RGA | Richard Grogan & ASSOCIATES

Welcome to the February Issue of Keeping in Touch

Welcome to the February issue of our newsletter.

In 2018 we decided to run a pro bono service in relation to employees who had not been paid the National Minimum Wage as interns. The pro bono initiative which we have taken have been to date successful and there is one significant case coming. The existing case is one where in addition to claims relating to non-payment of the National Minimum Wage we have also identified eight other claims which we are pursuing for the employee. As a result of undertaking this pro bona campaign Richard Grogan of this firm was interviewed on Newstalk FM. We also highlighted this in our newsletter. As a direct result of same, though nobody in the Workplace Relations Commission is probably going to admit it, very shortly afterwards the Workplace Relations Commission announced that they were going to undertake work relating to investigating Employment Rights issues concerning interns. The problem is still there. We do believe that our initiative has had an impact. We have got the Workplace Relations Commission to start to take this issue now seriously and look forward to helping employees in such cases. Such employees are extremely vulnerable. The reality is that they will not get Legal Aid. The reality is that they will be unable to afford legal representation. Therefore, as Employment Law Solicitors we felt it was appropriate that we would undertake this work on a pro bono basis. This was very much our way of repaying, if we could call it that the fact that we won the Employment Firm of the Year 2018 from the Irish Law Awards. We felt that it was appropriate that we would give something back and this was our way of giving something back.

For 2019 we are now announcing a new pro bono scheme. The Minister for Employment Affairs and Social Protection on the 19 December introduced a Statutory Instrument exempting those working in the Horse Racing Industry from some of the provisions of the Organisation of Working Time Act. In our view having regard to the EU Directive, the derogations which are allowed and importantly a decision of the Labour Court which went into the Law in great detail including EU Law we are

firmly of the view that the Minister has exceeded her powers and has given an exemption which the Minister was not entitled to give. We do not blame the Minister. Really the blame relates to the Department. We therefore have decided that for 2019 we will provide a pro bono service to those in the Horse Racing Industry who are denied their rights to daily rest periods of 11 hours, the breaks at work after 4.5 and 6 hours or who have to work in excessive 40 hours a week averaged for night time work. You may ask why we are doing this. There are two main reasons. The first is that we believe it is very difficult for some of these individuals who work in this industry to take on these cases without the benefit of legal representation. We know that the industry will fight these cases vigorously. Therefore, the employees need a specialist Employment Law Firm to act on their behalf we are happy to offer that service on a pro bono basis. The second is that we have a significant problem with the Department of Employment Rights and Social Protection issuing Statutory Instruments which we believe are clearly in breach of the Law. In this newsletter we have set out in some detail our concerns in relation to the particular Statutory Instrument and the reasons why we are taking the approach we are taking.

RGA | Richard Grogan & ASSOCIATES

Index

OUT AND ABOUT IN JANUARY

On 2 January Richard Grogan was interviewed on Newstalk FM on The Hard Shoulder relating to the issue of workplace stress and the difficulties employees encounter with having to be available 24 hours a day, 7 days a week, 365 days of the year.

On 14 January Richard was interviewed on The Pat Kenny Show in the "Ask the Expert" section. On that programme the format is that listeners send in their questions on the day. Richard was there to answer a number of questions raised by listeners.

Richard is due back on Newstalk on 1 April on The Pat Kenny Show.

On Sunday 27 January Richard Grogan was quoted in relation to a case against The Gate Theatre where the firm acted for an employee. The case was reported in the Sunday Times. On the previous Friday the case had been covered by RTE News on their Twitter feed.

We also had an article produced for Irish Legal News.

Both Richard Grogan and Michelle Loughnane of this firm have been active over the month on Linkedin, Twitter, Facebook and Instagram.

EMPLOYMENT (MISCELLANEOUS PROVISIONS) BILL 2018

At the start we would admit that we have been critical of the Bill.

We will set out those areas which we have significant concerns about later. The ones we have the significant concerns about are the ones that have been heralded by both Unions and by Minister Regina Doherty but which in our view go nowhere near what is being claimed.

Let us look at some of the provisions which we think are good.

Section 4 of the Act amends Section 8 of the Unfair Dismissals Act 1977 by inserting a provision that an Adjudication Officer may issue a witness summons. This is an issue which we have been writing to the Minister about since 2015. It was a defect in the Workplace Relations Act 2015. Thankfully it has now been finally rectified.

Section 7 of the Act introduces a new provision as to the minimum requirements which must be given to an employee on the first day of their employment. This includes:

(a) The full name of the employer and the employee;

(b) The address of the employer;
(c) Indicate if a temporary contract, its expected duration or if it is a fixed term contract, the date of which the contract expires;
(d) The rate or method of calculation of the employee's remuneration and the pay reference period for the purposes of the National Minimum Wage Act 2000;
(e) The number of hours which the employer reasonably expects the employee to work in a normal working day and a normal working week.

There are certain provisions where there is a mistake made which was an error or omission by way of a clerical mistake or was otherwise made accidently and in good faith, where an employer will not be penalised. That is fair.

It will be interesting to see how this Section is applied in practice. There are many cases from the Labour Court and the WRC where the notification of the rate and method of calculation of an employee's remuneration under the National Minimum Wage Act which has not been furnished has been held to be a "technical" breach where no compensation was awarded. We also anticipate that there is going to be a lot of arguments in relation to situations where documentation is not furnished on the basis that it was an accident and was made in good faith.

Section 10 of the Act provides for a provision relating to the creation of an offence where the documentation is not furnished. By this we mean the notification at the start of employment.

The difficulty with this is that there is a 12-month period. It is highly unlikely that any prosecutions will ever occur under this Section.

There is a provision relating to penalisation for making a complaint that the statement has not been furnished. This is to be welcomed. The provisions of Section 12 then provide that the maximum compensation is going to be 4 weeks. This effectively undermines the whole basis of the protection in reality. Let's take an employee who does not get the document and for example 3 months later requested it. The employer fires them on the spot as a trouble maker. They can receive compensation of a maximum of 4 weeks. They cannot bring an Unfair Dismissal claim because they do not have 12 months service. We had written to the Minister and proposed that where an employee raises such a complaint and is dismissed that the Unfair Dismissal legislation would have been amended to protect them and to allow them bring a

claim. This was rejected by the Minister. In reality this Section is toothless. It would be a brave employee who will make a complaint within the first 12 months. The effect of same is that the prosecution provisions can never apply if the employee waits until then. The employee will have no realistic protection in respect of their job if they make a complaint because of the fact that the Unfair Dismissal Legislation was not amended. This provision has been floated out as some great protection for employees when in reality it is nothing of the type.

Section 17 of the Act is one that is to be welcomed. The Organisation of Working Time Act had a significant defect in it, namely that while other legislation protected an employee from being penalised or being threatened with penalisation the Organisation of Working Time Act only protected an employee from being penalised. Effectively, the employer up until the time that this Bill becomes an Act and comes into effect can threaten an employee as much as they like for bringing a claim under the Organisation of Working Time Act with immunity. This, again, is an issue which we have been writing to the Minister about for a number of years now and are glad to see that finally this issue has been rectified.

Section 15 of the Act is the much-heralded provision relating to the prohibition on Zero-Hour working practices. It has been stated in various press releases from the Department of the Employment Affairs and Social Protection that this legislation is going to outlaw zero- hour contracts, except in very limited circumstances. Nothing could be further from the truth. We have a serious concern in relation to the way this legislation is being drafted that either it was complete incompetency or it was by design in the Department that the legislation was drafted in a particular way to make it look like Zero-Hour contracts were going to be prohibited but in fact put in place legislation which cements the ability of employers to put in place Zero-Hour contracts. We think it is useful that we would explain. The prohibition on Zero-Hour contracts in Section 15 of the Act and all the protections contained therein only apply where the contract of employment

"Operates to require the employee to make himself or herself available to work."

If the employment contract does not require the employee to make himself or herself available by simply stating:

"The employee shall not be required to accept any assignment and will not be penalised for refusing any assignment".

It is as simple as that. This is not a case where there is a loophole. This is a case where the legislation effectively has been drafted to preserve Zero-Hour contracts rather than to outlaw them. We had made submissions to the Minister in respect of this. Again. The whole Section only protects employees where there is a requirement for the employee to undertake the work. Provided that is not in the document then the employer can proceed with their Zero-Hour contracts with immunity. Now, it does beggar belief that the Department did not understand this. There must be a reasonable suspicion that the Department specifically put this in place so as to maintain Zero-Hour working practices rather than to outlaw them. I am not critical of Minister Doherty as she is not a trained lawyer. She would have relied upon her officials. We do however have serious concerns as to what was happening in the Department with her officials and as to why they would have put in place legislation which is effectively easy to circumvent. The Minister has been sent out to make statements that only those employers who are exploiting employees have anything to fear. The reality is, employers who are exploiting employees by the use of Zero-Hour contracts have absolutely nothing to fear. Those type of employers generally have access to good employment lawyers. They will not even need go to employment lawyers. The Act as passed by the Oireachtas is not one that has a loophole in it. It has a gaping chasm. What worries us is that the Department, and again we are not criticising the Minister as she is not a trained lawyer, on purpose torpedoed the legislation by putting in the requirement that the employee would be "required" knowing full well that this can be easily circumvented.

