Welcome to our Autumn edition of "Keeping In Touch" – September 2014

In this issue we deal with a number of employment, personal injury and taxation issues which hopefully those reading this newsletter will find interesting.

Topics covered in this issue include

- Transfer of Undertaking Regulations
- Why a company needs a handbook
- CCTV recordings in the workplace
- Data Protection Act – S.I. 337 and 338 of 2014.
- Employed –v- Self-Employed Status
- A number of articles on Unfair Dismissal cases
- Filing claims - before the EAT- the Brady and Bohemian Football Club EAT decision considered.
- Rights of mothers who are breastfeeding
- Dealing with Data Protection requests
- Protected Disclosures Act 2014- Protection for Whistleblowers in Irish Law
- Time Limits for Payment of Wages claims
- Holiday pay issues for employers and employees
- What is a Sunday premium in light of recent Labour Court rulings
- What is a "leave year" for Working Time purposes
- Zero Hour contract
- Using mobile phones while driving – an employer's liability
- Discrimination arising from pre-employment medicals
- Bullying and Harassment
- Dress codes and issues which can arise for employers – The Conchita Wurst scenario
- The challenges of Regulatory requirements and Employment Law contradictions
- Claiming from the Insolvency Fund
- When does the EU Charter of Rights apply
- Fatal Injury claims
- An article on how the Social Welfare and Pensions Act 2013 has from 1 August 2014 radically transformed Personal Injury cases
- Claiming compensation as a victim of crime
- New tax deductions and regulatory requirements for employers
- Claiming for medical and dental bills
- The Workplace Relations Bill 2014
- Employment Permits (Amendment) Act 2014.

With Halloween coming we have an article on whether you can discriminate against Monsters.

The Ethos of Our Firm

We thought it worthwhile to set out the ethos by which our firm operates.

Our firms approach can be defined as;

Our firm is defined by the clients and services we don't have.

You might think that this is strange. We don't think so. What makes a great restaurant? The things that are not on the menu. The world's most mediocre restaurants famously have virtually everything on their menus. It makes them average at everything and excellent at nothing.

The advertising agency which created the famous and remarkably effective ultimate driving machine strategy for BMW, Ammirati & Poris used to say

"You can measure our agency by the clients we don't have".

This was because that firm cared more about greatness than bigness.

Steve Jobs when he came back to Apple the first order of business was to reduce the product line from over 300 to 20.

We take the view that this firm needs to be true to the type of client more than a specific individual client with changing needs. In other words we expect not to be right for everyone. We expect to have clients whom we cannot provide services for at times. We regard that as OK. That is because we want to be exactly right for a particular client with particular issues than to try to appeal to every type of client or try to do everything for a particular client.

We focus on the "mittelstand". This refers to small and medium sized enterprises that have a razor thin focus which allows them to do a number of things well rather than a large number of things in a mediocre fashion.

Our strategy was to decide what to do. This translates into what legal services we do not offer. Our approach is not necessarily to identify a single type of client or service rather it is to provide a boutique list of services which we believe we are really good at and most passionate about. Many other firms take great pride in showing off a long list of services and clients. Somehow they feel that it is an indicator of their experience and competence. We do not regard this as the approach that we wanted to take. We wanted to concentrate on Employment Law, Personal Injury and Tax work, Estate Planning and Employment Tax.

We do not want to be like the restaurant that insists on putting everything on the menu. We believe a professional firm that stands for everything ends up looking like they stand for nothing.

We are not a full service firm. We don't want to be. We want to provide the specialist services in the areas of law that we believe and hope our clients believe that we are good at and are passionate about. We make no apology for this. It is an approach which has worked well to date, for us, and, most importantly for our clients. We therefore provide specialist services in specific areas of law that we are passionate about. So therefore as we say

THE FIRM OF RICHARD GROGAN & ASSOCIATES IS DEFINED BY THE CLIENTS AND SERVICES WE DON'T HAVE

What's new?

We congratulate our colleague Ruth Lynch who successfully completed the Law Society of Ireland Diploma in Employment Law course. In June of this year Ruth was made a Senior Associate in the firm.

On 28th November next Richard Grogan of this firm will be presenting a joint Employment Law Association of Ireland / Southern Law Association lecture on "The Practical aspects of bringing and defending a Working Time Claim".

The bringing and defending of Working Time claims can be complex. This lecture is intended, while dealing with the technical legal issues, to cut through the legal terminology to deal with these types of cases in a very practical and pragmatic way. Copies of the lecture notes will be available on our website in December.

In the summer edition of the Dublin Solicitors Bar Association Parchment Richard Grogan of this office had an article entitled, "Claiming Unfair Dismissal and Redundancy Simultaneously", published. A copy of the article is in the publications section of our website www.grogansolicitors.ie or can be downloaded directly from the Dublin Solicitors Bar Association website www.dsba.ie.

On 17 June last Richard Grogan presented to the Law Society of Ireland Certificate in Adjudication course, a lecture on the Taxation of Employment Law Awards which can be downloaded from the publication section of our website.

Since our last Newsletter we have published a number of Guides on our website including;

- Holiday entitlements, Annual leave entitlements of employees on sick Leave;
- Excessive Hours of Work – Working Time Claims – What is the reference period;
- What notice is an employer obliged to give and an employee entitled to receive to undertake overtime;
- Starting a business – looking to hire your first employee;
- Workplace Stress – An Employer's Guide
- Workplace Stress – An Employee's Guide
- Unfair Dismissals – Workplace Investigations – Keeping them Fair;
- Employees absences due to weather conditions;
- Guide to avoiding legal conflicts with employees; and
- Theft - A common sense and legal approach

In the area of Personal Injury / Accident cases our new Guides include;

- Time Limits for bringing Personal Injury Claims;
- Do you need a Solicitor to bring a Personal Injury claim; and
- Publications on construction site accidents, motorcycle accidents and dental negligence.

We are regularly placing new Guides on our website www.grogansolicitors.ie. The list above gives a flavour of some of our more recent publications.

Transfer of Undertaking Regulations

The Regulations set out a requirement for information and consultation with the employee's representatives prior to a transfer. There are procedures in Regulation 8(5) for the appointment of representatives where there are no representatives in place and there is a default provision under Regulation 8(6) where through no fault of the employees no representatives are appointed. The issue that arises then is what information and consultation must be undertaken and by whom. While the legislation in the United Kingdom is different a recent case of Allen –v- Morrison Facilities Services http://www.bailii.org/uk/cases/UKEAT/2014/0298_13_1604.html is an interesting case on this issue.

While our Regulations and the UK Regulations are different they both derive from an EU Directive.

This case highlights that the Directive places no obligation on Member States to introduce legislation to require a Transferor (being the employer transferring the employees) or the Transferee (the new entity) to give information to representatives of the other parties employees or to those employees. As in the United Kingdom this obligation has been imposed under the respective Regulations in each country which in our case is Regulation 8. However, this is not a Directive provision.

<u>The Law</u>

Where the transfer of a business comes within the definition in the E.C. (Protection of Employees on Transfer of Undertakings) Regulations 2003 employers are obliged to inform and potentially consult any employees affected.

The same duty applies to the entity which will become the new employer. Our law is different than the UK where in the UK the new employer only has to provide the information to who is the new employer. As a result employees in the UK are dependent on the information given by their existing employer about the new employers plans if they transfer. In Ireland the new employer must give the information.

What happens where wrong information is given?

It would appear that if wrong information is given that the employees have a claim against both what we will term the current employer and against the new employer. This information will only come to light probably after the transfer has taken place so it will be against the new employer and against the old employer. To bring a claim it would appear that it is probably advisable to bring a claim against both companies if there was any misstatement. The old employer may very well contend that they relied on information given by the new employer. The new employer will probably contend that they gave all the correct information to the old employer. It would therefore seem that it ends up effectively being a fight between the old employer and the new employer to determine where liability lies.

The difficulty with the Regulations

The difficulty with these Regulations is that the rules and regulations relating to how they are applied in practice have become so technical that there are often conflicting decisions from different Tribunals and certainly in commentaries relating to how these Regulations apply. There is also the problem that there is conflicting EU Case Law on how they are to be applied under the European Rules themselves.

It is difficult to understand how anybody could bring a claim under the Transfer of Undertakings Regulations and realistically be able to argue a case without specialist employment law advice. This has to be a defect in the Regulations and also in the Directive. It is neither fair to employers or employees when neither can with certainty be able to determine whether or not the Transfer of Undertaking Regulations apply. When acting for either an employer or an employee there is a view that a best guestimate is the best that even the most highly qualified employment law specialist can reasonably put forward because of the uncertainty with the legislation.

Whether in reading this you are an employer or an employee care must be taken in dealing with Transfer of Undertaking Regulations to investigate fully all relevant issues relating to whether or not a transfer is taking place. It does appear that by what could be termed judicious planning which may involve not asking too many questions an employer may be able to avoid the Regulations where an employer takes assets and this can include intangible assets such as computer records relating to a process or signed lists there is a greater likelihood that the Transfer of Undertakings Regulations will apply.

Why a company needs a handbook / prevention and compliance

The days of believing that a handbook can cause more harm than good are long gone. In today's business environment, a handbook serves both as a sword to carve out your legal rights as well as a shield to protect them.

A handbook sets expectations, encourages employees to behave in a certain way, helps ensure the employees are treated consistently and helps with employment claims.

Establishing expectations

Employees will expect their employer to communicate with them in a straight forward, professional and open way about all sorts of things. Simply having a handbook shows to your employees that you understand the employees needs for information. It can go a long way towards making a positive impression on a new employee. It can also go a long way in avoiding problems and litigation in the workplace.

Your handbook should outline for employees how to behave and perform. The handbook should set out what will happen if they fail to meet those requirements. A good handbook will inform employees about how they can succeed in their job. A good handbook will guide employees on how to request time off work, to make complaints, dress in an appropriate fashion, refrain from inappropriate drug and alcohol use (which may include prescription medicines), maintain confidential information, use electronic resources properly and comply with the law as it affects them.

You may well ask as to why you would want to have a situation where you set out how an employee can complain?

If an employee has a grievance it is important that the employee can bring it to your attention. It is equally important that the employee knows that there is a procedure there as to how to do it, in the right way, and what kind of response can be expected from their supervisor, manager and senior management. The last thing an employer needs is a grievance which festers. A grievance aired early can often be resolved. A good handbook will enable this to be done in a non-confrontational way. A properly tailored handbook on the way to do business will ensure that managers handle issues with consistency.

A handbook should not be seen as "an instruction book" on how to manage or deal with every conceivable problem or issue. Instead it should provide a framework for managers to follow.

Promoting your company to your employee's.

Employers spend a significant amount of money on every employee. Often they do not see this. Companies will spend money on Health and Safety Policies. Companies will spend money on training. Companies will spend time dealing with health and safety and training in the workplace. Companies may provide a canteen or kitchen facilities. All of these are a cost. There will be many other examples. A handbook allows an employer to take credit for this. This can include such matters as subsidising matters such as health insurance or even the canteen / kitchen facilities. Companies who are in the retail industry may have employee benefits for purchases at reduced rates. There may even be payroll services such as deductions for a credit union or pension payments processed through payroll. These are all a cost. It is worthwhile telling your employees what benefits they receive which may not be in monetary terms.

Helping to win employment claims

A well written handbook is the first step in a successful defence of a legal claim by an employee. Having written grievance and disciplinary policy can be very important in dealing with a claim for harassment or an unfair dismissal claim. Having a well written handbook gives a step by step procedure for any dismissal including the procedures relating to an appeal. You will see other Guides on our website that set out why employers lose Unfair Dismissal claims. It is usually due to lack of procedures. A well written handbook which is complied with by both managers and by owners of businesses minimises claims which can be successfully made.

Many employment claims hinge on consistent treatment of employees. Many also turn on whether the employees are on notice about important company policies, procedures and legal entitlements.

A well written handbook contains the applicable policies which an employer needs to have in place. It will also have a signed acknowledgement form. This may be critical to the defence of a claim.

Conclusion

Of course a handbook needs to be set out in compliance with the law. This does not mean that every law needs to be specifically addressed and referred to in detail in your handbook. Rather the handbook should not conflict with the law. The handbook should contain clear statements of an intent to comply with all applicable laws.

Some will say that you can get a handbook from another company and use it. A handbook should be tailored to your organisation. It should reflect how you conduct business. Copying another employer's handbook or one that you find online might do a lot more harm than good.

Handbooks which are copied in an unprofessional way, handbooks which are out of date, handbooks which contain another employers name, handbooks which contain inapplicable policies, what do they say about your organisation? Is that the type of message that you want to put out.

For a minimal investment you can publish a well written and professional looking handbook.

Desktop publishing allows that it be done at a reasonable cost. We would give a word of warning. Publishing handbooks online may save printing costs. However you need to be able to prove that an employee received the handbook and understood that he or she was required to abide by the handbook. To have such proof you need a signed acknowledgement form for a printed handbook. If you want to publish your handbook online you need an electronic acknowledgement receipt for an online handbook. Having an up to date, well written, legally compliant handbook is for your benefit as well as for your employees.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Recordings in the Workplace

The issue of the use of CCTV in the work place is becoming prevalent. The issue has been before the EAT and a Decision at this stage is still awaited from the EAT on a recent case in which this office was involved.

The issue which has yet to come into play is the issue of employees recording discussions with their employer or employers recording discussions with employees.

Mobile phones now have recording facilities. Conversations are being recorded. There is no doubt about this. The party recording rarely will advise the party who is being recorded that they are in the process of recording the conversation. Clearly issues are going to arise in the future where there is a significant divergence of evidence between an employer and an employee as to what was or was not said at a meeting.

The issue is going to have to be addressed at some stage if an employee, in an Unfair Dismissal case, when challenging a significant piece of evidence by an employer, whether a recording which was made, without the employers consent can be introduced in such circumstances. There are clear Data Protection issues.

It would be our view in a disciplinary hearing at which notes are taken, the notes are exchanged and given to an employee. The employee should be given an opportunity to comment on them if the employee either does not challenge the contents of the notes or, signs to accept that the notes are correct notes of what happened at the meeting then unless the employee can show that they are under some disability, such as a disability that they could not read or in the case of a non-Irish national for example that they could not read English and understood that the note said something else it would appear difficult for an employee to be able to produce a recording. This would be even if it was contended the recording says something else.

This is an area of law which is going to develop over the next number of years. Clearly if an employer at the start of a meeting states that they request that this meeting will not be recorded and asks the employee to confirm that they are not going to record it and get it signed then no recording can be produced. If an employer has been involved in covert surveillance then matters might be different.

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In such circumstances there is an argument that what is sauce for the goose is sauce for the gander and that in those circumstances the employee would be entitled to undertake their own covert surveillance.

We see this area of law developing. It is not one at this stage that there appears to be any definitive ruling on but clearly it is going to become more relevant in the coming years.

Employed –v- Self Employed Status

In Conroy –v- Scottish Football Association Limited UK EAT S/0024/13 the UK EAT considered the Employment Status of a football referee for the purposes of Unfair Dismissal legislation.

Mr. Conroy, a referee, brought a claim for Unfair Dismissal against the Scottish Football Association. The UK Employment Tribunal agreed with the argument that Mr. Conroy was a self-employed individual and could not bring a claim. On appeal to the UK EAT found that the Employment Tribunal decision was correct. They considered and weighed up all the relevant factors some of which were indicative of employment such as Mr. Conroy, was not entitled to send a substitute in his place and was covered by their private medical insurance. Others were indicative of self-employed status. Mr. Conroy paid his own taxes. He was not subject to disciplinary procedures and he had a right to decline matches. The UK Employment Tribunal had found that there were more factors which indicated that Mr. Conroy was self-employed and this was the decision that the UK EAT held that the Employment Tribunal was entitled to make.

