a call over. Representatives will know their employer client or their employee client and sometimes when they are going into

a hearing that is the time that reality bites. Even a call over may be enough to have reality bite and get cases settled. We accept that the WRC meet representative bodies. We would be strongly of the view that they need to start meeting some of those who operate at the coalface on a day to day basis. There are many of us. I do not believe that any of those who regularly appear would not be prepared to meet with the WRC. I believe that most would be happy to leave their hats outside the door by which I mean if they act for mainly employers or employees that they would leave that aside to put in place and advice and getting procedures that would actually work. Those of us who are involved in these cases regularly want to get cases dealt with quickly, efficiently, effectively and at limited costs to our clients.

We might give an example of a case being ADJ-12961. In that case the employer admitted the employee's case completely. If there had been a call over, it is probable that it would have been admitted on the day and whoever was dealing with the call over could then have determined that the case will be dealt with on the basis of written submissions only and the matter would have been resolved straight away. Therefore, time that would have been set aside for a Payment of Wages case would have been allocated to somebody else.

Setting compensation in employment cases

There is an issue which is regularly arising in cases. The Workplace Relations Act is very clear in that the employee can only go back 6 months in respect of most cases. This excludes cases for equal pay and claims under the National Minimum Wage Act where separate rules apply. Some AO's work on the basis that they can only look at the 6 months period. That is correct as regards whether a breach has occurred. However, other AO's, once they have determined that there has been a breach in the relevant period, for the purposes of setting compensation under the Act, will look at how matters occurred going back and sometimes over many years. Some employees will argue that the breach has been a continuing breach over many years but are limiting the claim to the relevant six months period but the fact of such extensive breaches can be taken into account in setting compensation.

Equally, employers in defending cases may often contend that, while there may have been a breach, it was a single breach or a small number of breaches and that over the normal course of the employee's employment these breaches did not occur. In our view, both arguments are legitimate. Many AO's will look at this in determining the level of compensation and this is, we would regard, as absolutely correct.

As we said, this can only happen where the AO determines that there has been a breach in the relevant statutory period.

Nice One Doc

Case ADJ-12881 is a prime example of somebody, though not represented, clearly had got some advice along the way as to how to get a claim in, before the WRC.

In this case the relevant individual put a claim in on the basis that they were unfairly dismissed because of exercising rights to Force Majeure Leave. When the case opened the relevant individual advised the AO that they did not know what Force Majeure Leave was. The relevant individual did not have one-year service. Under the Unfair Dismissal Legislation there is a requirement to have one-year service before bringing in the claim. There are however exceptions to this and one of these is that it is dismissal for exercising this particular right.

There are certain number of individuals operating in Dublin and elsewhere who are effectively little more than barrack-room lawyers but whom had taken upon themselves to advise individuals as to how to bring claims. These people have some legal knowledge. We stress the word "some".

The criticism which we have is in relation to these people who sometimes prey on individuals to get them to pay monies to be shown how to get a claim into the WRC. We are not saying that this happened in this case but it is unusual that an employee would know about the exceptions to the Unfair Dismissal Legislation.

As practitioners in this area of law, we regularly have to tell people that in our opinion they do not have a claim. Unfortunately, there are others

who are quite happy to assist people in manufacturing a claim, so that it gets before the WRC when in fact in reality there is little chance of the claim ever succeeding.

Recent Statutory Instruments

Circuit Court Rules (Service) 2018

The Circuit Court Rules (Service) 2018 SI 378 of 2018 amend Order 5 and Order 15 to enable parties to indicate their willingness to receive documentation in proceedings by email.

Appeals from the Circuit Court

The Rules of the Superior Courts (Appeals from the Circuit Court) 2018 SI 428 of 2018 was signed on the 3rd October 2018 and sets out the procedures for appeals from the Circuit Court. They also provide that where email addresses are provided that documentation can be served by email.

Prove of Foreign Public Documents

The Circuit Court Rules (Prove of Foreign Public Documents and Translations) 2018 SI 429 of 2018 was signed on the 3rd October 2018. It sets out the procedures for the various methods of authentication of documents completed in or issuing from foreign countries. These Rules amend Order 23 of the Circuit Court Rules.

National Minimum Wage Order 2018 SI 402 of 2018

These regulations were signed on the 4th October 2018. The Order comes into operation on 1st January 2019 and increases the National Minimum Wage to €9.80. The Minimum Hourly Rate of Pay will include the following allowances for board only €0.87 per hour worked.

For lodgings only €23.15 per week or €3.32 per day.

Periodic Payments

The Rules of the Superior Courts (Personal Injuries Periodic Payments Order) 2018 SI 430 of 2018 was signed by the Minister on 3rd October 2018.

These new Rules make provision for the payment of Periodic Payment Orders where the Plaintiff has suffered a catastrophic injury.

The Rules provide for the insertion of an Order 1A after following Rule 8 to provide for a new Rule 8A that a Personal Injury Summons may include a statement that the Plaintiff's claim is won in respect of which the whole or part of which it is appropriate that a Periodic Payment Order being made. The court can determine that a Period Payment will be made. The Rules provide that it is possible for there to be a separate hearing to deal with this issue.

These Rules amend the Rules of the Superior Court to facilitate the operation of Part IVB (Periodic Payments Order) of the Civil Liability Act 1961 as inserted by Section 2 of the Civil Liability (Amendment) Act 2017.

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.***