In respect of Section 16 the Banded Hours Contract provisions, again this has been greatly heralded. We have made submissions to the Department that the right to a Banded Hour Contract will go back to the date that the claim was lodged in the WRC if the claim was successful will be determined by the WRC or on appeal by the Labour Court. The alternative is that the employee could get compensation. Both of these were rejected out of hand by the Department on the basis that it would encourage frivolous claims. That left us somewhat speechless. If somebody is making a claim that they are entitled to Banded Hours and the employer says that is fine, then the employee has to work those hours. If the employee refuses, clearly the employee is saying that in putting in a claim that they are prepared to work those hours. If the employer at that stage then says - that is fine, they will give a Banded-Hours Contract, the worker has to work those hours. We cannot understand the logic.

When we look at the final version of the Bill as enacted, we see that effectively, again, the Department has put in place a scheme which looks very helpful but, in reality, is toothless. An employee will have to request a Banded-Hours Contract from the employer. If the employer refuses, the employee has to go to the WRC. The case then has to come on for hearing. A decision has to be made. The employer has a right of appeal. The matter then goes to the Labour Court. The employee will not get their Banded-Hours Contract until such time as the full process through the WRC and the Labour Court has finished. The employee will have to fund this themselves. There is no legal aid. Therefore, the chance of an employee getting one of these Banded-Hours will depend on whether they have a Union backing them. There are very few employees who will be looking for a Banded-Hours Contract in the area of 21 to 26 hours who are being paid the minimum wage or just over it that will be in a position to obtain legal representation. Equally, the employee has a situation that until the matter is fully brought through the full WRC and Labour Court procedures, they are not going to get a Banded-Hours Contract. In a claim under this Act it is going to be a matter for the employee to show the hours. This means having all the appropriate records. Many employees will not have that. There is another method by which the employer can completely restrict the employee getting a Banded-Hours Contract for well over a year. We set that out to the Minister. It would have required a small amendment to the Workplace Relations Act. This the Minister, or more properly her Department, refused.

The scheme is there. It has been set out in writing to the Minister. It will work. It is relatively simple. The employer simply does not turn up in the WRC. The employer waits till the decision issues. Then they appeal the decision. They do not pay the Labour Court fee. It would therefore appear to us, that for approximately one year the Labour Court cannot set aside the appeal. In the intervening period the right to the Banded-Hours Contract does not kick in. To avoid having this occurring, employees who receive a Banded-Hours Contract from the WRC, may have to lodge their own appeals, even if they are happy with the decision, so as to stop the scheme being applied.

There is a further problem with Banded-Hours. Let us take a position where an employee has a contract saying that they will work 10 hours a week. They in fact work 35 hours normally a week. They bring a claim. The Band here would be from 31-36 hours, therefore, the employer can immediately reduce their working hours to 31 per week. This lasts for a year. After a year, the employer can revert them back down to their 10 hours a week contract and only give them 10 hours a week. The

employee then has to bring another claim. Now, an interesting issue is going to arise as to whether an employee can rely upon having obtained a Banded-Hours Contract, for proving the next case or whether they are going to have to wait a further 12 months before bringing a further Banded-Hours Contract acknowledged on the hours worked in the period after the first Banded-Hours Contract expired. There are going to be interesting arguments on this issue. Equally the Act appears to be an "average" so if the employee gets zero hours for one week and 62 the next then the Act may have been implied with, the idea of the Act was that the employee would get set hours each week.

We are critical of the Bill. It would be our view that this Bill is one that has been sabotaged by the Department itself so as to pretend that they are bringing forward legislation intended to protect employees when in fact what they have done is brought in legislation which will not be effective. Now, we will have some politicians lauding claims that are brought and are won. However, the employers who seek to exploit employees have been given a charter of opportunities in this Bill to continue the exploitation with virtual impunity. It will be smaller employers who have never gone out with an intention to exploit individuals who will get caught with this legislation because they will not have any form of legal advice to put in place what are fairly basic schemes to avoid the Act. Those employers who wish to continue to exploit employees will have no difficulty doing so. This is due to the fact that the Department has produced legislation which is clearly defective. As we have said, we are not sure whether this was caused by design or just pure incompetency. We hope that it was not be design. We would be concerned that it was due to pure incompetency. Our experience, however, in seeing legislation drafted in this country in the area of Employment Law is such that incompetency seems to be a quality inherent in the requirements for drafting employment legislation.

Finally, this Bill when it was passed was heralded as once in a generation piece of legislation. We really do hope that this is a once in a generation piece of legislation and that going forward we will get employment legislation which is effective, honest in what it is saying it will do, and is properly drafted to achieve those goals rather than having legislation produced by the Oireachtas which does not meet its stated requirements. Either the Department is living in a fools' paradise or they have produced legislation designed to lead vulnerable employees up the garden path that they are going to get some level of protection. Either, is an appalling vista.

EMPLOYMENT (MISCELLANEOUS PROVISIONS) ACT, 2018 - WHAT EMPLOYERS SHOULD DO?

This Act introduces a number of new provisions. In this short article we are going to look at what is going to be the most important issue for employers across the sector.

Contracts of Employment

Employers now have a new obligation.

Within 5 days of an employee starting work, you as an employer must notify the employee in writing of what are called "core terms" of the employment. There are 5 of these.

You as an employer must give a document in writing which sets out:

1. The full name of the employer and the employee. This would be the legal name of you as the employer not the trading name. For example, if the trading name that you do business under is for example AB Services, but the legal name of the company is XY Limited it is the legal name, being XY Limited, not the business name which must be set out. It is useful to set out both by the way as it makes it easier for the employees to understand who they are employed by as they may know you by your trading name.

2. You must set out your address as employer or the principal place of business.

3. You must set out the duration of the contract, namely whether it is temporary or to end on a fixed date, being a fixed-term contract.

4. You must set out the rate or method by which wages or salary are going to be paid and set out the pay reference periods. This is the pay reference period as specified by the National Minimum Wage Act 2000. Normally, if you are paying a person on a weekly basis, or a monthly basis then the pay reference period will be the same. However, you must specifically set this out. It is not sufficient to say: "You will be paid weekly". To be compliant you would have to put in the contract: "You will be paid weekly and your pay reference period for the purposes of the National Minimum Wage Act, 2000 shall be a week". However, there are some unusual provisions in the National Minimum Wage Act, so for example, you may pay an employee weekly but the pay reference period under the National Minimum Wage Act, for confirming whether they are actually paid

the National Minimum Wage, can be anything from 1 week to 4 weeks or a month. So, you could have an employee who is paid weekly but the pay reference period is a three weekly period. However, normally, if you pay them weekly the pay reference period will equally be weekly and if paid monthly the pay reference period will be monthly.

5. You must set out the number of hours which you as an employer reasonably expect the employee to work. This can be the normal working day or the normal working week.

   If you fail to give this statement, the employee can seek compensation from you for up to 4 weeks wages.

We would remind you that it is important that you give the employee a copy of this document signed by you and dated by you. It can be signed and dated on your behalf by another member of your staff. It is best practice to get the employee to sign this document confirming that they received it. If you are doing this and sending the document to the employee, then we would strongly advise that you keep a copy yourself of the document that was sent to the employee in case they do not return it. If a claim subsequently comes in, it is no defence to say that you sent out both copies. The law says that you must retain a copy of the document you sent out.

You must ask does this then end matters. The answer is no. Within two months of the employee starting work, you must give them a document which complies with Section 3. We set this out below. You will see that all of the information that has to be furnished within two months is included in the information that has to be included within 5 days. As an employer, there is an easy way to deal with matters. That is to have contracts in place, that can be given out to the employee immediately when they start. The document which complies fully with Section 3 will also comply with this new provision and it is fine that these are given within 5 days of commencing work.

<u>What terms must be included in a Contract of Employment?</u>

All employees are entitled to a written statement of their terms and conditions of employment which must be furnished within 2 months of the commencement of the employment. This is set out in Section 3 Terms of Employment (Information) Act 1994.

This statement must include the following minimum terms:-

1. The full name of the employer

2. The full name of the employee

3. The address of the employer in the State or the address of the principal place of the relevant business or the registered office. The term registered office is that meant by the Companies Act 1963.

4. The place of work. Where there is no fixed place of work a statement setting out that the employee is required or permitted to work at various places.

5. The job title or the nature of the work.

6. The date of commencement of the contract of employment. By this we mean the start date.

7. In the case of a temporary contract the expected duration of if it is for a fixed term the date in which the contract expires.

8. The rate or method of calculating the employees' wages / salary and the pay reference period for the purposes of the National Minimum Wage Act 2000.

9. That the employee may, under Section 23 of the National Minimum Wage Act 2000 request from the employer written statement of the average hourly rate of pay for any pay reference period as provided.

10. When the salary / wages will be paid whether a week, a month or such other intervals as are set out.

11. Any terms and conditions relating to hours of work including overtime.

12. Any terms and conditions relating to paid leave other than paid sick leave. This normally means holidays.

13. Any terms and conditions relating to incapacity for work due to sickness or injury and paid sick leave.

14. Particulars of any pension or pension scheme.

15. The period of notice which the employee is required to give and entitled to receive.

16. A reference to any collective agreement which affects the terms and conditions of the employee's employment.

17. This statement must be given to the employee. It must be signed and dated for or on behalf of the employer. It must be provided within 2 months of the commencement date being the start of the employment.

Our advice to employers whom we act for is very simple. These documents should be signed and returned to you before the employee starts work. Until the documents are signed, it is best practice not to allow the employee to start work. This means having documents ready to go out once you offer somebody a position.

We believe that a number of employers will get caught with claims for not having issued these documents on time. You as an employer can be subject to an inspection from the Workplace Relations Commission if a complaint comes in which can be done by an employee on the basis that their name will not be disclosed to you and a check is then done and found that you are not in compliance. You can then end up having a Compliance Notice put on you. If that happens, it is likely that the WRC Inspector will not only deal with the issue of contracts but will do a full audit of you.