The case is interesting in Ireland for two reasons. The first is that the Tribunals take into account when considering someone's employment status that one or two anomalies will not necessarily prevent an individual being classified in a particular way. It is a balancing act taking all the factors into account. In Ireland the Revenue guidelines on self-employed / employed status are generally accepted as the tests to be addressed.

The UK Employment Appeals Tribunal is slightly different than the Irish Employment Appeals Tribunal. The UK Employment Appeals Tribunal does not necessarily involve itself in a full rehearing. It is not simply a matter of one or other parties being dissatisfied with the decision. The UK EAT is less of a fact finding entity than it is a point of law appeal entity.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Recent cases involving Unfair Dismissal where Richard Grogan & Associates were involved

The firm has been involved in a number of recent cases under the Unfair Dismissal Act. These are some of the more interesting which are published.

We have others before the LRC or which settled which as LRC decisions are not on a website so we do not refer to these or which settled which equally we do not refer to. Other cases in the EAT might simply have turned on their facts with no real precedent value.

In case UD283/2013 the employee in this case worked for Occipital Limited. The employee was employed as a cleaner.

The case is interesting not only in that the sum of €20,000 was awarded but also for the fact that the EAT set out in some detail that the investigation was flawed in a number of respects.

The EAT set out that where the procedure allowed for a two person investigation only one investigator was appointed.

The EAT pointed out that a statement that had been obtained was never shown to the employee. They also pointed out that more importantly the claimant had no idea that the matter was moving in the direction of the dismissal and that the claimant was disadvantaged by the fact that he did not obtain representation and was ignorant of the seriousness of the situation. The EAT pointed out that the employee was never invited to make a plea of mitigation. The EAT in their Decision pointed out that this last matter being the issue that the employee was never invited to make a plea of mitigation was one that the EAT took “most seriously”.

The Decision of the Tribunal again highlights the importance of procedures being followed at all times and that fair procedures are applied. The Decision also highlights the issue of the penalty being proportionate.

Before the Rights Commissioner service we obtained an award of €35,000 for our client. The case, cannot be set out in detail, as it is a private hearing.

However it was a case which was again won on procedures and the proportionality of the penalty.

This is a matter which this office has issued various Guides in the past upon. What is interesting is that this issue of fair procedures is consistently arising. You will find these in the "Our Services" section of our website.

In case UD 1134/2012 being Makowska and Masterville Ltd an award of €35,984.00 was made on 12th May. The employer failed to bring any witnesses to the case so could offer no evidence.

In the case of Michael Polchlopek and Piotr Polchlopek against Masterville the Employment Appeals Tribunal implemented an award of €10,000 for each of the individuals in respect of an Unfair Dismissal claim.

It now appears that in many cases employers are waiting for the implementation to occur. There is a strong argument that there should be a fast track system of implementation similar to that in say the Labour Court rather than the necessity of a case having to be listed before the Employment Appeals Tribunal. This is a matter where we made specific submissions to Minister Bruton on and which the new Workplace Relations Bill will address.

The listing of implementation cases is simply an additional cost to the State in time and resources and an additional cost to an employee seeking to implement a Decision which has not been appealed by the employer or the employee.

We don't win every Unfair Dismissal case.

The case of Thomas Justin –v- ATR Truck Rentals Limited UD319/2013 RP486/2012 is a case where this firm represented a Driver.

The issue effectively revolved around whether there had been a discussion about the employee being made redundant or whether the employee had resigned.

The employee was a long standing employee. There was an issue of surplus employees. The employee would not normally have been chosen under the redundancy scheme which worked according to the employer on a Last In First Out basis ("LIFO"). There were contrasting versions of events. The employer argued that the employee offered to resign as he was close to retirement age for the purposes of keeping others in work.

The employees position was that there was a general discussion and subsequently that the employee was told that there was no work for him having received a P45 a few weeks later.

The EAT accepted the evidence of the employer.

Are there lessons to be learned by both employers and employees in such situations?

Clearly there is. Misunderstandings as to what is said or not said can result in expensive litigation for both employers and employees. If there are to be discussions relating to terminating employment or an employee wishing to resign or saying they are going to resign or some discussion relating to redundancy or otherwise it is vitally important that these conversations are recorded in writing. That a note of what was discussed is sent to either the employer if the employee is putting forward certain proposals or by the employer to the employee with an option for either party to come back if there is any matters contained therein that they disagree with.

Unfortunately this is not done. It probably never will be done. It is an unfortunate fact that people say one thing and somebody else hears something else. It is the basis of many claims in employment law and in the Courts generally.

For employers whether they win or lose a case there is a significant cost in time and resources in defending Unfair Dismissal claims. Where matters are set out in writing and agreed and signed off the potential for expensive litigation is avoided.

Payment of Wages during Suspension

In a recent case of Dariusz Hanuszewicz, represented by this office, and Strand Security Limited (In Liquidation) case number PW317/2013 the employee appealed the Decision of a Rights Commissioner to the Employment Appeals Tribunal.

In this case the employee was suspended without pay on 10th April 2012.

No disciplinary meeting was convened to investigate any wrongdoing. The suspension continued until the company ceased to trade on 21st October 2012.

It was accepted that the contract of employment was silent on the subject of whether suspension was to be paid or unpaid.

The EAT in reaching its determination importantly considered the distinction between suspension without pay which is in the nature of a disciplinary sanction following a disciplinary meeting and suspension on full pay pending a disciplinary hearing for the purposes of conducting an investigation into allegations made against a particular employee.

In this case the Tribunal held that the employee was suspended without pay pending an investigation. The EAT stated that the Irish Courts had made it clear that the suspension of an employee may only be for a finite time and indefinite suspension will not be tolerated. In this case the employee was suspended for in excess of six months. The EAT held that in no way was this a finite period. They held that there was a clear breach of fair procedures.

The EAT importantly referred to the case of Deegan –v- Minister for Finance 2000 ELR190. In this case civil servants in the Department of Finance claimed that a decision to suspend them following the detection of financial irregularities was in breach of fair procedures and of their rights. The Supreme Court held that where suspension constitutes a disciplinary sanction the principle of natural justice should be considered before a decision is made to suspend an employee. However, where an employee is suspended pending an inquiry into whether a disciplinary action should be taken, the principles of natural justice may not apply. This may at first sight appear contradictory. It is not so. Suspension without pay, pending a disciplinary investigation is clearly not an action an employer can take. Even if the contract provided for suspension without pay, the fact is that suspension without pay is a disciplinary sanction. Such a sanction can only apply after there has been a disciplinary hearing.

In this case the Tribunal overturned the Decision of the Rights Commissioner and awarded the employee €8,575.

This Decision is fully in line with the Decision in RP471-2013 which was a Decision by the same division of the EAT heard on the same date but where the Decision issued in April of this year where redundancy was awarded to the employee on the basis that his employment was continuing up to the date of the company going into liquidation. The employee did have a previous further claim before the Rights Commissioner Service under the Organisation of Working Time Act where an award of €2,000 had been awarded for various breaches of the Organisation of Working Time Act.

The employee as an alternative in this case could have brought a claim under the Unfair Dismissal Legislation for repudiating his contract. However, the effect would have been the same as the award under the Payment of Wages Act and the Redundancy Acts. Double recovery for the same event is not permitted.

The importance of employees appealing dismissals.

The case of Richard Matthews and Applus Car Testing Services Limited UD795-2012 being a decision heard on 8th May 2014 is interesting in that the commentaries have generally speaking been about the failure of the employer to follow fair procedures where there was a whistleblower allegation against an employee where the employee was subsequently dismissed.

While the employee received compensation of €47,500 it is clear that the Tribunal was clearly considering a much higher award.

The Tribunal held that if the employee believed the process to have been unfair that it would have been logical to appeal the decision to dismiss. The Tribunal also felt that the employee had not given adequate proof of his efforts to mitigate his loss. In cases where an employee is dismissed it is important that the employee lodges an appeal. Even if the employee believes that it is a complete waste of time the employee should always appeal. Being seen to appeal is important arising from recent EAT decisions. The employee then cannot be criticised by any Tribunal. It also indicates to any Tribunal that the employee did not believe that the dismissal was fair.

In Unfair Dismissal cases the employee mush show that they attempted to mitigate their loss. This means that there is evidence which can be produced to a Tribunal showing the efforts to obtain work. How often those efforts were made, whom they were made to, when they were made, what replies the employee received, what interviews the employee went to, and, effectively every effort that the employee made to get alternative employment.

We find it a common case that employees who are dismissed do not always keep detailed records of their efforts to obtain work. Unless the employee has the records and that these records can be produced to a Tribunal then it undermines the argument that the employee sought to minimise their loss.

Employee who was by mistake paid double salary awarded €70,000 in compensation for Unfair Dismissal

In the case of Marc Bentley –v- Tesco Ireland Limited UD818/2012 www.workplacerelations.ie/en/Cases/2014/June/UD818_2012.html was heard on 29th and 30th April 2014. The case involved an employee who worked for the employer in the UK since 2007. The employee worked in a support role in the Irish store before permanently moving to Ireland in 2011 where he was employed as a stock control manager.

A few months after the employee commenced employment in Ireland the store manager became aware of double payments being made to the employee. This happened as a result of an error made by the UK store who assumed that the employee was working in Ireland on a secondment basis. A meeting took place with the employee. The employee was shocked to learn of the double payments. It later was found that the employee's wife who looked after the household expenses was aware of the double payment and the money had been spent. The employee was suspended on full pay on the grounds of breach of trust.

The employee provided the employer with a detailed letter from his wife in which she accepted full responsibility and in which she stated that the employee had no knowledge of the double payment. An offer to interview the employee's wife was made. This was refused. The employee was informed of a meeting by telephone. He was not informed that it was a disciplinary hearing.

The EAT found that the procedures adopted by the employer were inadequate given the serious accusations made and the equally serious consequences which would result therefrom.

The Tribunal found that the employee had an unblemished and untarnished record with the employer prior to this incident.

The EAT noted with approval the sentiments expressed by Mr. Justice Flood in the case of Frizelle –v- New Ross Credit Union Limited High Court July 30 1997. In that case Mr. Justice Flood stated that where the question of an unfair dismissal was an issue there were certain premises which must be established to support the decision to terminate the employment for misconduct. Mr. Justice Flood listed these as follows;

1. The complaint must be a bona fide complaint unrelated to any other agenda of the complainant;
2. Where the complainant is a person or body of intermediate authority, it should state the complaint factually, clearly and fairly without any innuendo or hidden inference or conclusion;
3. The employee should be interviewed and his or her version noted and furnished to a deciding authority contemporaneously with the complaint and again without comment;
4. The decision of the deciding authority should be based on the balance of probabilities flowing from the factual evidence and in light of the explanation offered; and
5. The actual decision, as to whether to dismiss should follow, a decision proportionate to the gravity of the complaint and of the gravity and effect of the dismissal on the employee.

The EAT in this case pointed out;

The eminent Judge succinctly added “put very simply principles of natural justice must be unequivocally applied”.

The EAT quoted the case of Bunyan –v- United Dominions Trust (Ireland) limited 1982 ILRM wherein it was stated;

“The fairness or unfairness of a dismissal is to be judged by the objective standards of the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal therefore does not decide the question whether or not, on evidence before it, the employee should be dismissed. A decision to dismiss has been taken and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded”.

The EAT in this case pointed out that in the Bunyan case despite the fact that the employee had undermined the Managing Directors authority the dismissal was deemed to be unfair and the employee was not afforded fair procedures. The EAT also pointed out the case of Philip Molloy –v- Wincanton Ireland Limited page 286 (2013) E.L.R. where it was stated;

"The role of the Tribunal is not to determine whether the claimant was guilty or innocent of the disciplinary matter. The role of the Tribunal is to determine whether a reasonable employer in similar circumstances and in a similar line of business would have dismissed the employee".

The EAT in this case properly pointed out that this is the real test.

In this case the Tribunal awarded a sum of €70,000 in compensation to the claimant.

This case further highlights the importance of procedures.

It is a case of PROCEDURES, PROCEDURES AND MORE PROCEDURES.

It is still staggering to note that employers are consistently losing cases because of failure to follow procedures. The importance of fair procedures cannot be underestimated. Having fair procedures does not simply mean that the procedures are followed and then the employee is dismissed. The decision to dismiss must be proportionate. In simple terms it means it must be fair. The fact that an employee may have done something wrong does not necessarily mean that the employee should be dismissed. There will be times when dismissal is warranted. There will be other times when some other penalty or a warning or a final written warning will be the appropriate penalty.

You will find on our website in the "Our Services" section a number of Guides which may help being;

1. Unfair Dismissals / Workplace Investigations / Keeping them Fair;
2. Why a company needs a handbook / prevention and compliance;
3. 5 reasons why employers lose Unfair Dismissal claims; and
   10 ways to avoid a dismissal being held to be unfair by a Tribunal

From reading decisions of the EAT it is very clear that the EAT is constantly pointing out the failure to follow fair procedures. At a very minimum, employers should follow the Code of Practice on Grievance and Disciplinary procedures which issued from the Labour Relations Commission. This recent case simply highlights the importance of fair procedures.

Unfair Dismissal Acts

The case of Bloomfield House Hotel and Bloomfield Company Limited and Sarah Hickey being a decision UD-384/2012 is a very interesting decision relating to the issue as to whether Unfair Dismissal proceedings should be stayed where there is also a personal injury case.

The Employment Appeals Tribunal in this case set out the line of authorities as to the circumstances in which matters might be put on hold pending a personal injury matter being resolved.

Filling a claim before the Employment Appeals Tribunal

In the case of Alan Brady and Employment Appeals Tribunal and Bohemians Football club being a decision of Mr. Justice Barrett delivered on the 30th day of May 2014
http://www.courts.ie/judgements.nsf/09859e7a3f34669680256ef3004a27df/e866b0d5b3

The key issue in that case was whether a dismissal notice was validly filed with the Employment Appeals Tribunal.

The facts of the case are that Mr. Brady was employed by Bohemian Football Club Limited. On 16 December 2011 he was dismissed. He asked when his dismissal was effective and he was informed “now”. No written notice of dismissal was provided. No P45 was ever provided despite it being requested. An Unfair Dismissal claim was completed, dated 22 December 2011 and lodged on 23 December 2011. The date of termination on the EAT form was 16 December 2011.

Subsequently, a Form T2 setting out the grounds of the defence was received on 12th March 2012. This made no reference to any alleged jurisdictional issue. The case came on for hearing on 3rd May 2013.

At that time the employer for the first time raised the issue that the Unfair Dismissal claim was out of time as it was received by the EAT before the dismissal took place when an alleged two weeks notice period was taken into account. The EAT dismissed the claim.

The Court considered the issue of estoppel. The Court stated;

"In the present case Bohemian Football Club gave the clearest indication to Mr. Brady that the termination of his employment had immediate effect from the moment it was advised to him". His Honour pointed out that;

"Prescribed time periods are typically intended to thwart the tardy, not punish the prompt". His Honour went on to state;

"the second, is the long standing principle of equity, good since at least the time of Smith –v- Clay (1761) that equity aids the vigilant not the indolent". He went on to state;

"The third is the practical issue of whether a person here in the Employment Appeals Tribunal, can be said to have received notice within a prescribed period. If it had notice, immediately prior to at the commencement of, and, throughout that period".

His Honour went on to state;

"It seems to the Court that in the particular circumstances of this case it would be absurd to hold that where the Employment Appeals Tribunal had notice of the claim at the commencement of, and, throughout, the six month period, that Mr. Brady should be denied the opportunity to bring his claim because the Tribunal, through no fault of Mr. Brady, may also have had notice of the claim immediately prior to the applicable six month period".

The Court held that no violence was done to the language of the Act.

The Court referred to a case of Matthews –v- Sandisk International Limited (UD331-2010) where a similar approach was taken.

The Court held that Mr. Brady had a right to bring his claim and so directed a new hearing before a new division of the EAT.

This issue had to go to the High Court. There is at the present time practical difficulties with employers failing to furnish P45's, failing to give written notifications of cessation of employment and failing to set out clearly the date of termination.

There has been recently, through one representative a procedure being applied to attempt to thwart claims under the Unfair Dismissal Legislation by having them issue too early. While this Decision does give assistance it does apply to the particular circumstances of this particular case.

There is however nothing to stop an employee if they get their claim in quickly if there is any issue of potential that they have not received the proper notice or any issue relating to the notice which they received to lodge subsequently a further identical claim and request that the two matters be amalgamated together which will cure any defect. The Decision of the High Court is extremely interesting on its own facts and for the rationale adopted by the Court in addressing the problem and in bringing justice to the particular circumstances of the particular case.

Rights of mothers who are breastfeeding

An employee who is breastfeeding and to whom Section 15 (B) of the Maternity Protection Act 1994 applies is entitled, without loss of pay, to take one hour off from her work each working day, as a breastfeeding break, which be taken as;

1. One break of 60 minutes
2. Two breaks of 30 minutes each
3. Three breaks of 20 minutes each, or,
4. In such other manner as to the number and duration of breaks as may be agreed by her and her employer.

The break may be accommodated for by reduced working time which is paid. Where an employer does not provide these entitlements to an employee an employee may bring a claim under the Maternity Protection Act by referring a dispute to a Rights Commissioner or the Employment Appeals Tribunal. Compensation not to exceed 20 weeks remuneration may be awarded.

What is the position where an employer refuses an employee the right to take these breaks?

The first answer which will spring to mind is that the employee brings a claim under the Maternity Protection Act 1994. Is there however a second option?

An employee who is breastfeeding has lactation needs. Lactation is a medical condition. It is a condition which relates to pregnancy. It is possible that an employee in such circumstances where she is not given the appropriate breaks could be deemed to be discriminated against under the Employment Equality legislation. If that is the position then the employee can claim compensation of up to 104 weeks remuneration.

This discussion arises because of the fact that Section 15 (B) of the Maternity Protection Act provides that an employee "shall" which is mandatory, be entitled without loss of pay, at the option of her employer to either;

a. Time off from her work for the purpose of breastfeeding in accordance with the Regulations as set out above or
b. A reduction in her working hours in accordance with the Regulations for the purposes of breastfeeding otherwise than in the workplace.

If lactation is a medical condition relating to pregnancy then failing to provide reasonable accommodation to a female worker who is lactating could possibly be deemed to be discrimination.

There would appear to be nothing in the legislation which would preclude an employee bringing a claim under the Maternity Protection Act 1994 and the Employment Equality legislation.

While the employee cannot recover twice this does not mean the employee could not recover under the Maternity Protection Act and still proceed with a claim under the Employment Equality Acts or win any award under the Employment Equality Acts being reduced by the compensation awarded, if any, under the Maternity Protection Acts.

With the current economic situation where employees may for financial reasons not be in a position to take additional maternity leave because of the fact that it is not covered under Social Welfare legislation many female employees may feel obliged to return to work earlier than they could have if additional unpaid maternity leave was taken. Therefore this could become an issue for employers. It will have to be addressed.

Dealing with Data Access requests

Data protection requests is an issue which often arises in the case of current and former employees. It applies to others also but this note is dealing with the issue between employers and employees. Every employee has a right to access their personal data. This right is under Section 4 of the Data Protection Acts 1988- 2003.

It is not just the employee's personnel file. It covers all information from which the requesting individual might be identified. This includes information on computer or kept manually. It can include emails, hand written notes, Doctors reports, accidents reports, CCTV, photos and even complaints against the party requesting same.

For employers dealing with access requests this can be a challenge for the organisation. There is no discovery procedure available to employees in employment law cases other than in the Circuit Court or High Court. In the other fora employees are increasingly using their right to access information under the Data Protection Act.

What must be done?

An employee must send in a request under Section 4 of the Data Protection Act. The employee should send the statutory fee of €6.35.

Time Limits

There is a limit of 40 days for completion of the request. Even if the €6.35 is not provided, the Data Controller, being the employer, should continue to process the access request in order to meet the 40 day timeframe.

Does the request relate only to employers or can it include advisors?

The information which is held by the Solicitor for an employer which is provided in the course of advising on potential employment law claims is privileged communication and cannot be obtained under a Data Protection request.

Many employers now use non legal firms to represent them before Employment Tribunals. The files of these entities are not protected as legally privileged. Communications from or to a Solicitor are legally privileged if they are in contemplation of proceedings but not to anybody else.

Verifying Identity

If there is any doubt as to the identity of the requesting officer this can be verified. Section 2 of the Act requires the data subject to provide the Data Controller with such information as is reasonably required to identify the requester. Employers cannot use this as a method of delaying processing a request. If a request comes in from an employee or through their Solicitor with a signed request by the employee it is not a matter for the employer or their non-legal representative to attempt to delay by challenging the identity of the requestor.

What should an employer do if they receive a request?

The first thing that is usually helpful is to write to the requesting party, being the employee, to ask what data they are actually looking for. This may mean that specific documents or information is being sought. If the employee has a Working Time claim it may be that they are looking for working time records. They may be satisfied if they receive same. If it is an Unfair Dismissal claim they may be looking for copies of the notes of any disciplinary hearing. By checking what information is actually required it can save an employer a considerable amount of time having to produce everything that is held manually and electronically. Having to print off all payslips and tax documentation on a payroll system because it is not checked as to what information is actually being looked for is a considerable cost in time and energy for employers which could have been avoided by simply clarifying the scope and complying with same.

Checking which documentation must be furnished

When a request is made and if the employee has not limited their request all personal data must be furnished. It is important that we would give an example as to what this could include. Sometimes it will be believed, wrongly, that a document may not belong to the employee. An example of this would be an email from a supervisor to a manager as to their view on the performance on a particular employee. This does constitute personal data of the employee. An employee is not entitled to a document where they are not personally identified from the document. If the employee can be identified from the document which will usually be because their name appears somewhere in the document then that is personal information which can be obtained.

Information about other parties

Section 4 (4) of the Acts sets out that a Data Controller, which will be the employer, will not be obliged to comply with an access request if that would result in disclosing data of other individuals. This is unless the other individuals have consented to the disclosure. However, the Data Controller is obliged to disclose so much of the information as can be supplied without identifying the other individuals. This will usually be done by redacting, by blocking out the names of the other individuals.

What happens if information is given in confidence?

Section 4 (A) of the Acts sets out that the employer would not be obliged to give any document where the opinion is given in confidence or it is on the understanding that it would be treated as confidential. This is not a broad exemption. This exemption has been very narrowly applied by the Data Protection Commissioner. In principle it only applies in cases where the opinion would not have been given but for the understanding that it was to be treated as confidential.

Simply marking a document confidential is not enough. The exemption normally will not cover references or reports given by managers about employees.

Depending who is giving the opinion it may or may not be privileged. An opinion by a Solicitor in respect of a claim under the Organisation of Working Time Act as to whether the employer was in breach of the Working Time Act would clearly be both legally privileged and confidential. A similar opinion given by a HR or IR consultant or a company that represents employers in employment cases may not have the same exemption. It may well be argued that the opinion would not have been given unless it was to be treated as confidential but that is difficult to argue as the opinion would probably have been requested and given in any event.

What exemptions apply?

Section 5 of the Acts sets out a number of exemptions.

Communications between an employer and their Solicitor is legally privileged.

Another example is medical reports which are obtained for the purposes of defending litigation proceedings. These will always be exempt. An example of a medical report which will not be exempt is a medical report which was obtained for an employment law purpose. This would include for example assessing fitness to return to work. This would apply even if litigation is ongoing.

It should always be noted that the fact that material may be evidence in litigation does not mean that it will automatically be legally privileged. A very common example of this is CCTV footage. What should be done where a request is obtained?

1. The first thing the employer should do is make sure that the request is dealt with within 40 days
2. The identity of the requestor being the employee should be confirmed. This is relatively easy to do as most employers will have some document signed by the employee and can compare the signatures.
3. The employer should request the fee but cannot delay processing pending receipt.
4. All information which is being sent to the employee should be copied and kept in a file.
5. A separate file should be kept with any information which is being withheld. This may become important if a complaint goes to the Data Protection Commissioner.
6. In sending the documentation to the employee a cover letter should be put in place. When responding there is a requirement under Section 4 (7) of the

Act to advise the person requesting the information that a complaint to the office of the Data Protection Commissioner can be made and which informs the employee of the categories of personal data being processed by the employer. If any exemptions are being relied upon in withholding personal data this should be stated in the letter.

Retaining Personal Data

Employers should be aware that information on employees should not be retained for longer than is necessary. For example, under the Organisation of Working Time Act employers are obliged to obtain records for a period of 2 years, therefore after that period of time employers need to consider whether this information should be retained and if not whether it should be destroyed. If employers retain information for longer than is required then they may find themselves in a position of having to provide substantial volumes of documentation simply because it has been retained for longer than is necessary. This may then enable the employee to require that documentation which should not have been retained to be destroyed.

What is coming down the tracks?

We are likely to see significant developments in Data Protection in the not too distant future. One of the changes is that the rights of individual employees to access their personal data will be made easier. There is a proposal that it must be complied with within a month. There is a proposal that there would be no fee for requesting the information.

What should an employer do if they believe the employee is simply putting in a request under the Data Protection Act to effectively annoy them or to create costs and expenses for them in processing a claim?

This is an argument which is often raised by employers in various employment forums where documentation has been requested under the Data Protection Act. Correspondence may often be sent by Solicitors claiming that the employee is involved in a “fishing expedition”. Documentation is often refused on this very basis. This is a very dangerous approach for an employer to take. An employee does not have to have a bona fide reason for requesting information. In an employment case they may well be involved in a “fishing expedition”.

Under the Data Protection legislation they are perfectly entitled to do so. Where the employer does not comply with the provisions of the Data Protection Act in particular Section 4 (7) where information is furnished but not everything is furnished in that the employer seeks to retain certain documentation but does not advise the employee accordingly. The employer runs a significant risk of a complaint to the Data Protection Commissioner. Where an employer simply copies the employee's personal file and sends it off and subsequently in an employment case produces other documentation the employee may well seek to have that case adjourned, furnish a complaint to the Data Protection Commissioner and require that all documentation is furnished. In addition the employer can find themselves in a situation of having to deal with the Data Protection Commissioners office on the basis that the employer did not comply with the Data protection Act.

Conclusion

The Data Protection Act is a significant piece of legislation for protecting individual's right to access information relating to them. It is particularly relevant to employees in Industrial Relations Disputes where they cannot avail of the normal discovery procedures that can be applied in the Courts.

We expect significant developments in this area of the coming years.

Data Protection Act – New Regulations S.I. 337/2004 and S.I. 338/2004 issued on 18th July 2014 by the Minister for Justice.

These Regulations came into place on 18th July 2014 under the provisions of the Data Protection Act.

Section 6 of the Act provides that a Data Controller must rectify, block or erase personal data that is collected, processed or otherwise dealt with in contravention with the Data Protection Act and to notify the data protection subject accordingly.

From 18th July the Data Controller must also notify any person to whom the personal data was disclosed during the preceding twelve months unless such notification proves impossible and involves a disproportionate effort.

Section 10 provides that a Data Controller must notify the data subject where the controller blocks, rectifies, erases, destroys or adds a statement to personal data in compliance with an enforcement notice issued by the Data Protection Commissioner. Following its commencement Section 7 (b) will require the Data Controller to also notify any person to whom the personal data was disclosed during the preceding twelve months on the same basis as set out above.

S.I. 338/2004 commences Section 5 (D) of the 2003 Act as it inserts subsection 913) of Section 4 of the Data Protection Act. This provision makes it unlawful for employees to require employees or applicants for employment to make an access request seeking copies of personal data which is then made available to the employer or prospective employer.

What does this mean in practice?

The first one we will deal with is S.I. 338/2004. It appears that some employers have been requesting prospective employees or employees during their probation period to make a request to their former employer under the Data Protection Act to obtain their personnel file and then to furnish it to their new employer / prospective employer. This is now illegal. S.I. 337/2014 will bring additional duties on Data Controllers to comply with the legislation and Data Controllers will need to be very careful of same.

Protected Disclosures Act 2014 – Protection for whistleblowers in Irish Law

The Act came into effect on 15th July 2014.

This legislation in Ireland represents best practice in line with international standards.

The Act brings into operation new obligations for employers. All public sector bodies now have to put in place a whistleblowing policy in line with the Act. For those in the private sector who have policies in place they need to review these to make sure they are in line with the Act.

The new legislation which was originally intended only to apply to public servants now applies to all employees. The legislation refers to “worker”.

This is widely defined. It includes all employees, contractors, trainees, agency staff; members of An Garda Siochana and the Defence Forces and of course all Public Servants. It also includes importantly former employees and also those seeking employment.

What is protected?

The legislation refers to "protected disclosure. This is stated to be "relevant information". It must be information in the reasonable belief of the worker which tends to show one or more relevant wrongdoings and which came to the attention of the worker in connection with their employment.

What is a "relevant wrongdoing"

There is a very extensive list of what includes "relevant wrongdoings". Some of the more common would be;

- An omission of an offence;
- A miscarriage of justice;
- Noncompliance with a legal obligation;
- Health and safety threats;
- Misuse of public monies, mismanagement by a public official;
- Damage to the environment; and
- Concealment or destruction of information relating to any of the forgoing.

Is the motive for making a disclosure relevant?

The simple answer to this is no. There is no requirement that the disclosure is made in good faith. However, there is a provision where if it is shown the disclosure is made other than in good faith compensation payable under the Act may be reduced by up to 50% where the disclosure of the wrong doing concerned was not the only or main reason for making the disclosure.

When does the Act apply from?

While the Act came into effect on the 15th July 2014 protected disclosures made before the Act came into effect may well be protected. The question is how far back can this go? As yet this has not been tested.

What are the steps in making a disclosure?

The Act encourages that the majority of disclosures will be made to the employer at first instance. The Act recognises that in certain circumstances this may be inappropriate or impossible.

The steps that are set out are;

1. Internal disclosure to an employer or other responsible person. Any worker may make a disclosure to their employer where the worker reasonably believes that the information shows or attempts to show wrongdoing. It also relates to a situation where the worker reasonably believes that the wrongdoing relates to the conduct of some person other than his or her employer or to something that some other person has legal responsibility. In such circumstances the disclosure can be made to that person;
2. Disclosure to a prescribed person. The Minister for Public Expenditure and Reform may prescribe a wide list of "prescribed persons". This could be a regulatory body;
3. Disclosure to a Minister. A worker employer in a public body may make a protected disclosure to the Department rather than to their employer;
4. Disclosure to a legal advisor. A disclosure made in the course of obtaining legal advice from a Barrister, Solicitor, Trade Union or other official of an excepted body is a protected disclosure; and
5. Disclosure to other persons and bodies.

There is provision for disclosure in other circumstances which would include disclosure potentially into the public domain such as the media. It must be noted that the standard for reporting is significantly higher. For this type of disclosure to be protected the worker must

(a) Reasonably believe that the information disclosed is substantially true;
(b) That the disclosure is not made for personal gain; and,
(c) The making of the disclosure is in all the circumstances reasonable.