To avoid same, it is our advice, to you as an employer, to put in place proper contracts of employment.

We have set out below what additional provision it is advisable to include.

<u>What conditions should also be included in an employment contract?</u>

We recommend as a minimum that the following should be included in any employment contract.

1. A probationary period and policy allowing for extensions.

2. A Disciplinary Procedure

3. A Grievance Procedure

4. Internet and mobile phone usage

5. Social Media Policy

6. Bullying and Harassment Policy

7. Retirement age. We would point out that you must be able to justify a retirement age.

8. Provisions for deduction from pay for example to include damage to property owned by the employer.

9. Policies relating to flexibilities which would include duties and/ or job location and/or change of start and finishing times.

10. A lay- off and short time policy to include non-payment of wages during lay-off or short time except for the period of time that the employee actually works.

11. A pay review and performance review policy.

12. A non-compete clause post termination.

13. A non-solicitation clause of your clients / customers after the contract ends.

14. Confidentiality clause during the employment and post termination.

15. Data Protection

16. A right to alter or amend the contract.

17. A Garden Leave provision namely that during a notice period you can require the employee not to attend at work.

18. Sexual harassment policy.

19. A clause confirming that the employer handbook will form part of the contract of employment as amended from time to time.

20. For Fixed term workers a clause excluding the Unfair Dismissal Acts.

We always advise where a Contract is being put in place that an employer considers having an Employment Handbook. The handbook will usually cover such matters as;

1. Grievance procedures

2. Disciplinary procedures

3. Internet and mobile phone usage

4. Anti-Bullying / Anti-Harassment policy

5. Sexual Harassment Policy

6. Your policy on Sick Leave to include reporting requirements and the right for the employer to have the employee medically assessed in certain circumstances together with an obligation for the employee to cooperate with same.

7. A Holiday Leave Policy. This can include the giving of notice for holidays or specifying certain times in the year when holidays cannot be taken or alternatively specifying times at which holidays must be taken.

8. A Maternity Leave policy

9. Parental Leave Policy

10. Carers Leave Policy

11. Particulars relating to the Pension Scheme or PRSA as applicable.

12. Detailed rules on hours of work, flexible working, time off from work, and overtime.

13. Health and Safety Policy

14. Reporting accidents in the workplace

15. Detailed particulars on the appropriate use of Social Media including ownership by the employer of all contract details.

16. Depending on the type of business there will be particular conditions applicable to particular industries. This may include compliance with Regulatory Rules relating to certain professions or jobs. It may include policies dealing with compliance with the Central Bank or a Regulatory Body requirements for staff.

While many of the clauses in staff handbooks will be relatively standard they must be tailored to the individual requirements of the individual employer.

A procedure which may be appropriate for a large employer may be inappropriate for a small employer. Equally a policy which may be appropriate for a small employer may be completely inappropriate for a larger employer.

When designing a Contract of Employment and Staff Handbooks this is a combination of Legal, HR and Industrial Relations issues.

Contracts of Employment and Staff Handbooks bind not only the employees but also the employer. It is therefore important that everybody understands their rights and obligations and particularly that employers understand that policies and procedures which they put in place and that the employers comply with same.

We would advise that you get advice from specialist Employment Law Solicitors. They can make sure that any document that issues is in compliance with the legislation and can make sure that practices and procedures are put in place in your employment to make sure that you do not get caught with a claim that you did not issue documentation in time.

There are many excellent Solicitor firms who will provide this service for you. We are more than happy to provide the service. We can be contacted on 01-9695781. You can also contact us at info@gorgansolicitor.ie. Whether you use us or another firm of Solicitors it would always be our advice that you use the services of an Employment Law Solicitor.

THE EXEMPTION OF THE HORSE RACING INDUSTRY FROM PART OF THE ORGANISATION WORKING TIME ACT 1997 IS VERY SUSPECT

Minister Regina Doherty being the Minister for Employment Affairs and Social Protection on 19 December 2018 issued Statutory Instrument 576 of 2018 being the European Community (Organisation of Working Time) (General Exemption) (Amendment) Regulations 2018. In which the Regulations of 1998 being SI number 21 1998 were amended in the definition of "agriculture" by the substitution of the word "agriculture" for a new definition of "agriculture including interalia, the caring for or the rearing or breeding or training of race horses".

We have been extremely critical of the Department in the past for sloppy drafting.

These Regulations must be regarded as extremely suspect as being contrary to EU Law and therefore if any case came before the WRC or The Labour Court that these Regulations would have to be set aside.

There are affectively two reasons for this. The first is a case C-378/17 being the case of Minister of Justice and Equality, Commissioner of An Garda Siochana, -v- Workplace Relations Commissions, and, Notice Parties Ronald Boyle and others. In that case the CJU held that affectively the WRC and The Labour Court would be obliged to set aside any Irish piece of legislation which is contrary to EU Law.

The second clearly indicates that the Department officials advising the Minister either did not read or totally disregarded both this case C-378/17 and more importantly the decision of The Labour Court in case CNN181 being the case of Golden Vale Trading as Ballydoyle Racing and the Workplace Relations Commission. In that case the Labour Court had reviewed the law on the issue of what "agriculture" means. From reading that decision it is quite clear that the Labour Court firmly held that horse racing does not come within the definition of agriculture. In addition, the Court went through the definition of what "agriculture" is. It is not defined in either EU Law or in Irish Legislation therefore has to have its common and ordinary meaning. The Labour Court had that case also set out very clearly than any derogation from European Law on which the Organisation of Working Time act is based must be strictly construed.

It would be our view that the new Statutory Instrument, introduced by the Minister, is totally ineffective. If any claim is brought by a worker we would be of the view that following the two cases we quoted and in

particular the decision of The Labour Court that the Regulations would have to be set aside as being contrary to EU Law.

We do not criticise the Minister. She is not a trained Lawyer. She could not reasonable be expected to understand the nuances of Employment Law. We are however extremely critical of the personnel in the Department who have advised the Minister in relation to this. Its smacks of complete ineptitude.

The Minister has introduced a Statutory Instrument. Neither in the Interpretation Act nor in legislation relating to the Organisation of Working Time Act has the term agriculture been defined. The Minister by Regulation cannot override the Interpretation Act which clearly states that in the absence of a phrase being defined then it has its ordinary meaning. If a special meaning is to be assigned to any Act then it needs to be specially defined and limited to that particular Act. This has most clearly not been done.

It would be our view that the Department has simple rolled over to demands from the Horse Racing Industry to be exempted from the Organisation of Working Time Act. It would be our view that the department in doing what they have done have acted in complete disregard of European Law and of the Regulations can have no effect.

It is entirely unacceptable that the Department would act in this cavalier manner seeking to simple avoid European Law in a roundabout way and taking no account whatsoever of its obligation to apply European Law correctly.

It is for this reason that we are this year offering a pro bono service to anybody involved in the Horse Racing Industry where the employer has sought to rely on any of the exceptions introduced in the relevant Statutory Instrument as regards to the daily rest of 11 consecutive uninterrupted hours, rest intervals during the day after 4.5 hours and for the breach of the night time working hours.

It might be asked why we are doing this. There is a simple reason. We regard as abhorrent the Department of Employment Affairs and Social Protection would simple disregard the EU Directive relating to working time which is there to protect workers the purpose of benefitting a sectoral part of the economy in blatant disregard of EU Law.

In fact, these cases are not going to, if taken, trouble us terrible much as regard proving. We will simple be producing a copy of the decision we have referred to above and the decision of The Labour Court. The

Statutory Instrument in our opinion is defective and has no effect whatsoever. Somebody has to stand up to what is defective drafting by Government Departments and to call a stop to legislation being introduced by the back door through a Statutory Instrument any competent official in the Department, dealing with this area, must know is not only highly questionable but in all probability legally ineffective. It is totally morally wrong for any Government Department to introduce legislation in such a way. As Solicitors we have no difficulty with legislation being properly introduced and properly being dealt with whether or not we would agree with it. We do have a problem with legislation being introduced which is defective again whether we agree with it or disagree with it. Therefore, firms like this who specialise in Employment Law we believe have to stand up and take the relevant pro bono cases to say to the Government this form of ineffective and legally impermissible legislation drafting has to cease.

BOGUS SELF-EMPLOYMENT

There has been a lot of discussion on the issue of Bogus Self-Employment. What is absolutely clear is that the Department of Employment Affairs and Social Protection have not got a clue about the level of Bogus Self-Employment in this country. This is not just my opinion. If you read the contents of the Joint Committee on Employment Affairs and Social Protection debate on a Thursday, 8 November 2018 this comes across very clearly.

The individuals from the Department were not able to say, despite the fact there has been inspections as to how many inspections where monies were recovered disclosed Bogus Self-Employment. What is even more staggering is that the Department appears not to keep records of this now this has to be looked at in the light of comments made by the Minister for Employment Affairs and Social Protection that the issue of Bogus Self-Employment was not a significant issue in Ireland. How could the Minister know? Her own Department do not keep records.

The issue of Bogus Self-Employment in the construction industry is an issue which the dogs on the street know about. This was raised. In the area of school building there is a requirement to ensure compliance by contractors. The Department was asked whether there is anything in the contracts about this matter by Deputy Bride Smith. The answer was from the Department that they didn't know but that they could engage to ensure compliance. The Department did undertake a public awareness program and some 10,500 visits were made but this only

resulted in 50 calls and 30 e-mails. It was pointed out that this maybe because of fear.