In addition, one of more of the following conditions must be met;

- At the time of making the disclosure the worker reasonably believes that he/she will be subject to penalisation and detriment by his/her employer if the disclosure is made to the employer;
- In the case where there is no prescribed person in relation to the relevant wrong doing the worker reasonably believes that this evidence will be destroyed, or concealed if a disclosure is made to the employer;
- The worker has previously made a disclosure of substantially the same nature to either the employer or a prescribed person and no action was taken, and
- The relevant wrong doing is of an exceptionally serious nature.

These are very high standards to be met. Any worker considering making disclosures other than for the first four set out above would be advised to obtain legal advice. The worker must be very careful of making disclosures into the public domain.

<u>What happens where an employee makes a disclosure and what protections are there?</u>

The Act provides workers who make protective disclosures with specific protections. These include;

1. Protection from dismissal for having made a protected disclosure. It should be noted that compensation for up to 5 years remuneration for Unfair Dismissal on the grounds of having made a protective disclosure can be awarded. Normally the level of compensation is up to two years remuneration. This shows how seriously the legislation provides protection for the employee.

<u>Protection from penalization</u>

- Immunity for action for damages and a qualified privilege under defamation law;
- A right of action in tort where a whistle blower or a member of the workers family experiences coercion, intimidation, harassment or discrimination at the hands of a third party;

- Protection of the workers identity. There are exceptions to this; and
- It is not a criminal offence to make a whistleblowing report which is a protected disclosure under the Act.

Protecting the workers identity

The Act includes measures to protect the identity of any workers so as to treat disclosures confidentially. Again, there are exceptions to this set out in the legislation.

What does this legislation mean for employees?

It means that employees are protected who make protective disclosures. It is not however a license for employees to simply use the legislation to make unfounded allegation against their employer. The legislation is there for a purpose. It is there to protect the employees disclosing wrongdoing.

What should employers do?

Employers should put in place a whistleblowing policy.

It may well be asked why an employer should do so. There is a simple reason. If there is internal procedure which allows for whistleblowing to take place it minimises the potential of an employee feeling that they must go outside the organisation.

Any policy should as a minimum;

1. Set out that the organisation takes malpractice seriously.
2. It should be set out very clearly that whistleblowing concerns are distinguished from and different from workers grievances
3. It should set out a procedure for making disclosures
4. A Policy should provide examples of the types of concerns which may be raised by any worker.
5. In setting out this list the employer should have regard to the provisions of the Act as regards setting out what relevant wrong doings are.
6. The employer should acknowledge that any worker has the option to raise concerns outside line management.
7. The policy should set out that there are different evidential burdens in the Act which the worker must reach in deciding to make a

disclosure to the employer, relevant body or some external entity. It is useful to set these out.

8. Every policy should state that the employer will respect the identity and confidentiality of the whistleblower.
9. The policy should set out how concern should be properly raised outside the employer organisations.
10. Employers should ensure that the provisions of the policy are communicated.
11. Every employer should, monitor the effectiveness of the steps and make changes if required.

Of course employers will not like this new legislation. However it is better to plan properly than have a disclosure outside the organisation which otherwise could have been dealt with internally.

How will the Act operate in practice?

This is new legislation. There is the issue of international best practice. Saying this, we will have to wait and see how it operates in practice in Ireland. This will take some time.

For employees who believe wrongdoing has occurred, within their organisation this legislation provides significant protections. For employers it is important that they are aware of the Act and their obligations under the legislation.

This is an area of law where there will be significant developments in the coming years.

Time Limit for bringing Payment of Wages Act cases

There has been a considerable amount of discussion and conflicting decisions from both Rights Commissioners and the Employment Appeals Tribunal as to the position relating to the time limit for bringing a complaint for non-payment of wages.

The cases all concern situations where there has been a deduction in the amount of wages paid. The cases all revolve around when the right of action accrues and the time limit for bringing a complaint.

Section 6 (4) of the Payment of Wages Act introduces a time limit for claims before Rights Commissioners. It provides;

"A Rights Commissioner shall not entertain a complaint under this section unless it is presented to him within the period of 6 months beginning on the date of the contravention to which the complaint relates….".

There are provisions for extending this for a further six months but they are not relevant to this particular issue.

In the case of the Health Service Executive and John McDermott being a Judgement of Mr. Justice Hogan delivered on 19th June 2014 www.courts.ie/judgements.nsf Mr. Justice Hogan stated that no special meaning has been ascribed to the word "contravention" so it must be given its ordinary and natural meaning.

His Honour pointed out that the actual language of the subsection is clear because the words "contravention to which the complaint relates" is critical. Mr. Justice Hogan held that the key question is the date of the contravention to which the complaint relates. Mr. Justice Hogan held that;

"In other words time runs for the purposes of the Act not from the date of any particular contravention or even the date of the first contravention but rather from the date of the contravention to which the complaint relates".

His Honour went on to state;

"As the EAT pointed out in its ruling on the matter, had the Oireachtas intended that time was to run from the date of the first contravention it could easily have so provided".

His Honour went on in paragraph 16 to give an example where;

"It follows, therefore, that if an employer had been making a deduction from the monthly salary of the employee since January 2010, a complaint which relates to deductions from January 2014 onwards and which is presented to a Rights Commissioner in June 2014 would still be in time for the purposes of S.6(4)".

His Honour did refer to the case of Moran –v- Employment Appeals Tribunal [2014] IHC154. As Mr. Justice Hogan pointed out in that case while the parties canvassed many of the arguments which featured in the appeal before Mr. Justice Hogan, in the Moran case Mr. Justice Keane did not find it necessary to rule on these arguments. This as his Honour Mr. Justice Hogan pointed out was because the complaint was formulated by the claim in that case related to a time period of alleged contraventions which was plainly time barred.

The Decision of Mr. Justice Hogan (and Mr Justice Keane) makes absolute common sense.

If any other construction was placed on the legislation the effect of it would be that once an employer made a deduction that the employees would only have a right to claim effectively for the first six months of any such deduction. Once the six months had elapsed the employer would be free from any restraint and could continue with the deductions forever.

What is interesting in this case is that the Court has held that the manner in which the claim is formulated is going to have a significant bearing on whether the claim was stature barred or not. It would therefore appear important to limit the claim to the period of six months prior to the date of the complaint. It is clear the decision of Mr. Justice Hogan is not at variance with that of Mr. Justice Keane in the case of Moran –v- Employment Appeals Tribunal referred to previously as in that case Mr. Justice Keane stated;

“Then it is open to him to present a complaint to a Rights Commissioner relating to any alleged deduction in the wages paid to him on any specified date (or dates) within the period of six months beginning on the date of the first payment”.

Also in that case it is clear that the arguments made before the Rights Commissioner and the Employment Appeals Tribunal were not argued in the High Court. Because of the wording of the Payment of Wages Act which relates to complaints issuing to a Rights Commissioner the complaint form refers to the fact that the employee was subject to unlawful deductions. It doesn’t specify a time limit.

It just specifies that the employee sets out particulars of the claim, it is sufficient for an employee to state "I was subjected to unlawful deductions". It therefore appears important that before a Rights Commissioner or the Employment Appeals Tribunal that the employee bringing such a claim limits the claim to a period of 6 months prior to the date of lodging the claim. The employee can of course make an argument that the six months will be extended back for a further period of six months due to exceptional circumstances. That would however still bring any complaint even if it is not upheld by the Rights Commissioner or the EAT to bring a complaint as regards the period of six months immediately preceding the complaint being lodged with the Rights Commissioner as being a valid complaint.

This decision has certainly brought clarity to this area which is to be welcomed. The decision of Mr. Justice Keane was being misrepresented by some representatives with selected interpretations of that decision. The decision of Mr. Justice Hogan should restrict such misquoting going forward.

A Salesperson's holiday pay cannot be limited to their basic salary.

In Case C-539-12 which issued on 12th May in a case of Lock –v- British Gas Trading Limited the ECJ had to consider the issue of how holiday pay was calculated for a salesperson. This decision will apply to any individual who received commission.

The Working Time Directive provides that every worker has a right to paid annual leave of at least 4 weeks. In this case the employee had been employed by British Gas as a consultant. His remuneration package had two main elements. He had a basic salary and commission. The commission was payable on a monthly basis in arrears. The UK Employment Tribunal referred a case to the Court of Justice asking whether the commission which a worker would have earned during his annual leave must be taken into account in calculating his holiday pay and how must it be calculated.

In the Judgement the Court pointed out that during annul leave a worker must receive their normal remuneration. They stated that the purpose of holiday pay is to put the worker during that period of rest in a situation which, as regards the employee's salary, was comparable to periods of work.

The company argued that the objective was achieved as the employee received during his annual leave a salary including not only his basic salary but also the commission resulting from sales achieved during previous weeks. The Court rejected that argument. The Court took the view that notwithstanding the payment received by the employee during his annual leave, the financial disadvantage which, although referred, is none the less genuinely suffered by the employee during the period following leave, may deter the employee from exercising the right to annual leave.

The Court held that as the worker did not generate any commission during the period of annual leave that the consequence of this is that in the period following the annual leave the worker is only paid their basic salary. The Court therefore found that such a reduction in holiday pay is liable to deter the worker from actually exercising their right to take annual leave. They held that this was contrary to the objectives pursued by the Working Time Directive.

The Court held that it would be necessary for the worker to have their pay, during the period of annual leave, determined in such a way as to correspond to the normal remuneration received by the worker.

The issue is how is this going to operate in practice.

Possibly an example might best explain the situation.

Example

Employee A received four weeks holidays.

Employee A therefore works for 11 months in the year and has one month off. Employee A therefore ears €11,000 commission in the year.

As Employee A would normally earn €1000 commission in a month for the period of time that the employee takes holidays effectively the Court has held that the commission he would have earned during the period must be included in holiday pay.

What does this mean in practice?

This means in practice that instead of Employee A receiving commission, during the year or €11,000, Employee A will receive commission of €12,000. The reason for this is so that in the month following the leave, Employee A will not be in a position that he received no commission payment.

The result for the employee.

The result for employees who are on commission is that effectively they will receive 1-13th (as there are 52 weeks in the year) additional commission.

The result for employers is that additional commission is going to have to be paid.

Conclusion

This decision only issued on 22nd May.

How it is going to be applied here in Ireland has yet to be determined by the Labour Court. Saying this, it would appear that this most recent ruling of the European Court of Justice is going to create a significant additional cost for employers who pay commission.

Employers who pay commission need to review this decision immediately. Failure to do so could result in claims being brought to Court. It could be extremely expensive for them.

This Court decision will affect not only sales persons but anybody who earns commission. The practical implication of this decision in Ireland will have to be seen and we await a decision from the Labour Court. In the meantime, employers need to be careful and take advice about the effect of this decision.

The press release relating to this decision is available on http://cusia.europa.eu/jcms/upload/doc/application/pdf/2012-ot/cp14007en.pdf

Right to Holiday Pay Survives Death

EU Law does not regulate inheritance law for each Member State.

The European Court of Justice has now ruled, at least as regards the right to annual leave, persuant to the Working Time Directive that employment law rights can be inherited. Article 7 (1) of the Working Time Directive states that every worker is entitled to at least four weeks' paid leave in accordance with national conditions for entitlement.

Article 7 (2) states that this minimum period may not be replaced by an allowance except when the employment relationship is terminated. Previous Judgements such as the case of Schultz –Hoff and Stringer established that where workers cannot take their annual leave due to sickness, the right to four weeks paid leave accrued persuant to the directive had to be carried over.

In the Bollacke Judgement the worker died after a long sickness. When he died 140 days' leave were due to him and his wife, his sole heir, claimed she had inherited this entitlement. The Court ruled in her favour. The Judgement could have consequences for the interpretation of other EU Employment Law rights. The reasoning would appear to apply equally to back pay due pursuant to the Directive on Insolvent Employers and to compensation relating to any breach of other EU Health and Safety Legislation.

The case is unlikely to have widespread implications but it is interesting for the approach the Court is taking to these issues.

What is a Sunday Premium?

Section 14 of the Organisation of Working Time Act provides that an employee who is required to work on a Sunday must be compensated. There are four methods of compensation being;

a. By the payment of an allowance of such amount as is reasonable, or,
b. Increasing the employees rate of pay, or,
c. Granting the employee paid time off, or,
d. A combination of two or more of the other three means.

It has always been assumed that where an employee has to work on Sunday that if they are receiving a Sunday premium that it will be a monetary amount. This matter however was never subject to any litigation between parties. In the case of Hyper Trust Limited trading as the Leopardstown Inn and Igors Gordins who was represented by this office this issue came on for hearing.

It was common case that the employee was required to work on Sunday. The employee complained that this was not taken into account in determining his pay and that he was not compensated by his employer for being required to work on Sundays. The employer argued that as the employee was required to work on Sundays he had access to free meals on each day on which he worked and was thereby paid an allowance in respect of the work he performed on Sunday.

The employer argued that the meals had a value and must therefore be considered an allowance for the purposes of the Act. The Court held;

"The wording of the Act is clear. It requires the payment of a sum of money either by way of an allowance or by way of an increase in pay, or by the granting of additional paid time off. It does not provide for the provision of access to a benefit in kind determined by the employer as a substitute for the payment or an increase in pay or the payment of an allowance or additional paid time off".

The Court awarded the employee in respect of this portion of his claim the sum of €2,000.

We are not aware of any previous case where the issue of a Sunday Premium as regards whether it could be a benefit in kind or whether it had to be a payment of a monetary amount had been found before the Labour Court. This issue has now been determined by the Labour Court in a substantial Decision which has set out the law and the practice which must be applied. The case reference is DWT1467. In this case this office represented the employee. We found this case an interesting case for the technical legal argument which had to be dealt with before the Labour Court. What might otherwise appear as self-evident and one where it would have been expected that the issue would have been addressed in the past it became evident that there was no jurisprudence in the Labour Court as regards decided cases on this particular point. The matter has now been determined.

For employers who are employing employees to work on Sundays it is important that the Sunday premium issue is addressed. Assuming that a free meal or some other benefit in kind is going to be sufficient to comply with the Sunday premium issue would be a mistake which can be costly.

In a subsequent case of Ireland's Eye Seafood's Ltd and Yulianna Brekhlichuk DWT 1469 the employer argued that within the retail industry persons would be employed on €8.65 per hour and as the employee was paid €9.50 per hour this rate would "reasonably incorporate a premium". The Labour Court rejected this argument. This office is currently seeing some very imaginative arguments relating to Sunday premiums. However the argument of anything over €8.65 per hour incorporating a premium seems to have become very popular.

Organisation of Working Time Act

In the case of Irish Museum of Modern Art and Joe Stanley the Court had to consider the issue of what is the holiday year for the purposes of the Organisation of Working Time Act.

The Court held that the leave year for the purposes of the Act runs from 1st April and ends on 31st March in the following year. In this case the Court said;

"It is clear from the Decision of the High Court in Royal Liver Assurance Limited –v- Macken [2002] 4 I.R. 427 that a cause of action accrues in respect of a failure to afford and employee annual leave during a leave year at the end of the leave year in which the leave relates. The Act provides that a leave year commences on 1 April and ends on 31 March of the following year".

The Court held that as the complaint was lodged on 8th April 2013 the contravention of the Act in particular Section 19 is in respect of the full leave year in which the time limit is actionable.

The Court went on to hold as regards public holidays that claims in respect of public holiday entitlements accrue as and when they arise. The Court stated;

"In Royal Liver Assurance Limited –v- Macken, Lavan J held, in effect, that in the case of public holidays a separate cause of action arising from the failure to comply with Section 21 of the act accrues on the date of each public holiday to which the contravention relates".

This case is important for again restating the issue relating to the annual leave year.

Many companies operate on an Annual Leave year from 1st January to 31st December. Unfortunately this is not in compliance with the Act. This office has made representations to the Minister seeking to have the legislation changed. In the UK employers can specify a leave year and it is only where there is a failure to do so that the statutory leave year applies. There is every reason why a similar situation should be considered here in Ireland.

The new French rules on working hours

In April it was widely reported in the media that the French Government was introducing legislation which would prohibit employees from having to deal with phone calls or emails after 6pm.

Within hours this had gone viral. The French Minister for the Digital Economy was forced to go public. The new rules are contained within a sector specific labour agreement. They only affect about 250,000 in the high-tech and consulting fields and there is no mention of a 6pm cut off.

The debate however does open up the issue as to whether dealing with email or telephone calls or doing other type of work after hours might in certain circumstances put an employer at risk of breaching the law.
Our Organisation of Working Time Act www.irishstatutebook.ie /1997/en/act/pub/0020/ derives from the Working Time Directive. The Working Time Legislation is a piece of Health and Safety Legislation designed to protect the Health and Safety of Workers. It is critical for employers to keep this area of compliance under review. The reason for this is that employers who offend under the legislation may be prosecuted and fined and further may be subject to proceedings by an employee. If employees constantly work excessive hours to the knowledge of their employer and if they suffer illness as a result of it they may well also have a personal injury claim against the employer. Many HR professionals will be familiar with the general effect of the Working Time Legislation restricting most categories of workers to 48 hours work each week on average along with the requirement that the employee receive 11 hours uninterrupted breaks between finishing work and starting work the next day. They will also be familiar with the requirement that an employee receive two weeks uninterrupted leave during the leave year.

It is therefore important for employers to continually monitor working hours carefully so that they do not fall foul of the law in this area. Many will be able to comply with this by relying on payroll records where the employee is paid by the hour however the administrative burden increases for salary workers whose hours are not routinely recorded and for flexible workers where hours may vary.

Where employees are working outside of core hours taking telephone calls or answering emails there is always the potential of the 48 hour working week being breached. In addition, there is the potential of the 11 hour uninterrupted break being breached. The normal defence that is put forward in such circumstances is that the employee is at a level where they determine their own hours. This will depend on the particular circumstances of each particular case and is not a carte blanche defence.

A more difficult problem arises in relation to annual leave. Where the employee goes on annual leave, and they are at a management level, it is more normal than not that they would bring their laptop or at least their mobile phone with them and might be phoned by the office during their holidays. Where an employee, on holidays, is being phoned by the employer or by somebody in the firm and in particular if they are phoned by their manager they may well have a claim that their holiday entitlements had been breached. There is no exemption for contending that they are setting their own hours for that particular breach. In theory, although not in practice, there is nothing to stop a senior manager leaving their company mobile phone and laptop in the office when they go on holidays.

While the specific provisions of the French Labour Agreement in terms of the restriction on emails and telephone calls during rest breaks are unlikely to be introduced in Ireland this new law, in France, does serve as a timely reminder to HR Professionals to remain vigilant as regards working hours and rest breaks and also holiday entitlements.

It is very easy to overlook the Working Time Legislation where an employee's hours have increased over time.

Good monitoring and record keeping systems are the key to avoiding serious consequences for noncompliance. It is worth remembering that if an employee has to bring their laptop / mobile phone on holidays or is phoned or emailed by the employer especially while on holidays the employee can claim they did not get their holiday entitlements. This can be a significant claim. A successful claim might not only result in an award against an employer but also the potential for a NERA inspection. NERA do monitor decisions to identify non-compliant employers.

National Minimum Wage

In Ireland the National Minimum Wage Legislation is effectively policed by NERA. In the UK the relevant regulatory authority is the UK Revenue. This may seem strange. It is not. The Revenue in the UK and here has specific expertise. They have expertise in dealing with Income Tax. They understand the rules relating to same. They understand the calculation of wages. They understand what portion of a payment is taxable and what portion is not taxable. They are trained to review records. They know how to read the records. Where there is an underpayment of National Minimum Wage there is invariably an underpayment of Tax, USC and employers PRSI. There is therefore a strong incentive for the Revenue to properly investigate non-payment of National Minimum Wage. In the UK currently employers can face a fine of £20k irrespective of the number of employees. The UK Government has recently announced in the Queen's speech that their legislation will be amended so as to provide for penalties of up to €20k per employee where a breach is found. This has to be looked at in light of the level of the National Minimum Wage in the UK which is £6.31. In the UK the business Minister Jenny Willott stated that paying employees less than the minimum wage was not only wrong but illegal. She stated;

"If employers break the law they need to know that they will face tough consequences. Any worker who is entitled to the Minimum Wage should receive it".

In the UK the Revenue list those employers who pay less than the National Minimum Wage. They set out how much was underpaid and to how many workers. As part of the new Workplace Relations procedures to be brought into play by the Minister there is a strong argument that the Irish Revenue should have a significant role to play. National Minimum Wage cheats undermine legitimate businesses in the State. Businesses that pay the National Minimum Wage are put at a financial disadvantage by competitors who flout the law. Rather than having a situation where NERA has to bring a prosecution to the Courts it would be more beneficial and probably a greater deterrent if Revenue could enforce fines. The provisions are there under the Tax Legislation.

Where claims for non-payment of the National Minimum Wage come before a Rights Commissioner currently or an Adjudicator into the future or to the Labour Court and are upheld there is an argument that there should be an automatic reporting. Equally in Ireland where such cases do arise an Adjudicator or the Labour Court should be able to request the Revenue to undertake an audit in respect of the employee who has brought a claim and if the claim is upheld in those circumstances the Revenue would then automatically implement an audit on the employer for all other workers in the preceding six years. From a review of the published Decisions of the Labour Court, and NERA's annual reports, it is clear that the vast majority of individuals who are not paid the National Minimum Wage are non-Irish nationals. Some of the worst abuses occur in respect of those who are non EU citizens.

There does need to be serious consequences for an employer who fails to pay the National Minimum Wage. As it is in claims before a Rights Commissioner or the Labour Court the most that can be done is that the employee is awarded the wages due to them. There is no provision for compensation to be awarded against the employer to act as a deterrent to the employer.

Yes "out of pocket" expenses can be awarded but that is a pittance and will never be a deterrent.

Zero Hour Contracts / Zero Hour Contract Abusers / UK Government Reaction

On 25th June the Business Secretary, in the UK, Mr. Vince Cable announced plans to ban exclusivity clauses in zero hour contracts.

Employees on zero hour contracts will have the freedom to find and work for more than one employer in the UK. Exclusivity clauses prevent an individual from working for another employer even where no work is guaranteed.

In the UK is has been argued that exclusivity clauses in Zero Hour Contracts undermine choice and flexibility for the individuals concerned.

There is a place for Zero Hour Contracts in the Labour Market. They are for valuable flexible working opportunities for students, older people and other people looking to top up their income and find work that suits their personal circumstances.

In the UK they have found that it has become clear that some unscrupulous employers abuse the flexibility that these contracts offer to the detriment of their workers.

The UK is banning the use of exclusivity clauses in zero hour contracts. There is a strong argument that they should also be banned here in Ireland. The UK is going to look at ways to prevent rogue employers avoiding the exclusivity ban. One of the easy ways of doing this is offering one hour fixed contracts. This has been identified. It is a prevalent abuse of the system. In the UK they are going to work with business representatives and Unions to develop a Code of Practice on the fair use of zero hour contracts by the end of 2014. The UK is also going to work with various stakeholders to review existing guidance and improve information available to employers and employees on the use of these contracts.

Mr. Tim Thomas, the Head of the Employment Policy at EEF the Manufacturers Organisation said;

“The way forward set out in the Small Business, Enterprise and Employment Bill (UK) treads a fine line between supporting the majority of workers who want to continue to work on their zero hour contracts and limiting their use where they are neither necessary nor appropriate”

In the UK a review was conducted in August 2013. It identified two clear concerns namely;

1. The use of exclusivity clauses which leave employees tied exclusively to one employer even if there is little or no work available; and
2. The lack of transparency and information in the employment contract which leaves individuals unaware of their rights.

In the UK an estimate is that about 125,000 workers are covered by exclusivity clauses. This derived from a CIPD employer survey on the use of zero hour contracts which estimated that 9% had exclusivity clauses. In the UK there are approximately 1.4 million such contracts with no guaranteed hours. Combining these two pieces of information suggests there are about 125,000 contracts with exclusivity clauses.

In the UK, as in Ireland, there is a strong argument that zero hour contracts can be appropriate at times.

However, in making the labour market more flexible and efficient there must also be fairness. While Zero Hour Contracts have a role and are generally used by employers correctly and in good faith, there are some employers who can be classified as effectively “rogue employers” who abuse zero hour contracts. At the present time we have no legislation which bans exclusivity provisions. We have no Code of Practice on the fair use of zero hour contracts. We have no procedures for limiting their use where they are neither necessary nor appropriate.

Hopefully the Department of Jobs, Enterprise and Innovation will look at the developments that are occurring in the UK and consider whether their legislation and the way they are moving forward may be also appropriate for this jurisdiction.

Business’ need to have flexible workings. That is a given. Saying this, that flexibility must also recognise that with it comes obligations and one of those must be that zero hour contracts are not abused and are only appropriate and allowed to be used where it is reasonable and necessary. We do not need a situation in Ireland where we have rogue employers using zero hour contracts, which undermine legitimate businesses attempting to be fair and reasonable to their employers, and/or, are designed to be effectively abusive of employees.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Use of mobile phones while driving

Earlier this year the law in this country changed as regards holding a mobile phone while driving or texting.

For employers it is important to have in place a mobile phone policy particularly for workers who are mobile.

The starting point is a risk assessment.

You either provide hand free sets or you have vehicles with hand free facilities. Having a cradle for the phone is not sufficient.

If you do not provide hand free sets in vehicles then effectively you have two choices. The first is that you require the employee to put in a hands free set. This is probably impracticable as it would not be a condition of their employment.

The second is that you direct that they either turn off the mobile phone when driving or if they receive a mobile call that they pull in, off the road, when it is safe to do so and return the call.

If you do not put in a policy to cover such situations effectively the employee is left in a situation where the employee has no choice but to simply either turn off the phone or just not answer it. As an employer there will be no opportunity to complain about the employee not taking a phone call when they were driving if the employer does not provide hand free kits.

If you provide hand free kits then it is important to provide that the employee shall not phone when driving and shall not text while driving. Modern technology provides a great ability to be in contact with employees when they are out of the office. It is however also a distraction to individuals when they are driving. There is clearly a cost for employers to put in hand free kits into vehicles if the vehicles are not already set up for a hands free facility. It is therefore necessary to look at which employees require hand free kits and which do not. It is then necessary to structure matters around the use of mobile phones when driving.

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Claims for damages for assault involving claims for wrongfully sexually assaulting and abusing an employee

Normally in personal injury claims where a person has suffered either physical or emotional suffering, before a claim can issue it must be referred to the Injuries Board. In the case of PR and KC Legal Personal Representatives of the Estate of MC Deceased http://www.courts.ie/Judgements.nsf/0/C9844DFAE5FCC4BD80257CA90057A9CF being a judgement of Ms. Justice Baker delivered on 11th March 2014 the High Court held that a claim for damages for assault allegedly carried out by the defendant and the plea being that the defendant wrongfully sexually assaulted and abused the plaintiff is the primary cause of action. The Court held that where the plaintiff sought damages for assault and for battery and for trespass to the person and the intentional infliction of emotional suffering and breach of the plaintiff's constitutional rights to bodily integrity.

The Court concluded that the substance of the action commenced is not a civil action for personal injuries. The Court held it is an action by which a plaintiff seeks to vindicate personal and constitutional rights to bodily integrity. The Court held that it is an action which is founded on Tort which is actionable without proof of actual damage or injury. The Court held that the claim is excluded from the operation of the Act of 2003 by Section 4 (1) (iii) and in such circumstances the claim is not one where prior authorisation by the Injuries Board was required.

Discrimination arising from pre-employment medicals

Many employers will offer potential employees a position subject to a "satisfactory medical". The problems arise where a medical is not satisfactory for an employer. The employer is then faced with a decision to make. Where a potential employee is not offered a position, and the employer relies on a medical as the reason for not giving that person the position, this may be deemed to amount to discrimination on the grounds of disability.

There are legitimate reasons for having pre-employment medicals. They can be very important. If the employee is going to be involved in a safety critical role a satisfactory medical may be a very valid reason. All employers must design a safe system of work and identify risks as they relate to a particular employee. For example is somebody applies for a job as a crane operator and a medical discloses a fear of heights this would be a relevant issue. Pre-employment medicals may be very important to deal with subsequent personal injury proceedings particularly where a medical discloses a prior medical history such as a pre-existing back problem. Saying this, the fact that an employer does not receive a medical which is satisfactory to the employer does not mean that the employer can refuse employment. Just because somebody has a mobility issue does not mean they can be refused a job as a receptionist if it is a static job by which they mean they remain at reception.

The Equality Tribunal and the Labour Court have considered this issue.

What is the Law on this area?

Section 8 of the Employment Equality Acts 1988 -2012 requires an employer not to discriminate against an employee in relation to access to employment. The reality is that where a potential employee is requested to attend a pre-employment medical effectively an offer of employment has been made. Therefore if a medical is received which is not satisfactory it is not a decision not to offer the position. It is effectively a decision to withdraw the offer.

Employers must be aware that where disability is very broadly interpreted by the Equality Tribunal and the Labour Court withdrawing an offer of employment on the basis of a medical report which is not satisfactory to the employer may well result in a claim for disability discrimination. By virtue of Section 16 of the legislation an employer must provide reasonable accommodation to persons with a disability. Section 16 of the Act also provides that it is a complete defence to a claim for discrimination on a disability ground if it can be shown that the pre-employment medical formed part of a bona fide belief that the potential employee was not capable of performing the duties for which he or she had been employed. Reasonable accommodation can only be satisfied where some form of assessment has been undertaken to determine whether reasonable accommodation can be provided at all. The Equality Tribunal have found that the use of pre-employment medicals or questionnaires is not unlawful by their very nature.

However, employers need to exercise care when using information obtained. It is important, following case law, for employers to make sure that they do not rush to a decision if necessary medical assessments should be checked and further opinions sought if an issue of the employee's suitability for the role is not clearly set out or if the issue of reasonable accommodation has to be considered.

The practice of requiring potential employees or those who have recently been hired to attend for a medical assessment is good practice. It is well established. There is good reason for having this practice. Saying this, where an assessment gives rise to a cause of concern an employer needs to proceed with caution. There should be no rush to withdraw the offer of employment or to terminate the employment. An employer should consider the obligations under the Employment Equality legislation carefully.

An employer must consider whether reasonable accommodation can be made available to the employee or potential employee. The fact that there may be a cost for the employer in doing so is not a reason unless the cost would be unreasonable namely expensive. What would be an unreasonable cost for a small shop may well be reasonable for a large company. Before an employer withdraws an offer of employment or terminates the employment the employer will need to have medical evidence which supports the conclusion that the employee is not fit to undertake the work. In addition the employer must have satisfied themselves that reasonable accommodation could not be provided. The employer must be in a position to prove that they had medical evidence which supports their decision and that the decision that reasonable accommodation could not be provided was based on sound rational grounds which can be objectively proved.

Where an employer has to terminate the employment or refuse the employment the employer will be in a far better position to explain matters to the relevant individual in a clear, precise and rational basis. They will also be in a far better position to defend a claim for discrimination.