The reality of matters is that on the figures from the Department the potential loss to the state from a Bogus Self-Employment arrangement will range from €5,000 to €15,000 per worker per year. The Department themselves estimate that if action was taken potential additional revenue between 30 million and 60 million per annum would be obtained.

When you read the committee documentation there is a clear message coming from it namely that the members of that committee are less than impressed with the information they received from The Department.

It is incredible that the Department would come out and state that Bogus Self-Employment is not an issue of significant concern and at the same time estimate that some 30/60 million euro could be obtained if this was fully tackled.

Bogus Self-Employment is a blight on Society. Bogus Self-Employment impacts on legitimate businesses. A legitimate business has to pay employer PRSI. They have to provide in many cases minimum rates of pay. Those who arrange to have individuals taken on, on Bogus Self Employment contracts make significant savings which undermines legitimate employers trying to be compliant. It is quiet disturbing the attitude that the Department has taken. They dress it up with the argument that the Department is not trying to stop individuals operating legitimate self-employed status. That is not what the issue is. The issue is dealing with Bogus Self-Employed. It is not an issue of dealing with legitimately Self-Employed. We would have a concern as to what the agenda in the Department of Employment Affairs and Social Protection is. Bogus Self-Employed involves putting in place Tax Invasion Schemes by the entities bringing people into work for them on these Bogus Self-Employment situations. It is as simple as that.

It is incredible what is happening in the Department. In relation to the committee in The Oireachtas the Department is due back. It will be interesting to see what information they bring back. There appears to us to be a significant level of opposition within the Department to tackling the issue of Bogus Self-Employment. We cannot understand what that reason is but clearly that is the impression the Department is giving.

EMPLOYMENT INJUNCTION

An interesting case arose in the case of Barbara Whooley and the Merck Millipore Limited and Merck KGaA being a judgment of Ms Justice Pilkington delivered on the 30th November 2018.

The facts of the case are interesting but two particular issues arise:

1. The issue of a deemed resignation was raised, it appears, by the Defendants. In the case, however, the Defendants withdrew that argument. It was pointed out by the Court that had that position remained, there was an argument of deemed resignation, that could have given rise to separate issues.

2. The second issue is that the Defendants in this case also agreed that they would consider any issue of damage to the Plaintiff's reputation. It was pointed out that this concession was made belatedly. However, it was pointed out that this was one which the Court would have to have regard to.

The Court held that those matters determined the balance of convenience against the grant of an interlocutory relief to the Plaintiff.

This is a case where the Defendant sought to simply terminate the employment on the basis of the terms of the contract.

It does raise in such cases of Senior Executives the issue that employers can avoid injunctions if they agree that they will look at issues such as the loss of reputation. They of course are separate proceedings that would have to go through the normal Court process. It would be extremely difficult of course for an employer subsequently to go back from such assertions. What is interesting in this case is the issue of reputational damage, if it is admitted by the employer as one that the employer is prepared to address, it can assist the employer in avoiding an Injunction. It may however subsequently be difficult for an employer to raise any defence that there was no reputational damage and may limit an employer in such cases to the amount or quantum of compensation.

DISMISSAL ON THE GROUNDS OF INCAPACITY -

EMPLOYMENT EQUALITY ACT 1998

In case ADJ-14465 the AO had to deal with an issue where an employee had been dismissed while out sick for a short period of time.

In this case the employee was admitted to hospital in June. The employee then visited the employer who told him that his job was secure. Shortly afterwards, on the 28th July the employee was told that he was being made redundant. At no stage in the intervening period nor prior to the Complainant becoming ill was there any reference to the possibility of redundancy nor was there any discussion as to the options normally associated with redundancy being a selection process or alternatives.

The AO held that there was no credible alternative explanation for this other than that the employer decided in view of the Complainants illness and extended rehabilitation process to terminate the employment.

The AO pointed out, it is permitted to fairly terminate employment on the basis of capacity but not after the passage of a mere view weeks nor without a proper and fair procedure and not under the cloak of redundancy. The AO helpfully pointed out that there have been various references to dismissal under the cloak of redundancy the origin of which is a case of JVC Europe Limited -v- Jerome Panisi 2011 IEHC 279 where Mr Justice Charlton stated:

"Redundancy cannot be used as a cloak for weeding out those who are regarded as less competent than others…If that is the reason for letting an employee go, then it is not a redundancy, but a dismissal".

In this case an award of €35,000 was made.

This case is a reminder to employers of the importance of fair procedures and how an employer can get caught with an equality claim.

If an employee is to be considered to be let go on the basis of capacity it should not be under the grounds of redundancy. If it is on the basis of capacity then of course the employee should be advised that their job is at risk. They should be sent for a medical. The medical report should be furnished to the employee. The employee should have an opportunity to challenge same. The employer should look at what might be a reasonable return to work time. The employee should be allowed to

comment on same also. The employee should have the full right to representation and effectively be dealt with in the same way as a disciplinary process as regards the right of representation and appeal.

Using redundancy as a cloak to get rid of employees is extremely dangerous. In some cases, it will result in an unfair dismissal case. In others, particularly where it could be based on the incapacity of an employee which may only be short term then in those circumstances the danger is that an equality case will be brought.

PREGNANCY RELATED DISMISSAL

An interesting case arose in relation to a bar manager in a hotel case ADJ13503.

The AO in this case helpfully has set out considerable amount of law in relation to matters including the case of Melbury Developments Limited-v-Valpeters and as regards to the issue of burden of a proof the AO then set out the law relating to pregnancy related dismissal and the main cases including Webb-v-Emo Air Cargo (UK) Limited, Brown-v-Rentokil Limited and the Dekker case. The AO also set out The Labour Court decisions in Trailer Care Holdings Limited-v-Healy EDA128 and Wrights of Howth Seafood Bars Limited and Dorota Murat EDA178.

The AO in this case found that the employee had been dismissed due to her pregnancy. The AO in this case awarded €14,000. Importantly the AO in this case stated that the AO arrived at the award having regard to the effect of the discrimination of the complainant and the requirement pursuant to Article 17 of the framework Directive that the sanction be quote effective, dissuasive in proportionate" the AO in this case then went on to state the discrimination might well merit a higher award but that the AO had given consideration to the relatively short tenure of the complainant's employment.

We do have a difficulty with the reasoning of the AO in this case. The level of service is, in our opinion, irrelevant to the issue of discrimination. We are aware that there is no principle set out in any European decision or in decisions of The Labour Court which have held that an award will be higher for an employee who has been in service for a longer period of time compared to someone who has been in service for a shorter period of time. So, where discrimination occurs it is irrelevant, in our opinion, whether the employee has been employed for a day, a year or 10 years. Where a woman is dismissed due to being pregnant it is irrelevant to end the service the employee has. It is the

fact of the discrimination which should be the only criteria for setting compensation. That is however only our opinion. The reality is in most cases we come across in that those with less service are more likely to be dismissed.

GENDER EQUALITY, DIVERSITY AND INCLUSION

The issue of Gender Equality, Diversity and Inclusion were hot topics in 2018 and we believe they will continue to be in 2019.

A lot has been spoken about these. We have the Gender Pay Gap Bills going through the Oireachtas. We have a Labour Party Bill and a Government Bill. We had made submissions to the Department of Justice on the proposals for a Gender Pay Gap Bill. Submissions have been made over the last 3 years on this issue by us. However, Gender Equality is not just about pay. It is about access to employment. It is about promotions. It is about equality of treatment and equality of opportunity. It also in our view includes respect and accommodation. Gender Equality does not mean that everybody has to be treated the same. The whole basis of Equality Legislation is that different groups of people can be treated differently so as to achieve equality. It is not about everybody being treated equally. That may sound unusual but it is not. Take a person who has childminding duties. Compare them with another employee who does not have those duties. Accommodation for the person who has childminding duties may be necessary, and probably will be. This is a simple example. Such a person should not lose out on salary increases, or promotions or the opportunity of moving ahead in the firm or company. However, a person who does not have children should equally not be treated incorrectly. Expecting a person without children to work significantly longer hours may in itself be discrimination.

Problematic is the issue of Diversity and Inclusion. A number of employers will have a Policy on Diversity. However, a Diversity Policy is never going to work unless you have an Inclusion Policy. A Diversity Policy and an Inclusion Policy are effectively two sides of the same coin. It has been said that:

“Diversity is being asked to the dance. Inclusion is being asked to dance.”

In Ireland, we have moved in the last 10 to 15 years to being a more diverse society. Diversity is a challenge for many employers. A Diversity Policy will work only where there is also a Policy of Inclusion.

There are potential road blocks to Gender Equality, Diversity and Inclusion. Last year we reported on what was happening in Wall Street in the US where some, and we use the word "some" as appear to be more prevalent than just some senior males were afraid to mentor junior females because of fear of a discrimination claim. Where male and female employees treat each other with mutual respect then this should not be an issue.

For employers to have Gender Equality, Diversity and Inclusion in the workplaces which does create a positive working environment it is necessary to have appropriate training in place. It is training on their policies. It is also particularly training for managers and senior executives along with supervisors to promote these ideas that is needed. It is not simply sufficient to have a policy. It must be communicated. It must be explained. It must be constantly reviewed. It must be checked. Employees, supervisors, managers and senior executives need to be met with, if necessary, one to one meetings to go through what the policies mean and what they understand them to mean. The policies must be seen to be enforced and applied. An issue which we are finding constantly whether acting for employers or employees when cases come and a question is asked about the particular policy that we are looked at with a blank expression of total bemusement as to what is in a particular Company Policy.