Where the medical report discloses medical history which is not a bar to the employee taking up the employment or where the employer can make reasonable accommodation for that medical problem, the offer should never be withdrawn as the employer is very likely to be sued.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Bullying and Harassment

In the case of Una Ruffley and the Board of Management St. Anne's School [2014] IEHC 235 was a Judgement of Mr. Justice O'Neill which issued on 9th May.

In this case the Court awarded general damaged of €115,000 and loss of earnings of €93,276.39.

The case is very interesting in resetting out the law on the issue of workplace bullying. The Court stated;

"Workplace bullying is defined in paragraph 5 of the Industrial Relations Act 1990 (Code of Practice) detailing procedures for addressing bullying in the workplace (Declaration) Order 2002 SI No. 17/2002 as follows;

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

The Court went on to state;

In Quigley –v- Complex Tooling and Moulding Limited [2009] 1 I.R. at 349 it was held by the Supreme Court that for conduct to amount to bullying it had to be repeated, inappropriate and undermining of the dignity of the employee at work.

Furthermore in his judgement, Fennelly J said;

"The Plaintiff cannot succeed in his claim unless he also proves that he suffered damage amounting to personal injury as a result of his employer's breach of duty. Where the personal Injury is not of a direct physical kind it must amount to an identifiable psychiatric injury".

The recent case is important in restating what the law on this complex area is.

Keeping Up Appearances – After the Eurovision Song Contest

The victory of Conchita Wurst in this year's Eurovision Song Contest http://www.eurovision.tv/page/timeline is still news.

What would happen if a male employee was to turn up to work in the same type of attire as Conchita? By this we mean wearing tailored dress and heels. Having long flowing hair and sporting a beard. How would most employers respond?

The factual situation is that if a female worker arrived in work wearing trousers a shirt and tie, with no make-up and flat shoes most employers would not even consider sending her home or directing her to come back more suitably dressed to the office.

Some might consider that a dress code would be of assistance. It is unlikely to be. Most dress codes will specify broadly conventional attire. If somebody dressed like Conchita that individual will probably not have contravened the code. They will be wearing a tailored dress. It would be entirely appropriate to a professional environment. The hair is clean. It is tidy. However the beard suggests that she is male.

It is unlawful to discriminate, victimise or harrass a person who is proposing to undergo or is undergoing or has undergone a process or part of a process for the purposes of reassigning that person's sex. It is unlawful equally to discriminate victimise or harass a person because of their sexual orientation. The issue is however does our legislation protect transvestites or cross dressers. An individual wishing to undergo gender reassignment will generally have to satisfy a life test which requires them to live in their non-birth gender which will generally be for a year before undergoing surgery. However transgender people may choose for a variety of reasons not to have surgery at all.

It will be very difficult for an employer to distinguish between an employee who has made a commitment and one who merely enjoys cross dressing.

Simply assuming that a beard / dress combination indicates a cross dresser rather than transgender may be a risky assumption. It may well be appropriate for informed, sensitive and open ended enquiries being made.

Is it possible for a corporate dress code to help inform such discussions?

It is vitally important, where a dress code is in place, that it imposes similar standards on men and women. The inconsistent application of standards to one gender could lead to a claim of direct sexual discrimination. In the UK for example an employer who required a male barman to wear a waistcoat on a hot day but let the female bar staff remove their waistcoat lost a discrimination claim. It is probable that a similar outcome would arise in Ireland.

We do not have any real decisions on this issue here in Ireland. In the UK in 1996 the Court of Appeal held that dress codes that apply an even handed approach between men and women are not discriminatory. In Smyth –v – Safeway plc [1996] IRLR456 a rule which would have a different context for men and women is not necessarily discriminatory. If those rules impose a common requirement for smartness and conventional attire.

The Eurovision Song Contest in 2014 has certainly demonstrated that social mores surrounding these issues are constantly evolving. Both Courts and Tribunals may not necessarily apply the same standards and assumptions as may have been applied in the past. An alternative response to Conchita scenario might be to live and let live and take no action. It is possible that clients may be less alarmed than would be thought. An employer might even get cudo's from many for being progressive and tolerant. It is probably over the coming years that there is going to be a seismic shift in what is acceptable and non-acceptable attire in the workplace. There is nothing to stop an employer insisting on having conservative attire provided it is applied in a non-discriminatory fashion.

Having a dress code tailored to your business requirements is a useful exercise for employers. If you run a firm providing professional services such as accounting services or a retail outlet "business attire" or a uniform may be necessary.

Without a dress code in the terms of employment an employer may have difficulties requiring an employee to "dress" as the employer may want them to.

The lack of interaction between Regulatory requirements and Employment Law – Challenges for employers

In Ireland, as in the rest of Europe, some companies are highly regulated. They are in regulated sectors. It is a sad fact that increasingly they face contradictory requirements by regulatory authorities and under employment law.

For example, the Capital Requirement Directive which relates to rules for Banks, Building Societies and other financial organisations have a provision which requires a clawback of variable remuneration in a case of subsequent misbehaviour. The German Federal Labour Court does not allow the forfeiture or even clawback of remuneration based on events which occur after a bonus year. It is hard to see here in Ireland how the provision of the Payment of Wages Act would allow a clawback of variable remuneration in the case of subsequent misbehaviour by an employee.

The New York Stock Exchange sometimes requests monitoring of phone calls from employees. This is to ensure compliance with embargo provisions. Our Data Protection and privacy laws would forbid monitoring of phone calls without notification to the employee. An example might show the difficulties which employers have. Deutsche Bank dismissed some employees who had manipulated the EURIBOR. The German Labour Court ordered reinstatement to their previous positions. The German Regulator issued an Order directing the bank not to allow these employees take up their previous positions.

<u>What is the solution?</u>

In the short term there is none.

<u>What is the problem?</u>

The problem is a lack of joined up thinking where the EU in particular takes no regard whatsoever of areas of employment law which are not covered by EU law. Because dismissal law is not covered by EU law the EU effectively takes no account of same in setting its rules relating to other regulatory sectors of the economy. National Governments themselves cannot avoid some responsibility.

If EU law is implemented in any Member State then there should be an issue of looking at how it will impact on other areas of rights and obligations in respect of employers and employees particularly.

Luckily these types of problems have not as yet arisen in Ireland. They will.

This is an area of law where some joined up thinking is required so that when regulatory provisions are enacted particularly those in a highly regulated sector such as the banking and financial services that due regard is had to employment legislation. This is simply fair to employers. It would be significantly unfair to an employer that they be subjected to an order reinstating an employee by a Tribunal when at the same time a regulator may direct them not to do so. While this will impact on a very small number of employees it can still have a significant financial implication for an employer. These will invariably be highly paid employees.

This is a lacuna in our employment legislation. It needs to be addressed.

Social Welfare and Pensions Act 2014

The legislation brings in a number of changes which are relevant for both employers and employees.

Section 4 provides that only gains from share option transactions which result in the employee actually receiving shares will come within the definition of "share based remuneration" in order to benefit from the exemption from employers PRSI liability.

Planning will be needed to avail of this exemption.

The Redundancy Payments Act 1967 provides for lump sum payments by employers upon their dismissal by reason of redundancy. Where the employer does not pay such a lump sum payment an application may be made to the Minister for Social Protection by the employee for payment. The Minister can then recover such amounts from the employer. The Act in Section 6 provides that where the employer has a debt owing to the Minister in respect of redundancy lump sum payments and the employer qualifies for a refund of PRSI contributions then the debt owing to the Minister can be recovered from the PRSI refund. This makes absolute sense.

Section 7 provides that increases in job seekers allowance, pre-retirement allowance, supplementary allowance, disability allowance or farm assist in respect of a qualified adult of the recipient will not be payable for any period during which that qualified adult is;

(a) Resident, whether temporarily or permanently outside the State, or,
(b) In prison or otherwise detained in lawful custody

Sections 13 and 14 extend the power for the recovery of Social Welfare over payments to include recovery from certain lump sum payments made by the Minister for Social Protection to that person which would include refunds of PRSI contributions, lump sum payments made under the Redundancy Payments Acts 1967 and the Protection of Employees (Employers Insolvency Act) 1984. Section 15 extends to provision for Attachment Orders for overpayment of Social Welfare.

Section 16 provides for the Transposition of Directive 2010/41/EU on the application of equal treatment between men and women engaged in self-employed activity in so far as that Directive relates to ensuring that the spouse of a Civil Partner of a self-employed worker can benefit from Social protection in accordance with national Law. This means that liability for Social Insurance Contributions will be extended to spouses and civil partners of self-employed contributors who are not business partners or employees where they perform the same or ancillary tasks. Liability for self-employed employment PRSI contributions in the case of such spouses and civil partners will be subject to the same annual income threshold which applies to self-employed contributors in general being €5000.

The Pensions Act 1990 is amended by providing that Trustees of a Defined Benefit Pension Scheme must notify scheme members of the details of any unilateral direction issued by the Pensions Authority to the Trustees.

Claims against the Insolvency Fund – Insolvent Companies

Under the Protection of Employees (Employers Insolvency) Act 1984 where a company is insolvent and it goes into receivership or liquidation an employee is entitled to recover from what is known as the Insolvency Fund.

A problem arises with what are termed “informal insolvency” situations. This is where a company ceases trading but does not go into Liquidation or Receivership. In “Barrett European Law Francovich Strikes Again or When is an insolvency not an insolvency” (1996) DULJ1 157-166 the authors state;

"In the event Francovich failed in his claim, his argument running into what was in the event proved to be an insurmountable hurdle on the wording of Article 2 (1) the clear conclusion to be drawn for Irish law seems clear. Ireland's failure to provide the same protection for employees in informal insolvency situations as it provides for employees in an identical situation save that their employers have been the subject of formal bankruptcy or insolvency procedure's may well continue to be an inequality which begs to be remedied".

In the case of In the matter of Davies Joinery Limited and in the Matter of the Companies Acts 1963 – 2012 being a judgement of Ms. Justice Laffoy delivered on 19th July 2013. This is a case in which Her Honour stated; "there has been no determination either by a competent Court in this Jurisdiction or by the Court of Justice of the European Union as to whether the Employers Insolvency Directive has been properly transposed into Irish law and, if it has not, whether an adversely affected employee of an insolvent employer has a cause of action against the State".

While the Court gave no view on the issue the reality of matters appears to be that there is an inequality in Irish law. There appears to be no political appetite to deal with informal insolvency situations except in cases where the Revenue or the Department of Social Protection are due monies. Where a company is not placed into liquidation within 18 months of an award in favour of an employee the employee will lose their payment from the Social Fund.

The appointment of a provisional Liquidator is not sufficient. There must be a winding up Order. However, if a provisional Liquidator is appointed and subsequently there is a winding up order the relevant date for ascertaining the 18 month rule is the date of the appointment of the Provisional Liquidator. Many commentators have pointed out that the issue of informal insolvency situations is inequitable. It does create inequality. There appears to be a complete lack of political will to address such situations as a result of which many employees and usually those who are lower paid employees are effectively left with no recourse to collect monies due to them other than redundancy payments.

EU Directives which need to be transposed by 2016

Directive 2014 /67- EU on the Posting of Workers is required to be transposed into Irish Law by 18th June 2016. Drafting has not yet commenced on this.

Directive 2013/35/EU on the Minimum Health and Safety requirements regarding the exposure of workers to the risks arising from physical agents is required to be transposed by 1st July 2016. Drafting has not yet commenced on this.

There is a codifying Directive being Directive 2009/104/EC on the minimum health and safety requirements for the use of work equipment by workers at work being the Second Individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC. The current position is that the drafting of detailed transposing Regulations is continuing. Codification which brings together previous Directives is one where there is usually no timeline required for the transposition of Codified Directives.

When does the EU Charter of Rights apply to private parties

The Court of Justice of the European Union in January clarified the circumstances in which the Charter of Rights may be invoked against private parties.

In Association De Mediation Sociale the Trade Unions challenged a private employer's refusal to establish a worker consultation pursuant to the EU Directive.

The Court ruled that French Law breached the Directive. The Court stated that while the relevant rule in the Directive was precise enough to have direct effect Directives cannot be invoked against private parties. There is well established case law on this. The Court confirmed that prior case law which states that the principle of indirect effect, which is the requirement for National Courts to interpret National Law to be consistent with an EU Directive, is limited as in this case where the unambiguous contradiction between the National law and the relevant EU Directive was clear.

The Court in this case mentioned the long standing concept of suing a Member State for damages for failing to implement a Directive correctly.

The Court distinguished its prior Judgement in Kucukdevici on the grounds that the principle non-discrimination on the ground of age laid down in the Charter is sufficient in itself to confer on individuals an individual right which they may seek to invoke. Effectively, the Court has clarified that in certain circumstances the Charter can be applied to private parties. The Court has effectively distinguished between Article 21 (1) and Article 27 of the Charter.

It would appear that Article 27 requires more specific expression because neither the Article nor the explanation concerning it indicates that the key clause in the Workers Consultation Directive is a directly applicable prohibition against excluding categories of employees from that Directive.

The problem with a Directive is that there appears to be very limited scope for somebody relying on a Directive which has effectively been completely ignored or inappropriately implemented in a Member State where that individual seeks to bring a claim against the private individual. In such cases the individual is limited to bringing a claim against the State. The problem in bringing a claim against the State is in those circumstances, here in Ireland, the person seeking to rely on the Directive and its non-implementation in Ireland will have to show loss. If they cannot show loss then effectively they have no way of bringing a claim against the State. In the area of worker consultation, for example, a Union or workers would be claiming that because of a failure, by the French Government to implement the Directive, their only loss was the loss of a right of consultation.

EU Decisions of the European Court of Justice are going to have to address in specific terms where the role of Directive and Regulations are to go. If Directives do not have full effect even against private entities the value of those Directives is limited.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Domestic Workers

The Irish Government has ratified the International Labour Organisation Convention on decent work for domestic workers. Ireland has become the third European country to enforce the convention which was done on 9th July.

Minister Bruton stated that the ratification of the Convention was an important milestone and showed a strong commitment on the part of Ireland to protect the rights of domestic workers.

The Workplace Relations Bill 2014

The Minister for Jobs, Enterprise and Innovation on 8th July announced the publication of the Workplace Relations Bill 2014. The Bill is the culmination of a wide ranging programme of reform of employment rights and industrial relations institutions undertaken by Minister Bruton.

There was a very wide ranging public consultation on two occasions before the Bill was published. It is interesting to review those submissions, which are available on the Department website. Many of the suggestions made, to the Minister, in the course of the consultations have been adopted by the Minister in the Bill. The Minister must be congratulated for this.

On a trial basis the Minister introduced a mediation facility in the Workplace Relations. There were submissions made, including by this office, on the importance of having a mediation facility that was not undertaken solely over the phone but by way of face to face meetings. This office is delighted to see that the Bill envisages mediation taking place similar to that currently undertaken by the Equality Tribunal. By this we mean face to face meetings. The Bill places considerable emphasis on early resolution of disputes without the need to proceed to formal adjudication. By having a mediation procedure which may result in legally binding and enforceable agreements this encourages early settlement.

What is particularly innovative in the process is that the Bill clearly provides that mediation will not delay matters proceeding to hearing if mediation does not work. This is an extremely important innovation to encourage mediation and early settlement. It means that a party going to mediation will know that the mediation process will not delay the ultimate outcome of matters.

The Bill will bring in place procedures that are standard across all employment law cases. This is to be most welcomed. The Minister has also streamlined the issue relating to the grounds for late submission of complaints. The test will be "reasonable cause" in all cases. The maximum period of any such extension will be limited to six months under all employment legislation. It is currently up to twelve months under certain pieces of legislation. The appeal procedure will be standardised.