Employers will pay fees to put in place policies and procedures. It is a complete waste of time and money if those policies are simply taken, distributed by email and then filed away as having been sent out. A Policy and Procedure which relates to Gender Equality, Diversity and Inclusion only works when it is communicated, explained and where the workforce from the top down are trained on the policy. It is then necessary for senior management and managers in general to be seen to apply that policy fully in their day to day activities.

Some companies are appointing individuals who are titled as "champions" of a particular policy. These are people who employees can come to. Such individuals must be given the appropriate training, tools and resources to be seen to be champions of a particular policy and must get the support of senior management in the firm or company to be champions for that policy.

In 2019 we will be commenting especially on the issue of equality in all its forms.

DISCRIMINATION

In case EDA 1848 The Labour Court had to deal with what is possibly a very unique argument put forward in a case of Navan Education Centre and Brenden Lydon. The Complainant in the case, it was set out, did not have a disability. The contention was that the Respondent discriminated against him in a competition for a post when they treated a person with a disability more favourably. It was his contention that this treatment went beyond reasonable accommodation. The complainant argued that because the comparator in the case had a disability at the time of the discrimination that he could according with Section 6 (2) of the Act take a case but the respondent contended that there was no discrimination, but in any event, a literal reading of the legislation is that only a person with a disability can take a case. The Court pointed to the case of Coleman-v-Attridge Law, Case C-303/06 where the Advocate General stated that the Directive protect people who although not themselves disabled suffer direct discrimination and report harassment in the field of employment and occupation because they are associated with a disabled person. In this case the Court held that there was no such association.

The Court set out that having regard to Section 6 (1) of the Act, the Directive and the ECJ judgement the complainant did not have locus standi to bring a claim on the grounds of disability.

The case is one where both sides were legally represented.

RETIREMENT AGE

There has been a considerable amount of discussion in relation to the retirement age. This issue comes up when individuals are required to retire.

The Public Service Superannuation (Age of Retirement) Bill 2018 was passed just before Christmas.

Up until then Public Servants had to retire at the age of 65 at the latest. This is despite the fact that the new age for qualifying for the State Pension is 66.

This can leave workers with a gap in retirement income. In addition, some employees wanted to continue in their position beyond 65. There have been some interim measures allowing staff to be rehired until the age of 66. These individuals were treated as newly employed resulting in a drop-in income despite doing the same work.

The Unions have lobbied for workers to be allowed to stay on until 70. Under this new Bill which has been signed by the President they will now be able to do so on their existing pay and conditions until the age of 70.

This Act is going to have significant additional implications for business. Up until now there was a strong argument that 65 was the accepted retirement age in the country. That now has gone.

It is now going to be necessary for employers to be in a position to objectively justify retiring an employee at 65. That is already the law but this is now going to be harder when looking at the practice in the State entities of a retirement age of 70 where the employee wishes to stay on.

This Bill, even though it only applies to State employees, is one that we would anticipate is going to be referred to as having changed the landscape as regards retirement age and which may put additional pressures on employers seeking to justify an earlier retirement age.

It will be interesting to see how this Act applies and the effect that it has on private employers. It would be our advice that employers now going forward need to put in place very strong and detailed policies relating to a retirement age. They need to be able to set out the objective justification for whatever age they are going to put in. They need to be aware that they are now going to have greater difficulty in requiring an employee to retire.

LONG TERM DISABILITY SCHEMES

Many employers will have in place a long-term Disability Scheme for employees who become disabled. This is usually covered by the way of a premium to an insurance company.

An issue is now arising or has been identified as one which is likely to arise in relation to the issue of an employee who is been dismissed due to a medical incapacity.

All employers will know that there is an obligation to reasonably accommodate an employee under the Employment Equality Act 1998 to 2015 where an employee has an incapacity or disability. No employer should dismiss an employee without having the employee medically examined, getting a report on the likely return date of the employee or that the employee will not be able to return to work, making sure that the employee has an opportunity to review same or produce their own

medical evidence to counter same and that the employment is not terminated without fair procedures having been gone through and the employer investigated whether the employee can be reasonably accommodated.

That is well known.

Another issue has now arisen due to a case in the UKEAT AWAN-V-ICTS UK Limited. This case has raised the issue that a term can be implied into an employment contract that once an employee is entitled to a benefit under an employer's Long Term Disability Scheme that an employer in those circumstances cannot terminate the employee by reason of incapacity for the issue that has been raised in the UK in effectively dismissing the employee in such circumstances may give rise to a claim of breach of contract up to the value of the Long Term Disability Scheme. This can be an excessive sum of money if you have an individual who is 30 or 40 which would have to be kept on until normal retirement age and at the same time which would fund the employee into the company Pension Scheme.

There is now an issue that Courts may be prepared to imply a term into an employment contract to prohibit the dismissal on the grounds of incapacity where an employee is entitled to benefits under a Long-Term Disability Scheme. Of course, the employee could be dismissed in our view for redundancy and possibly also a summary dismissal for cause. If the dismissal is undertaken simply to avoid the employee being able to claim a Long-Term Disability Benefit then this may open a huge risk for an employer.

Where an employer is considering terminating the employment of an individual for example where they are being assessed or there is a waiting period to qualify extreme care should be taken.

In any case where you are dealing with an employee maybe dismissed due to incapacity or who has an incapacity and may even be subjected to potential redundancy or possibly disciplinary action it is always important to obtain legal advice before dismissing the individual. Where there is a potential the individual employee could lose an entitlement to the Disability Benefit under a Company Disability Scheme then we can only say that extreme caution should be exercised.

CONSTRUCTIVE DISMISSAL

The State in case UDD 1863 Advanced Environmental Solutions Ireland Limited and Ilori the Labour Court in this case has helpfully again set out the law relating to the issue of Constructive Dismissal. The Court has said that in such cases the Court must firstly examine the conduct of both parties. The Court has set out that in normal circumstances a person who seeks to invoke the reasonableness test in furtherance of a claim must also act reasonably by providing the employee with an opportunity to address whatever grievance they have. They must normally demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before resigning. The Court referred to the case of Conway -v- Ulster Bank Limited UD474/1981. The Court also referred to the case of Beatty -v- Bayside Supermarkets, UD142/1987 in referring to the need to utilise grievance procedures where it was held:

"The Tribunal considers that it is reasonable to expect that the procedures laid down in such agreements be substantially followed in appropriate cases by employer and employee as the case may be, this is the view expressed and followed by the Tribunal in Conway -v- Ulster Bank Limited 474/1981. In this case the Tribunal considers that the procedure was not followed by the Claimant and that it was unreasonable for him not to do so. Accordingly, we consider that applying the test of reasonableness to the Claimant's resignation he was not constructively dismissed."

The Court did point out on the other hand in the case of Allen -v- Independent Newspapers (Ireland) Limited 2002 IlR84 that the Employment Appeals Tribunal has held that it was reasonable on the facts of that case for the Complainant not to have faith in the employer's ability to properly or effectively address grievances.

In our view the Court has very clearly and carefully set out what the law on this issue is. In our experience a number of employees seek to rely on the Allen case. The Allen case is one where there were particularly serious issues. It would be our view that only in exceptional circumstances will an employee be able to rely on not going through the grievance procedure where they are relying on the reasonableness test. Those circumstances will be the exception rather than the norm.

Where employees are seeking to rely on the fact that the employer has acted in an unreasonable manner towards them it would be our advice that before anybody resigns, appropriate advice from an Employment Law Solicitor should be obtained. The percentage of Constructive

Dismissal cases which are won on the reasonableness test being applied to employees who simply resign is minimal. The majority of these cases are lost simply because the employee has not gone through the grievance procedure.

We would point out that simply going through the grievance procedure in itself is not sufficient. That is only one step. The employee must still show that the action of the employer was such that it was reasonable for the employee to resign.

Where there has been a breach of contract, which is the alternative test, then the requirement to go through the grievance procedure does not apply.

Constructive Dismissal cases are becoming very common. Our experience is that the vast majority of people simply resign without getting any legal advice and bring claims which have no realistic prospect of being successful.

Where an employer receives a grievance from an employee, it is vitally important that the employer addresses same in accordance with their policies. Failure to do so may well assist an employee in bringing a Constructive Dismissal claim.

There are two interesting cases that have issued in this area being ADJ14840 and ADJ12828.

In the first case the AO helpfully quoted the case Margot Conway-v-Ulster Bank Limited UD474/1981 where the tribunal stated.

"*The Tribunal considers the appellant did not act reasonably in resigning without first having substantially utilised the grievance procedure to attempt to remedy her complaints. An elaborate procedure existed but the appellant did not use it. It is not for the Tribunal to say whether using this procedure would have produced a decision more favourable to her but it is possible*"

In this case the AO held that the employee through the actions of a named individual had been completely overwhelmed and felt forced to resign.

In the second case the AO held that part of the responsibility of an employer is to manage staff and if bullying complaints are made these should not be ignored or brushed aside as happened in this case. The AO in this case held that the actions of the Respondent in failing to put in place a process whereby a grievance could be made and heard properly resulted in the complainant coming to the reasonable belief

that her employment could no longer continue. The AO in this case also found that the employee had been subject to constructive dismissal.

Both of these cases are unusual. Normally it is necessary for an employee to show they have gone through the grievance procedures. There are exceptions. The case of Allen and Independent Newspapers is of course the leading case on this issue.

While these cases won it will always be our advice to an employee that an employee should always raise a grievance before resigning. There are exceptions. The exceptions arose in the particulars of these cases. In one of them there was no disciplinary procedure. In the other it appears to have been a quite aggressive manager. Cases which employees win where they have not gone through the grievance procedure are unusual.