It is the intention of the Bill that two new compliance measures namely compliance notices and fixed payment notices will apply. These are intended to be effective means of securing employers compliance with employment legislation without the need to resort to prosecution. It is noted that the employer's failure to comply with either form of notice will be an offence which can be prosecuted in the District Court. The issue of enforcement of awards was a problem. Matters had to be brought in certain cases to the Circuit Court. In other cases they went to the District Court. There was a considerable cost in doing so. Now it is to be proposed that all enforcement process will be through the District Court under the Enforcement of Court Orders Acts. This will be a far cheaper and more effective procedure.

The current bodies will now be amalgamated into two bodies.

The Labour Court will obtain enhanced powers and additional personnel but will be the Court of appeal for all cases.

The Equality Tribunal, the Labour Relations Commission and the Employment Appeals Tribunal will all become part of a new Workplace Relations Service. The Employment Appeals Tribunal will continue in place even after the Bill becomes law to deal with the current cases listed before it. We know that there is going to be considerable comment in relation to the Workplace Relations Bill but we thought that it would be useful to highlight some of the particular sections that are going to be relevant to practitioners.

The Commission or the Minister will be able to put in place Codes of Practice. The importance of Codes of Practice cannot be underestimated. For example the Code of Practice on Grievance and Disciplinary hearings is regularly referred to in Unfair Dismissal cases before the Employment Appeals Tribunal.

There will be a provision for compliance notices. Where an inspector is satisfied that an employer has in relation to his or her employees contravened a provision to which Section 27 applies the inspector may serve a notice being a compliance notice on the employer. The purpose is to require the employer to do or refrain from doing an act or acts which are specified in the notice by such date that is specified. There is a right for the employer to appeal this to the Labour Court within 42 days. Unlike other enactments if the employer is dissatisfied there will be an appeal to the Circuit Court. Reports of inspectors will be admissible as evidence. Where an inspector performs a function under Section 27 a report will have to be prepared. That report will be admissible in evidence in proceedings before an Adjudication Officer, the Labour Court or a Court established by law. There will of course be a right to examine an inspector in proceedings referred to. Currently we have a situation in many cases before the Rights Commissioner Service or the Labour Court in particular where claims are made that there was an inspection by NERA which held that the employer was in compliance. There reports are however not currently available to be challenged without an application to the Labour Court to issue a witness summons to call the inspector.

The fact that reports will be prepared will make it easier where such allegations are made for them to be checked.

Section 29 of the Act will provide that the Labour Court can direct the Director General to arrange for an inspector to enter premises of an employer and perform such functions as are set out in Section 26 as are specified in the direction. Any report obtained will then be given to the parties involved in the appeal. This may become particularly relevant in relation to cases under the Organisation of Working Time Act or the National Minimum Wage Legislation. We would also see it as being particularly important in cases concerning issues of pay in Equality cases, Fixed Term Work cases and in cases involving Agency workers.

The legislation in Section 30 importantly provides that the Workplace Relations Commission will now be a specified body for the purposes of the Revenue furnishing information to for example the Labour Court relating to tax return documentation which may have been returned by an employer. This may become extremely relevant in cases involving National Minimum Wage claims. Equally Section 261 A of the Social Welfare Consolidation Act 2005 will equally apply to Workplace Relations Commission.

The provisions of Section 31 will provide for the disclosure of information, which comes to the notice of the Commission to appropriate bodies where there is the issue of a possible offence having occurred. Currently, for example, in cases where an employer has been involved in Tax Evasion or Social Welfare Fraud or an employee has been so involved excepting cases under the Unfair Dismissal legislation there is no provision for disclosure. There is also an issue that there was no right to disclose in such circumstances. The new legislation now provides that this may be disclosed. The Bill in Section 35 provides for Fixed Payment Notices. Relevant offences are under 3 Acts namely Section 11 Protection of Employment Acts 1977, Section 4 (4) of the Payment of Wages Act or Section 23 of the National Minimum Wage Act.

The issue in relation to the National Minimum Wage Act is different to what is proposed in the UK. The UK currently has fines of STG £20,000 against an employer who is in breach of their legislation. We have covered this in a separate article in this publication. There is an issue that non-compliance with the National Minimum Wage should attract a higher penalty.

Part 4 of the Act starts with the appointment of case resolution officers. There will also be mediation officers. The approach in relation to mediation is to be very welcomed. What is to be even more welcomed is that taking part in mediation will not delay cases proceeding. Where cases go on for hearing and a decision is made then if an employer fails to carry out a decision within 56 days of the date in which the notice of the decision was given to the parties the District Court shall without hearing give a decision in favour of the employee. Where appeals are to be made to the Labour Court they must be made within 42 days.

Where it is necessary to go to the District Court either after an adjudication officer gives a decision or the Labour Court gives a decision then interest will run at the Court rate from 42 days after the date that the decision was given.

The decisions of the Labour Court on appeal will be final subject to a right of appeal on a Point of Law to the High Court. This is provided for in Section 47.

Section 48 grants power to the Director General or the Labour Court to direct that particular cases can be dealt with by documentation being sent in in writing rather than by the necessity to have full hearings. There is of course a right of any party to object to same in which case a full hearing will take place. However, it is useful that this provision is bring introduced. It may greatly assist in speeding up matters, particularly in cases where, for example, the claim relates to not having received a proper contract of employment. It may also arise in cases under the Payment of Wages Act where there is a claim that there was an illegal deduction of wages or non-payment of wages.

Section 70 of the Bill refers to forged documents. The issue of forged documents is certainly one which officers came across is the past. It is now going to be an offence and this is to be welcomed. The Bill in Section 72 will allow the Labour Court to require any person to produce documentation before it. This will be extremely relevant in a number of cases where records of one type or another may be available but which have not been produced. Currently an employee has to attempt to rely on the Data Protection Legislation.

In respect of the Payment of Wages Act 1991 the provisions of Section 7 (2) (b) requiring a Notice of Appeal to be sent to what would in this case be the Labour Court and to the other party has not been repealed. The provisions of Section 7 (2) (b) is one which causes particular difficulties in the Employment Appeals Tribunal to date.

We know that the Employment Appeals Tribunal have on many occasions sought to have Section 7 (2) (b) of the Payment of Wages Act amended to delete the provision of having to notify the other party has not been made provision for in the new Bill and hopefully may be dealt with at committee stage.

In respect of Section 23 of the National Minimum Wage Act the legislation still seems to be going to require an employee to serve a notice under Section 23 before proceedings can be brought. It catches out a considerable number of individuals who are not legally represented or who are not represented by a Trade Union. There is no realistic reason as to why a notice under Section 23 of that Act must be served before proceedings can proceed.

In respect of the Terms of Employment (Information) Act the terms of Section 7(2) have been amended to provide that among other things that an Adjudication Officer or the Labour Court can effectively rewrite a contract to alter any such statement for the purposes of correcting any omission in the document.

The Bill will essentially, when it is enacted, transfer to the Labour Court, the additional workload of the Employment Appeals Tribunal. Because of the fact that the Employment Appeals Tribunal is an entity that has originating jurisdiction it is contended that this is going to place a significant additional workload on the Labour Court. This may not in fact materialise. We think it is important that we explain our reasoning for this. Under the Bill all unfair Dismissal claims will initially be heard, if they are not dealt with by mediation, before an Adjudication Officer. Currently, Unfair Dismissal cases are brought either to the EAT or to the LRC. While there are no real records that can be ascertained, it would appear that somewhat less than 10% of Unfair Dismissal claims before the LRC are actually appealed to the EAT. Assuming that even 20% of cases ultimately go on appeal, the additional workload of the Labour Court is unlikely to rise so significantly that more than one further division will be required. The proposal to have two new Deputy Chairmen of the Labour Court where there would be one Deputy Chairman available to effectively deal with case management should streamline a number of matters. We understand that it is envisaged that there would be various Codes of Practice produced to deal with cases. These will be particularly relevant in relation to professional advisors such as Solicitors and Barristers, Trade Unions and employer representative bodies along with HR/ IR representatives who provide services for gain. Where these entities are involved it is highly likely that new procedures will require exchange of documentation and possibly even statements of evidence in advance of any hearing. Currently problems arise where in particular certain persons and bodies are known for not producing documentation at hearings before the Labour Court. By having procedures in place where all documentation which either party wishes to rely upon must be produced in advance and be available on the day will significantly help in disposing of cases in a proper and fair way.

The issue of "forum shopping" has often been raised. By having one forum hearing all cases forum shopping effectively stops. The fact that an employee may have similar claims under different pieces of employment legislation is of course not forum shopping. By having all complaints in one forum, at the same time, all complaints can be disposed of. This reduces cost to the State, employers and employees.

The issue of employers and employees not appearing at hearings is an issue at times. The new requirement that those seeking to appeal who do not appear at the first hearing having to pay €300 to appeal, which may be refunded, should avoid such circumstances arising. There has been a proposal that an employee wishing to bring a claim would have to pay a fee. This office and others did make submissions against this on the basis that it may deter legitimate claims and restrict access to the service. The Minister has instead proposed simply a fee where a party does not appear at the first hearing. This is, in our view, fair and reasonable.

This office has made a number of submissions to the Minister in the course of the consultation process. Other Solicitors, Unions, Employer representative bodies and individuals have equally made submissions.

What is evident from the Bill is that a number of the submissions have clearly been taken into account by the Minister. There has been resistance to change. That must be recognised as a fact of life. The Minister set out at the start of this process to bring in place an Industrial Relations Dispute Resolution Service which would meet the requirements of the 21st century. The new Bill must be recognised as doing so. The implementation of the Bill in practice will ultimately be the test. This is going to involve good faith from all. In particular it will require good faith from the Labour Court, the Adjudicators, the Commission, professional advisors being Solicitors, Barristers, IR / HR Representatives, Trade Unions and Union Representatives working together to ensure that the practices and procedures that apply going forward will be fair to both employers and employees. Communication is going to be a significantly important issue in this. It means that in particular professional representatives who are doing so for gain must know what is required of them, what documentation and papers must be produced, when it must be produced and the manner in which it must be produced.

There must be realistic and reasonable accommodation to enable this to be done within reasonable timeframes. Saying this, there will need to be some method of ensuring that those who do not comply cannot frustrate the new service, when it becomes operational being effective, fair and speedy. This new service is designed to cut the cost of dealing with disputes for both employers and employees. The reduction of costs to employers, employees and to the State, are all matters where the stakeholders must be seen to cooperate. Particular obligations must be places on professional advisors, those who represent for gain, Unions and employer representative bodies to cooperate fully. Finally, we must congratulate the Minister for the first significant overview and modernisation of our employment law services. The Labour Relations Commission, the Employment Appeals Tribunal and the Equality Tribunal have all been staffed to date with dedicated competent and professional individuals. They have provided a fantastic service to both employers and employees. Those organisations however, were designed for a different era. They were designed at a time when there were fewer disputes. They were designed for a time when there were fewer pieces of legislation. They were designed to deal with a different type of employment environment.

When the EAT for example started claims were heard within 3 months. Now in some cases it is 18 months to have a case heard. That is not fair to an employee bringing a claim. It is not fair to an employer trying to defend a claim. The delay in claims proceeding for hearing before the Equality Tribunal are lengthy and many are over two years between lodging a claim and having it come on for hearing. That is equally unfair. The delays in the LRC are not as bad. For any system to work so that it is seen to be fair to both employers and employees as we have said there will have to be obligations and duties places on representatives to do what is required to have matters come on speedily. The converse of this is that the new Workplace Relations Commission will equally have to perform by ensuring that cases are listed in a speedy and efficient manner. It will as a matter of practice in future be necessary for the section dealing with matters at first instance and the Labour Court on appeal, as regards the listing of cases, to ensure that where representatives are on record that they are not listed for two different locations at the same time or before an adjudicator officer and the Labour Court at the same time on the same day.

There needs to be procedures for advanced notice of hearings so that the availability of witnesses can be prepared and availed of and so that the issue of unnecessary adjournments are avoided. These are administrative issues which are outside the scope of the Bill. However, the Bill when it is enacted cannot be regarded as an end in itself. It must be regarded simply as a beginning between now and the time that the Bill is enacted there is an opportunity to prepare the groundwork for what will be required to ensure that the new service will be fast, effective, efficient and cost effective for both employers and employees. That work needs to be done now in conjunction with the Bill.

This office has been seen to be a supporter of the proposals by the Minister. This office has been the subject of criticism by some for doing so. We make no apologies for our approach of wanting a fast, effective, efficient and cost effective service that meets the requirements of the 21st century.

There will be parts of the new service that various representatives will not like. There are parts that we will not be particularly fond of. Saying this, in the round this is a fantastic piece of work that has been undertaken by the Minister and his staff and personnel in his department. It has taken drive, commitment and a farsighted progressive attitude to bring matters on as far as they have to date. This office congratulates the Minister again, his staff and everybody involved in the project work to date. Those individuals, bodies and entities that made submissions must also be congratulated. The interaction by all those involved in employment law in this country in this process has been proactive and well articulated. The quality of the representations made to the Minister when you read those on the website have been of the highest quality whether they were supporting or opposing the proposals.

We look forward to the passage of the Bill through the Oireachtas. We will be producing at a later stage a more detailed overview of the Bill in a technical prospective.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Employment Permits (Amendment) Act 2014

The Employment Permits (Amendment) Act 2014 came into operation on 27th July 2014.

The legislation introduces a new provision for applying for and obtaining work permits. There has been quite an amount of commentary on this already for those who are interested in this area. What is however particularly interesting for employment law practitioners is Section 4 of the Act which inserts a new section 2B and 2C into the Employment Permits Acts 2003-2013.

This section applies in respect of a foreign national who without a work permit has entered into a service of employment in the State or was employed in the state without an employment permit.

In such cases where an employer or a contractor has not paid the foreign national an amount of money in respect of work done or services rendered during the period of the employment then the foreign national or the Minister may institute civil proceedings for the amount of money to recompense the foreign national for such work done or services rendered. In any such proceedings which could be limited effectively to proceedings under the Payment of Wages Act or the National Minimum Wage Act the employee must satisfy a Court that the foreign national took all steps that were reasonably necessary and open to him to comply with the requirements to obtain a work permit.

The issue is what other potential claims could be brought.

It is possible, it would appear, for an employee to bring a claim under the Organisation of Working Time Act for non payment of holiday pay or public holiday pay as this would be an amount of money which would be due to be paid to the employee. Where those Acts do provide that compensation is awarded it would appear that this would not be limited simply to the monetary loss.

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There would appear to be no provision for the employee to bring claims for breach of other areas of employment law.

The issue in relation to work permits particularly for foreign nationals who come from non EU countries would appear to be a situation where a number of such individuals are subjected to significant abuse. They would appear mainly to cover individuals who are domestic workers or those working in the fast food industry particularly in ethnic restaurants and food outlets.

While the move by the Minister, is in line with an issue which arose in a High Court case, there is a situation where the employer may effectively be in a position of simply having to make good the economic loss that should have been paid rather than allowing the LRC, EAT, Equality Tribunal or the Labour Court on appeal to award compensation which would likely be a deterrent to such an employer contravening the legislation going forward. The only area of penalty which will now be able to be opposed is effectively a criminal prosecution against the employer.

In a related article in this newsletter we have set out the proposals which the UK Government is bringing into effect to penalise employers who are in breach of their national Minimum Wage Legislation. There is a strong argument that some form of real and serious penalty must be introduced in Ireland for employers who pay less than the National Minimum Wage and also where employers, in particular, engage vulnerable individuals without the necessary work permit legislation which would provide protections to those individuals. Saying this, the amendment to the legislation is one which this office congratulates the Minister on. This new legislation is a direct result of a decision given by Mr. Justice Hogan who was critical of the legislation in Ireland as regards to foreign nationals who are non EU Nationals working in Ireland without a work permit. The Minister has certainly dealt with the matters which were before the High Court relating to the issue of wages but the other areas of employment law have not been addressed. There was an opportunity to do so. Unfortunately it was not taken. This office did make submissions to the Minister relating to the legislation, when it was first introduced at Bill stage, to have the legislation amended so as to apply to all aspects of employment law.