USE OF CCTV IN DISCIPLINARY MATTERS

In case ADJ-8545 the AO in this case has helpfully set out that the Data Protection Commissioners finding in Case Study 10 requires an employer to satisfy the fair obtaining principles of the Data Protection Act which regard the use of CCTV cameras and those people whose images are captured on camera must be informed of the identity of the Data Controller and the purpose of processing the data. If the employer intends to use cameras to identify disciplinary or other issues relating to staff as in this instance, staff must be informed on this before the cameras are used for those purposes. In this case the AO found that there has been no evidence that this was done and awarded the sum of over €6,000.

This case is a warning to employers that if CCTV cameras are to be used, it is appropriate to ensure that staff were advised that it can be so used and that its use is proportionate.

HOLIDAY PAY AND PUBLIC HOLIDAY PAY

In ADJ-15102 the employee in this case brought a claim against the employer for Public Holiday Pay. The Adjudication Officer in this case upheld the complaint. An award of €500 was made.

The Adjudication Officer in this case stated that the Von Colson & Kamann principles apply. We would not necessarily agree with this view. The Von Colson & Kamann principles would certainly apply in relation to Holiday pay. In relation to Public Holiday pay, this is not an

issue covered by the Directive and therefore in our opinion the Von Colson & Kamann principles do not apply.

An Adjudication Officer in a case under a claim for Public Holiday pay is still entitled to award up to 2 years' wages for a breach, but we disagree with the view that they must apply the Von Colson & Kamann principles.

When, however, you look at case ADJ-7697, being a case where an employee was not paid their Holiday pay, the Adjudication Officer in this case simply awarded the economic loss. As this is a claim for Holiday pay under the Act and as Holiday pay is a specific right protected by the Directive, in this case the Adjudication Officer should have, in our opinion, looked at the Von Colson & Kamann principles in setting compensation on top of the financial loss.

The issue of Holiday pay is a fundamental right. This is guaranteed by the Directive and by the Charter. The CJEU has recently ruled on this issue again and confirmed that it is a fundamental right. In those circumstances in our opinion the Adjudication Officer should have applied the Von Colson & Kamann principles and award the compensation on top of the economic loss.

CLAIMING HOLIDAY PAY WHEN AN EMPLOYEE IS OUT SICK

Case ADJ-15440 is a case where the employee brought a claim for holiday pay while out sick. The employee lost his case as during the entire period of his employment the employee failed to lodge any medical certificates. In this case the contract of employment specifically provided for medical certificates to be provided.

ROAD TRANSPORT REGULATIONS SI 36 OF 2012 AS AMENDED

In case RTD185 Advanced Environmental Solutions Ireland Limited, Bord Na Mona and Ilori the Court had to deal with a situation where the employee contended that he was covered by the Regulations. The employee in this case was a driver of a refuse collection truck. The Court has held that such work is not covered by the Regulations. The effect of this judgment is that such drivers are covered by the ordinary provisions of the Organisation of Working Time Act. This is useful clarification of the law by the Labour Court.

REDUNDANCY PAYMENT ACTS

Sometimes you see a decision which is absolutely perfectly set out in relation to this Act. ADJ-14128 is a prime example. It sets out the start date. It sets out the finishing date. It sets out the rate of pay. Equally importantly, it sets out the period where the employee was absent. That period, which was Sick Leave, is not taken into account in calculating redundancy.

The manner in which this decision has been set out, makes it very clear and precise to the Department of Social Protection if a claim has to made to them for the Redundancy Payment.

In another decision which we reviewed we found that a different AO in a different case while finding a redundancy had occurred set out the start and finishing dates and the date of the notice for dismissal but nowhere in the decision set out the employee's rate of pay. That decision would be one that we would regard as unenforceable.

PAYE TAX RETURNS

Going forward there will be a Revenue statement issued to employers each month with tax due based on submissions.

The statement will deem to be a return if no correction is made before the end of each month.

Employees P45/P46 will be set up in payroll.

Employers each month will have to give particulars of start and finishing dates of employees.

Each monthly return will stand as a return in itself. Therefore, there will be no ability to do a clean up P35 return at the end of the year. This means that employers will need to be far more careful in making returns every month.

For 2019 there will no longer be a requirement for employers to provide a P60 at the end of the year. There will be a requirement to furnish a P60 for 2018. These changes are to be welcomed. Certainly, it will mean that employees going for a new job will not require a P45. There have been issues in the past where employers have refused to give a P45. The requirement to get a P45 will now cease.

Probably the most significant change is the fact that employers will not be able to do a clean up at the end of a year. It means that if there is a mistake on payroll this is going to cause significant problems for employers. It is therefore very important going forward that employer's payroll is kept up to date. This is an issue which employers should speak to their accountants about and make sure that if payroll is being organised internally that it should be checked and double checked very month.

EMPLOYMENT PERMITS (AMENDMENT) (NO.4) REGULATIONS 2018 S.I. NO.550/2018

These Regulations issued on the 13th December. They provided for an additional 750 permits for Meat Processor Operatives in addition to the remaining one such permit not issued out of the quota of 573 provided for in previous Regulations.

CATERING INDUSTRY

Two Statutory Instruments issued being S.I. No. 2018 and S.I. No. 590/2018 abolished the Catering Joint Labour Committee and Catering Joint Labouring Committees by Statutory Instruments in 1977 and 1992. By S.I. No. 591/2018 the Catering Joint Labour Commission Establishment Order issued to cover workers employed in catering establishments in the State.

The order will apply to workers in a catering establishment in the State where involved in the preparation of food and drink, the service of food and drink and work incidental to these matters performed at any store or warehouse or similar place in the catering establishment. They will not cover workers to whom an Employment Regulation Order has been made from another Joint Labour Committee, Managers, Assistance Managers and Trainee Managers are also excluded. For the purposes of a catering establishment it can mean a premises or part of a premises primarily used for supplying any person not resident on the premises food or food and drink for consumption on the premises. This will include fish and chip shops and ice-cream parlours. The provisions will not apply to premises registered as a hotel or licensed premises having not less than ten apartments normally available for the sleeping accommodation of travellers.

CLAIMS IN THE WRC AND BEFORE THE COURTS

In Case ADJ12251 the AO in this case had to deal with a case where there was a claim under the Unfair Dismissal Act and where the employee had an existing claim before the High Court for personal injuries.

The case is interesting in its facts but one issue raised was that of the case of Kulkin-v-Sligo County Council Culkin and another 2017 IECA104. In that case the Court of Appeal held that an individual who is unsuccessful in a claim before the Equality Tribunal pursuant to the Employment Equality Act 1998 to 2015 is not automatically precluded from proceeding with a personal injury action arising out of the same facts. It was not possible for Mr. Culkin to maintain the entirety of his claim against the defendant before the Equality Tribunal because that statutory body has no jurisdiction to entertain a personal injury claim. That case revolved around Section 79 of the Act. There is a comparable provision in Section 15 of the Unfair Dismissal Act 1977/2015 in subsection 2 which provides where a decision has been made by an Adjudication Officer in respect of a claim by an employee for redress under the Unfair Dismissal Acts the employee shall not be entitled to recover damages at common law for wrongful dismissal. In this case the parties applied for the matters to be adjourned pending the outcome of a High Court litigation relating to the enforceability of the settlement agreement. This application was refused. The Adjudication Officer held that there was no dismissal as a binding settlement was executed by the parties.

It will be interesting to see whether this case goes on appeal

COMMENTS ON CASES IN THE WRC

There are two main issues we would like to comment on this month.

Firstly, there is the issue of the way some decisions are set out. In some decisions it is set out that an employee would be paid a certain number of days as compensation by which we mean days' pay. We have reviewed some of these decisions and without mentioning the numbers here there are cases where nowhere in the decision is there a figure setting out what is a daily rate of pay or even what a weekly, monthly or annual salary is.

Therefore, those sorts of decisions are completely unenforceable. In the District Court a District Justice cannot go behind the decision to work out how much was actually awarded. It would be much more beneficial that instead of setting out amounts by way of a certain number of days' wages that the actual amount is set out. There is nothing wrong then in an AO setting out separately that this is "equivalent to x days/weeks/months wages".

Secondly, from reviewing decisions, there is a considerable number of cases now where neither party turns up. This means that valuable time in the WRC is wasted where individuals with cases, waiting to go on, have their cases delayed because other cases have not been withdrawn or the parties just simply do not turn up. With the increase in the number of cases going to the WRC, there is a strong argument, as we have made to the WRC that there would be call over days so as to ensure that appropriate submissions are put in, in time, and that the parties will attend, to make sure that dates can be agreed, within reason, so both sides will be available. We do know that the WRC are looking at this issue but it is one that is quite urgent particularly when you see the number of cases which are being dismissed for lack of prosecution.

COMMON SENSE APPROACH TO PERSONAL INJURIES

An interesting case on this is the case of Vincent O'Mahony -v- Nicola McCarthy Hanlon and Waterford and Wexford Training and Education Board 2018 IEHC 657.

In this case both the Plaintiff and the First Named Defendant were employees of the Second Named Defendant being the Training and Education Board.

In this case the Plaintiff was cycling to work. This is what he always did. The Plaintiff cycled along the pedestrian pathway. He would go through a pedestrian point of entry on to the Second Named Defendant's property. On the date in question he entered into a road at an intersection from the pathway. He failed to stop and collided with the First Named Defendant's vehicle. The First Named Defendant was driving at what was described as a relatively low speed.

The Plaintiff claimed that the injuries were caused by the First Named Defendant's manner of driving. Secondly, the Plaintiff claimed that the Second Named Defendant was liable and in breach of his contract from the failure to ensure his safety while on the premises.

Mr Justice Keane dismissed the claim against both Defendants. He found that the Plaintiffs failure to stop and dismount at the intersection of the path and the road was what caused the accident. Importantly in this case the Court found that even the regular use by the Plaintiff and others of the pathway as a cycle way and despite the fact that there was no signage indicating that cycling was not permitted, that this was irrelevant. In this case Mr Justice Keane stated that:

"Foolhardy behaviour does not become reasonable behaviour merely because a number of people have engaged in it in the past."

He went on to hold that the common law duty of care owed by an occupier was to take such care as is reasonable in all the circumstances having regard to the care which a visitor might reasonably be expected to take for their own safety.

In our opinion and it is one that a number of Personal Injury Solicitors would hold the Court have been applying a common-sense approach to the duty of care owed to individuals. This particular judgment has set out that personal responsibility and reasonableness as to how an individual acts will be applied to all parties. This is whether they are occupiers, visitors, employers or employees.

It is now quite common for individuals to believe that because they have suffered an injury that they are entitled to be compensated. That is wrong. A person is only entitled to be compensated for injuries where there has been negligence or breach of a duty including a statutory duty on somebody else. There will be accidents which are caused by the individual who suffered the injury. There will be other accidents which are caused by the fault of nobody. In those circumstances there is no Personal Injury claim.

Where there is a genuine injury caused by the negligence of somebody else, even where the person who was injured may have contributed to the accident by their own negligence, there will still be a claim for compensation.

What is clear is the Courts are now putting a higher burden on Claimants and insurance companies are more likely to fight claims where negligence is a significant issue.

RECENT JUDGEMENTS IN PERSONAL INJURIES CASES

Lorna Bentley –v- Liam Nolan
[2018] IEHC 735

This personal injuries case arose out of a road traffic accident on the 2nd June 2016 and was for hearing before Mr. Justice Barr on 19th December 2018. Liability was not in issue. The Plaintiff suffered soft tissue injuries to her neck and lower back as well as bruising to the left side of her body and to her left arm. In addition, she developed pneumonia in the weeks following the road traffic accident. She also suffered scarring to her face. At the time of the accident, she was wearing sunglasses on the top of her head and when the airbag deployed and her glasses fell onto to her face, she was caused to suffer extensive lacerations to her face which left her with permanent scarring. She also developed psychiatric sequelae as a result of the accident.

While the court did accept the Plaintiff's evidence in relation to her physical and psychiatric sequelae, the court was not convinced of the Plaintiff's evidence in relation to not being able to afford the physiotherapy treatment and sessions of therapy, as recommended by her a consultant orthopaedic surgeon and consultant psychiatrist. When highlighting same, the court noted that the Plaintiff had only been out of work because of her injuries for a period of 4 weeks and could thereafter continue with her work. In addition, the court also highlighted that it was not told what salary she was paid nor what her outgoings were nor whether her ex-husband was paying alimony towards the upkeep of her two children. In those circumstances, the court was not convinced that the Plaintiff could not afford the recommended treatments.

The court awarded the total sum of €80,550.00, being €30,000.00 for pain and suffering to date, €45,000.00 for pain and suffering into the future and agreed special damages of €5,550.00. Interestingly, the court was then informed that a higher offer of settlement of €93,000.00 had been made to the Plaintiff before the case commenced. The court was informed by the legal team for the Plaintiff that this came at the 11th hour. This will now have cost implications for the Plaintiff.

This case is a timely reminder of the legal duty on a Plaintiff to mitigate any loss by following all advices given by treating doctors in terms of attending for physiotherapy treatment and therapy sessions. It is also a timely reminder to carefully consider any tender offer made. If a

tender offer is not accepted and a Plaintiff fails to secure an award or settlement higher than the tender offer, he / she will be liable for legal costs from the date of the tender offer. This can greatly reduce the amount of monies which the Plaintiff will ultimately receive.

Philip Keane –v- Dermot McGann Groundworks Limited
[2018] IEHC 747

The Plaintiff in this case suffered injury during the course of his employment as a general operative with the Defendant company at the private residence of a client of the Defendant company on 26th October 2017. Judgement was delivered by Ms. Justice Bronagh O'Hanlon on 29th November 2018. A tractor began leaking fluid and the Plaintiff was asked to find out where the leak was coming from. The Plaintiff contended that he was invited to extend his left hand to clear his vision because there was dirt at the site of the leak. There was a low intensity leak which turned into a spurt of hydraulic oil. The Plaintiff believed that the steering of the tractor turned when reversing during his inspection of the leak. The Plaintiff confirmed that he did not touch the oil leak but that he was near it and that he told the driver to stop reversing the tractor. He was never asked to stay away from the machine. He usually did not have anything to do with machinery while at work. He did not realise that he was in any danger.

The Plaintiff's injury ultimately lead to the loss of his left index finger. In addition, when he was in hospital for the amputation of his finger, he was diagnosed with grade IV sarcoma of the axilla which required further treatment. The Plaintiff's injury is permanent and he has pain for which he will require one, if not two, surgeries. He suffered psychiatric sequelae as a result of the accident. His capacity to work as a groundsman was lessened due to the injury and he will therefore suffer loss of ongoing opportunity as a result.

The court preferred the evidence of the Plaintiff to that of the Defendant. The court noted that the Plaintiff was not trained in driving or in servicing machinery. The court held that the Defendant was in control of the tractor and should have been aware that the dangers of a hydraulic oil leak to the Plaintiff were reasonably foreseeable. The Defendant should have instructed the Plaintiff to stand well back and a mechanic should have been called to deal with the problem. The onus was on the Defendant to maintain safe machinery and to supervise the Plaintiff. The Court found that the Plaintiff had been exposed to a danger/hazard in the workplace and that there was a failure to provide

a safe place of work or a safe system of work. The Court also noted that there was no particular risk assessment carried out for the particular job in question on the day of the accident and noted in particular the statutory obligation of S19 of the Safety, Health & Welfare at Work Act 2005.

The court awarded the Plaintiff €105,315.69, being €100,000.00 in general damages to include pain and suffering to date and into the future and an amount of damages to cover loss of opportunity and €5,315.69 for special damages.

This case highlights the duty of care owed by an employer to an employee and the necessity for an employer to take reasonable and prudent steps to take care for the safety of it's employees. It is also a reminder of the employer's statutory obligations under the Safety, Health and Welfare at Work Act 2005 and the regulations applicable thereunder.

Joseph Creedon –v- Depuy International Limited
[2018] IEHC 790

The Plaintiff in this case had both of his hips replaced in 2007. The prosthetics were manufactured by the Defendant. In August 2010, the prosthetics were found to be defective and were recalled by the Defendant. The Plaintiff was made aware of same in October 2010 and he subsequently brought a case against the Defendant. The Plaintiff claimed that he was in a lot of pain as a result of the defective prosthetics and that revision surgeries for both hips would be required in the future. Other medical treatments such as bi-annual MRI scans and annual ion level reviews would also be required. A Personal Injuries Summons was issued on 3rd March 2011 and the Defendant did not file a Defence until 18th June 2013. The Defendant pleaded a preliminary objection in it's Defence alleging that the Plaintiff was not entitled to bring a claim for personal injuries against it in circumstances where the Plaintiff had failed to obtain an authorisation from the Injuries Board to maintain the claim. Accordingly, the single issue to be tried before Ms. Justice Bronagh O'Hanlon was whether the Plaintiff's action came within S3 (d) of the Personal Injuries Assessment Board Act 2003, i.e. whether he required an authorisation from the Injuries Board to maintain his claim or whether his claim fell within the exclusions outlined in S3 (d) of the Personal Injuries Assessment Board Act 2003.

In it's submissions, the Defendant relied upon the case of Murphy –v- DePuy International Limited [2015] IEHC 153 in which DePuy successfully argued that an action against a medical device company did not come within the natural and ordinary meaning of medical negligence and, accordingly, did not come within the type of civil action within S3 (d) that did not require an authorisation from the Injuries Board.

The Plaintiff in it's submissions argued that Murphy –v- DePuy International Limited was wrongly decided in light of the Supreme Court decision of Clarke –v- O'Gorman [2014] IESC 72 in which case it was held that S12 of the Personal Injuries Assessment Board Act did not operate as a jurisdictional bar and was procedural in nature only. The Plaintiff further submitted that Murphy –v- DePuy International Limited was not applicable to this particular case as this case was not solely based on liability for defective products and that the Defendant was estopped from pleading failure to obtain an Injuries Board authorisation as a Defence. The Plaintiff also submitted that the Defendant's representation in correspondence with him over a 2.5 year period before a Defence was issued amounted to an implied representation that the proceedings were validly initiated.

The court was unable to depart from the decision in Murphy –v- DePuy that an Injuries Board authorisation is required before a case of this type is initiated. In those circumstances, Ms. Justice O'Hanlon found that precedent binds the court and found in favour of the Defendant in relation to it's preliminary objection.

This case is a reminder that an action against a medical device company is not necessarily a medical negligence action.

Lorraine Walker –v- Michael Lyons on behalf of the Adelaide & Meath Hospital Incorporating the National Children's Hospital and ISS Ireland Limited Trading As ISS Facility Services
[2018] IEHC 21

This case involved personal injuries suffered as a result of a slip/trip and fall. The Plaintiff was a patient of the First Named Defendant's hospital on or about 16th January 2006 when she walked into the pantry area of a ward and was caused to slip and fall heavily as a result of a wet and highly slippery and dangerous floor surface. Her claim was that she was allowed, permitted and/ or felt free to enter the pantry area of the ward to get a drink to enable her to take some tablets. The

Plaintiff maintained that there was no sign telling her not to enter the pantry nor was there a warning sign to tell her that the area had just been cleaned.

Ms. Justice Bronagh O'Hanlon dismissed the case and did not find either Defendant liable for the accident. The Court also held that the view that the Plaintiff's contention that there was no yellow sign is incorrect and believed the evidence of the cleaning lady that the Plaintiff moved the sign. The court found that the Plaintiff was the author of her own misfortune and that her accident was caused by her own disregard of the system in the hospital, both in how the hospital was managed and how the cleaning system was carried out. The court found that the engineering evidence for both the Plaintiff and Defendant agreed that the floor surface used in the pantry was one which was widely used in hospitals in Ireland and that it was a very good surface when dry but very slipping when wet. The Court also looked at the duty owed by an occupier under S3 Occupiers Liability Act 1995 to a visitor, which is what the Plaintiff was in the hospital of the First Named Defendant. The Court also looked at S7 Occupiers Liability Act 1995 which deals with the liability of occupiers for negligence of independent contractors, which was the relationship between the First Named Defendant hospital and Second Named Defendant contract cleaning company. The court found that there was no breach of S7, based on the evidence heard.

Sometimes potential clients have the misconception that just because they have suffered an injury, they are entitled to compensation for the injury. This case is a good example of the requirement to also prove liability and that not all accidents are caused by an actionable wrong.

HAZZARD IDENTIFICATION IN THE WORKPLACE

It is well settled law that an employer owes a duty of care to an employee. An employer must take reasonable and prudent steps to take care for the safety of it's employees. One of the ways that an employer can do so is by complying with it's statutory obligations under S19 of the Safety, Health & Welfare at Work Act, 2005. This section relates to hazard identification and risk assessment. The section is broken down in detail below: -

- S19 (1) requires an employer to identify the hazards in the place of work under it's control, assess the risks presented by those

hazards and to be in possession of a risk assessment. The aim of a risk assessment should be to reduce the risk of injury and/or illness associated with work.

- S19 (2) requires an employer when carrying out such a risk assessment to take into account the work being carried on at the place of work and to have regard to it's statutory duties.

- S19 (3) requires an employer to review it's risk assessment where there has been a significant change in the matters to which it relates or there is a reason to believe that the risk assessment is no longer valid. In either of those circumstances, the employer is required to amend the risk assessment appropriately following review.

- S19 (4) requires an employer to take steps to implement any improvement identified as necessary in the most recent risk assessment which relates to the safety, health and welfare at work of employees. This section also requires an employer to ensure that any such improvements are implemented in respect of all activities and levels of the place of work.

- S19 (5) requires that every persons to which Sections 12 or 15 of the Safety, Health & Welfare at Work Act applies shall carry out a risk assessment in accordance with S19 even though it's duties under those sections may apply to persons other than it's employees.

It is in an employer's best interests to be in compliance with S19 in an effort to keep injury and illness among employees at a minimum at work. This will lead to a reduction in any sick leave absences, minimum exposure to personal injury* claims* and happier employees which contributes to good productivity and revenue for any business owner.

LONG TERM SICK LEAVE AND PERSONAL INJURIES* CLAIMS*

Where serious injuries have been suffered in an accident, be it in the workplace, as a result of a slip, trip or fall, a road traffic accident or otherwise, it can have a devastating impact on the livelihood of an employee and his / her ability to earn a living. Some injuries can result in an employee having to re-train to obtain gainful employment in a

completely different area of work. More serious injuries can result in permanent infirmity and can affect an employee's ability to return to any sort of employment.

One of the benefits of choosing a firm of solicitors with expertise in both personal injury* litigation and employment law is that you have the benefit of legal advice on how best to protect your employment and income while bringing your claim*. Some employers will have a sick pay policy and some employers may even have provision for some sort of income protection policy or permanent health insurance policy. This means that some form of income is provided to the employee if on sick leave from work.

If an employee can no longer perform the duties which he / she was employed to carry out, an employer may take steps to terminate the employment on the basis that you are no longer medically fit to carry out the work that you were originally hired to do. A recent UK Employment Appeal Tribunal case has highlighted the potential dangers for an employer in doing so where an employee is awaiting or in receipt of long term disability benefits.

In the case of *Awan –v- ICTS UK Limited*, the employee, Mr. Awan, had a contract of employment which provided for contractual sick pay and a long term disability scheme. Mr. Awan suffered with depression and was certified as unfit for work in October 2012 and remained on sick leave from work until his employment was ultimately terminated in November 2014. Mr. Awan brought a case and argued that his dismissal was unfair and discriminatory. His contract of employment gave him an entitlement to payment of his basic salary if he was unable to work due to injury/illness up to a maximum of 6 months. The contract of employment also provided for an entitlement to be paid two thirds of his basic salary less any state benefits if he could not work due to injury/illness for more than 6 months. This was an entitlement that would continue until he returned to work, retired or died. However, the contract of employment also provided that the employer could terminate the contract of employment at any time by giving Mr. Awan the requisite notice. The UK EAT held that these express terms were contradictory. The UK EAT also considered case law which held that the power to terminate a contract of employment is restricted if the termination would result in an employee being deprived of certain rights under a long term disability scheme. The UK EAT held that an implied term could be brought into the contract of employment implying that "once the employee has become entitled to payment of disability income

due under the long term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work." As a result, Mr. Awan's dismissal was found to be in breach of contract and the matter was sent to a new division of the Employment Tribunal for reconsideration. The case is a good reminder to employers to think twice before dismissing an employee on the grounds of medical incapability and for employees to take the appropriate legal advice if they find themselves in such a situation.

Where an employee has suffered serious injuries that take him / her out of the workplace for an extended period of time, there will more than likely be a claim* for loss of earnings which will form part of the personal injuries* claim*. Section 2 of the Civil Liability (Amendment) Act 1964 sets out what sums that are not to be taken into account in assessing damages in a personal injuries case not causing death. Interestingly, S2 (1) (b) sets out that payments received by way of any policy of insurance or *"pension, gratuity or other like benefit payable under statute or otherwise, in consequence of the injury*" are not deductible from a claim for loss of earnings in a claim for damages for personal injuries. An invalidity pension will however be deductible pursuant to Part 11B of the Social Welfare (Consolidation) Act 2005, as amended. This is another example of the benefits of using a firm of solicitors with experience in both personal injury* litigation and employment law when bringing a claim* for personal injuries*.

DATA PROTECTION LAW AND INJURED* AT WORK CASES

When an employee has suffered an injury at work due to an accident or an assault, he / she may be entitled to compensation for the injury. In order to determine the strength or weakness of a case, an employee's solicitor will have to carry out certain investigations at the very beginning of a case. The Data Protection Act 2018 is a very useful piece of legislation to assist in these investigations.

An employee will have to prove that he / she was injured in the accident or incident. Accordingly, medical records will form a very important part of the personal injuries* case in proving the injury. Employees are entitled to access their medical records from their doctors / hospitals by using the Data Protection Act 2018. A request for medical records should be made in writing. The request should be clear and provide the appropriate information, e.g. the name and address of the patient, his / her date of birth and the time period of medical records being

requested. The hospitals / doctors generally cannot charge for furnishing the requested medical records unless of the cost of complying with the request is excessive. The hospitals / doctors have a period of 30 days within which to furnish the requested medical records but this time period can be extended in certain circumstances.

An employee will also have to prove that his / her injuries were caused by the negligence of the employer. Again, the Data Protection Act 2018 can be used to assist in these investigations at a very early stage of a case. Pursuant to data protection legislation, a data subject (the employee) can request a copy of personal data held by a data controller (the employer). When an employee has suffered injuries due to an accident / incident at work, a request for the employee's personnel file or certain documentation and information should be made to the employer by the employee pursuant to data protection legislation. The information requested will depend on the type of accident / incident but will mostly include the accident / incident report form, training records for the employee, risk assessments for the task in question given to the employee and any CCTV footage of the accident / incident. The employee will only be entitled to his / her personal information. Accordingly, the documentation and information received will have information that relates to other employees redacted. Again, the request for this information should be in writing and the appropriate information should be furnished to help the employer identify the data being sought, e.g. the name of the employee, employee number, duration of employment, the items being sought, etc. The employer will have 30 days within which to respond with the requested information but this period of time can be extended. If the requested information is not forthcoming, a complaint can be submitted to the Office of the Data Protection Commissioner. The information is usually provided free of charge unless the cost of complying with the request is excessive.

Using the data protection legislation to obtain a copy of any CCTV footage of the accident / incident at a very early stage of a case is extremely beneficial. CCTV footage will show the precise manner in how an accident / incident occurred and will trump any oral evidence at the hearing of an action. It will allow the employee's solicitor to have essentially an independent view of how the accident / incident occurred and to carry out an assessment of the case at the very beginning rather than waiting until discovery has been furnished when pleadings have closed. Employees sometimes forget that CCTV footage of him / her is personal information to which they as the data subject are entitled to from the data controller. The data controller in these cases may not

always be the employer as the recording of footage of an accident / incident is now very sophisticated. It can include a video on a colleague's phone, a body camera on security personnel of a security company that work in the organisation or a dash cam on a vehicle. In order to obtain the footage, a request should be made in writing to the relevant data controller. The request should set out the date, time & location of the accident / incident so that it can be easily located by the data controller. If the footage is incapable of being copied, stills / photographs of the footage should be provided. Again, the footage should be furnished within 30 days at no cost. However, employees need to remember that when requesting CCTV footage, time is of the essence as most footage is deleted or overridden within a short period of time. In addition, any other persons in the footage will be redacted.

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.***