The law now appears to be that in the case of a non EU national who works without a Work Permit an employer may work them 365 days a year, pay no Sunday Premium, not give them a contract and discriminate against them including sexual harassment with no fear of the "employee" being able to bring any claim. Unfortunately we see exploitation of such individuals continuing as the level of criminal sanctions imposed, as opposed to the technical maximum, for not having a Work Permit for an employee are not any real deterrent.

Interesting cases due in the High Court in October under various Employment Laws

The first case which will certainly test the Haddington Road Agreement is a case involving a Secretary in a private school in South Dublin. The EAT found by a majority of 2:1 that the deduction made from the wages of Damhnait Nic Bhradaigh who worked at Mount Anville Secondary School for 22 years was unlawful under the Payment of Wages Act 1991.

Financial measures in the Public Interest Act 2009 introduced wage cuts for public servants. On foot of this the Department of Education set a circular to private schools. The Department claims to have obtained legal advice that all staff working in a recognised school were public servants solely for the purposes of the Act. The employee argued that the cuts in her wages amounted to an interference in a private contract between herself and her employer and were illegal. There was an argument that she was effectively being made a public servant without the benefits and protection of public servants.

The school argued that it believed that it had no alternative but to make the deductions. An appeal has been lodged to the High Court and the case is listed for October.

There is a case listed for October again in the High Court relating to the interaction of SI. 36 of 2012 and the Organisation of Working Time Act as it applies to truck drivers.

This office is involved in a case listed in October. Although it is unlikely to go ahead as it is awaiting the outcome of a Labour Court decision under the Organisation of Working Time Act. The case concerns compliance with Section 3 of the Terms of Employment (information) Act. In that case the Employment Appeals Tribunal have heard that the document complied with the provisions under the Act. The employee is appealing on the basis that there were defects that were not covered under the provisions of Section 3 of the Terms of Employment (Information) Act and therefore the Employment Appeals Tribunal was incorrect in their determination.

Amendment of Regulations made under the Protection of Young Persons (Employment) Act 1996

The Minister for Jobs, Enterprise and Innovation announced on 9th June that new Regulations will revoke and replace S.I. No. 1 of 1997. These regulations permitted certain exemptions for young persons by which we mean persons between the ages of 16 and 17 years old in both the fishing and shipping sectors from certain working hour rules and night time working rules contained in the Protection of Young Persons (Employment) Act 1996.

The new Regulations will retain most of the exemptions contained in the 1997 Regulations. However, they will not continue the exemption from the rules on night time working for young persons in the shipping sector. Separate provision in relation to exemptions from night time working rules for young persons in the shipping sector where training programs are involved will be contained in Regulations made by the Minister for Transport Tourism and Sport in line with the Maritime Labour Convention 2006.

Fatal Injury Claims

The issue of fatal injuries arise where the dependants of the deceased person have a statutory right to take a claim where the deceased's death was caused by the wrongful act of another.

The case of Hewitt –v- The Health Service Executive [2014] IEHC300 being a Decision of the High Court has clarified that a fatal injury action cannot become statute barred before the date of death of the deceased.

The law on this issue

Section 7 of the Civil Liability Act allows a personal representative to continue legal proceedings commenced by a deceased prior to his or her death or to commence proceedings where the deceased could have commenced these prior to his or her death. The personal representatives bring the proceedings on behalf of the estate of the deceased. The damages awarded form part of the estate.

Under Section 48 of the same Act the personal representative of deceased can bring a fatal injuries action if it can be shown the death of deceased was caused by the wrongful act of another and but for that persons death the deceased could have maintained an action and recovered damages in respect of the wrong.

The case in question

In this case the deceased became aware in July 2007 of inadvertence on behalf of the hospital. The deceased died on 23rd June 2010.

On 25th January 2012 her husband in his capacity as personal representative issued proceedings.

The Court had to consider whether the fact that the claim under Section 7 was statute barred meant that the fatal injuries under Section 48 would also be barred.

The Statute of Limitation (Amendment) Act 1991 provides that a claim under Section 48 of the 1961 Act must be brought within 2 years of the date of death of the deceased or the date of knowledge of the dependant whichever is the later. Mr Justice Baker noted that the running of the time is expressly linked to the death or knowledge of the dependent and not to any limitation period which would have run against the deceased.

In this case the action under Section 48 only came into existence on the death of the deceased and issued within 2 years of the date of her death.

Conclusion

Although Legislation provides for a form of fatal injury action by statutory dependants and has been in place for a century and a half, this is the first decided case on whether the running of a statutory time limit against the deceased also bars the fatal injury claim by the dependants.

The deceased did not bring a claim within the statutory time limit.

This case confirms that the dependants of a deceased can bring a claim even where the deceased themselves could not have brought a claim.

This may appear an anomaly in the legislation but we now have a definitive decision from Mr. Justice Baker which confirms that it is sufficient for the dependents to merely show that the deceased had an action at one time in respect of the wrongful act to be able to bring a claim.

Social Welfare and Pensions Act 2013 will radically transform personal injury claims

The Act came into operation on 1 August.

We believe that the Act will cause a significant increase in legal fees in dealing with personal injury claims.

Up until now compensation paid by insurance companies in personal injury cases have been reduced by the amount of Social Welfare benefits paid arising from an accident. This has been a gain to employers of approximately €22 million per annum. The Department of Social Protection is seeking to recover this. The new Act brings in what is called a recoverable benefits and assistance scheme. From August 1 insurance companies paying out under personal injury claims will be under a legal duty to refund certain Social Welfare payments to the Department of Social Protection. This must be done prior to paying out compensation to claimants in non-fatal personal injury cases. Insurance companies will apply to the Department of Social Protection for a statement of welfare payments known as recoverable benefits certificates. The certificate must be provided within 28 days. After this the appropriate payment must be refunded to the Department. Only then can the person who was injured be paid compensation for general damages and loss or earnings or profits.

The insurance company may offset the refund of recoverable benefits against the amount of compensation for loss of earnings or profits but not against general damages.

The amount will be the full refund of the amount specified in the recoverable benefit certificate unless a Court gives an Order indicating that there was an apportionment of liability between the parties. For example if liability was apportioned 60/40 in favour of the party who was injured the party will seek a refund of 60% of the relevant benefits paid.

Up until now insurers saw great advantages in all in settlements. They could pay personal injuries claimants a single sum to include general damages for pain and suffering, any loss of earnings and legal costs and the cost of expert witnesses. In doing so they avoided costly disputes over the level of fees to be paid to Lawyers, Consultants and Engineers. Often these all in settlements had advantages for everybody. Under the new procedures the level of compensation to the claimant must be clearly specified in any settlement. Not only that, but the general damage must be differentiated from the loss of earnings or profits claimed. What is the result of this? It is likely to make the resolution of claims more cumbersome. The cost of settling claims is likely to increase. The new measures will apply only to personal injury litigation. It is going to mean that in settlements it is going to be important to set out in detail what element is general damages and what element is loss of earnings. There is also going to be difficulties where there is an apportionment of liability.

The entitlement to recover payments by the Department will be limited to six categories. These are illness benefits, partial capacity benefits, injury benefits, incapacity supplements, invalidity pensions and disability allowances. The limitation period for the recovery of the benefits is 5 years beginning on the date of the incident giving rise to the Social Welfare entitlement and ending when the insurance company pays out the injured party a sum in full and final settlement of the claim. This is also going to cause a difficulty in that if a case is settled on say 1 September it could be at least another month before the insurance company gets a certificate from the Department. If the individual is at that stage still receiving for example a disability allowance there will be a minimum of a month period between the settlement and the date of pay-out. This month period could end up being refunded. In larger cases this may not seem significant but in smaller claims it will.

Where a claim is being examined by the Injuries Board it will apply to the Department of Social Protection for the benefit certificate and assistance before it makes it assessment of damages. The Injuries Board will then direct the insurance company to make the due refund to the Department and separately to pay general damages and other appropriate compensation to the claimant.

The reason for bringing in this legislation is perfectly clear. It is actually very fair. The State should not be compensating insurance companies by making a contribution towards loss of earning claims which are partly funded effectively by the Department. However, saying this, its practical application may well result in additional cost and expenses which will have to be met. It will make settlements more difficult. Where there is additional work to be undertaken this is an additional cost which will have to be paid for? As is usual it is probable that the legal profession will get the blame for the increased costs. However, if somebody is claiming for personal injuries it would be very important that the issue of their Social Welfare contributions particularly where a serious injury has occurred, they have been in receipt of Social Welfare and where the claim has proceeded for a period of time, that these matters are properly and comprehensively dealt with. It will also mean that where there is contributory negligence by which we mean the injured party was partly at fault for the accident this matter is going to have to be addressed as part of any settlement.

We anticipate that the new system will make it more difficult to arrange settlements and will unfortunately increase costs. There is no doubt there will be teething problems with this new system which will have to be worked out. Hopefully matters can be structured in a way which will keep additional costs to an absolute minimum. Being aware that the new system can create additional costs is the best way of avoiding unnecessary additional costs arising.

Are persons who suffer injuries as a result of a crime entitled to compensation?

The simple answer is yes. If you have been a victim of a crime which has caused you any injury you may be entitled to compensation from the Criminal Injuries Compensation Tribunal.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

The Criminal Injuries Compensation Tribunal was set up in May 1974. It provides compensation for injuries criminally inflicted as a result of a crime of violence. The Crime of violence must have happened within the Irish State. The scheme covers loss suffered or likely to be suffered by the dependants of a victim who has died as a result of injuries as a result of this crime of violence.

Time Limits

An application must be made to the Tribunal within 3 months of the incident. The time limit may be extended in certain circumstances however it is our advice that it would always be done within 3 months.

How to claim compensation under the scheme?

The following group of people can claim compensation;

1. The person who sustained the injury, i.e. you, if you are the victim.
2. Any person who is responsible for the maintenance of the victim who suffered or incurred any expenses as a result of the victim's injury.
3. Where the victim had died any dependent of the victim.
4. A person who received any injury due to the coming to the assistance of a member of An Garda Siochana because of an unlawful attack on the member of An Garda Siochana or because the member of An Garda Siochana was attempting to prevent a crime or take a person into custody or there was a riot or a disturbance of the peace or attempting to rescue a person in custody or because the member of An Garda Siochana was engaged in saving a person's life.

What compensation is a person entitled to?

The type of compensation that can be awarded by the Tribunal is limited. There is no compensation for pain and suffering in respect of the injuries occurred if they happened post 1 April 1986. Compensation may be awarded for actual monetary loss only suffered or likely to be suffered. Out of pocket expenses can be claimed including medical expenses, medication, aids, appliances and equipment required due to the injuries and loss of earnings.

What does this mean in practice?

This means in practice that no compensation is given for the pain and suffering. It is only for your expenses or future expenses including loss of earnings.

Making an application

An application form must be sent to the Tribunal. A Garda report and a copy of any statement you made to An Garda Siochana if available must be sent.

- A certificate from the employer regarding loss of earnings of if self-employed a letter from the Revenue Commissioners;
- A statement from the local Social Welfare office;
- All receipts and expenses for out of pocket expenses such as loss of earnings medical expenses and medication etc.;
- A full and detailed particulars of the injuries suffered together with details of the treating Doctors;
- If there is going to be future loss such as loss of earnings it is necessary to get an actuarial report; and
- A statement from the Department of Social Protection setting out the benefits that have been received through the Department of Social Protection as compensation may be reduced by the value of any Social Welfare benefits received.

Not all injuries will result in compensation

Compensation or reduced compensation may not be payable where;

- The defendant and victim were living together as members of the same household at the time the injuries were inflicted.
- If you the applicant do not give the Tribunal all reasonable assistance in relation to a medical report that it may require
- No compensation is payable in respect of injuries inflicted in a traffic offence except in the opinion of the Tribunal there was a deliberate attempt made to run down the victim.
- No compensation is payable if the Tribunal is of the view that the victim was responsible because they provoked the perpetrator.

- Where the Tribunal forms the view that the conduct of the victim or the victims character or their way of life makes it inappropriate that they should be granted an award.
- If the person who inflicted the injuries pays money or compensation to their victim this will be taken into account in any award by the Tribunal.

PAYE – Obligation on employers to register with Revenue and to keep, maintain and produce a Register of Employees.

Revenue e-Brief no. 42/14 issued on 13th June 2014.

The Revenue PAYE (Employer) Compliance Manual has been updated as regards an employer's obligation to register with revenue as an employer for PAYE purposes, to send notification to the Revenue of details of new employees and the obligation on employers to keep and maintain a register of employees.

The Revenue has also published a Tax Briefing on PAYE Employers Obligations to keep, maintain and produce a register of employees.

Where an employer is obliged but fails to keep and maintain a Register of Employees at the normal place of employment of each employee or at that employer's main place of business Section 987 Taxes Consolidation Act 1997 provides that the employer shall be liable for a penalty of €4000. In addition to the penalty of €4,000 where the employer is a company, the Secretary of the Company is liable to a penalty of €3,000.

Section 903 Taxes Consolidation Act 1997 provides that an Authorised Revenue Officer may enter any premises where he or she has reason to believe that an employer is or has been carrying on an activity as an employer. That officer may require the employer to produce any records which the officer may reasonably require. Where an employer does not comply the employer shall be liable for a penalty of €4,000.

While this is a tax issue there are significant issues arising for employees in bringing claims at the present time. Many employees do not receive a proper contract or document which sets out the full name of their employer. Where proceedings issue against the wrong employer then they are difficult to rectify.

There is a strong argument that employers should have to register with Revenue all employees and that the employees would know that they would receive a document from the Revenue setting out the full name and address of the legal entity who is employing them.

Local Property Tax / Deduction at Source from Wages/Salary or an Occupational Pension

On 3rd July the Revenue issued an important notice to employers and pension providers about Local Property Tax (LPT). Legislation governing LPT provides that payment by a liable person of the amount due in respect of 2013, 2014 and arrears of 2012 Household Charges can be made by either a single payment per year or by phased payments over the course of a year. One of the phased payment options provided for in the legislation is a deduction at source from wages / salary or an occupational pension.

The Revenue will notify an employer / pension provider via the Tax Credits Certificates (P2C) to deduct the amount from the employee's net salary or pension as appropriate.

The employer / pension provider must commence deductions on receipt of the P2C as soon as possible within the payroll cycle and spread them evenly over the pay periods up to the end of December 2014.

ROS registered employers receive P2C's in an electronic format via the ROS inbox. Where an employer received such a P2C notification in respect of an employee for the 2013 LPT tax year but fail to account for the amount specified then the employer should rectify the situation by filing an amended P35 or P35L return and paying any balance outstanding.

The Revenue will be writing to employers who appear to have unpaid LPT liabilities on record for the 2013 tax year and will demand payment as provided for under Section 960 E (2) of the TCA 1997.

Do you have Medical and Dental Bills / Claiming Tax Relief

Falling sick can happen to anybody. However many people do not realise that most medical expenses qualify for tax relief. Each year you can reclaim some of the money that you pay to Doctors, Hospitals, Dentists or Pharmacists from the Revenue Commissioners. You can claim relief on medical expenses incurred by you, your spouse, dependent children or dependent relatives as long as you have not already been reimbursed or are entitled to be reimbursed for the costs by a health board or by a medical insurer such as VHI.

There are some procedures that you have to go through. The forms you need are MED1 and MED 2. You will get these from the local tax office. You can also download them from the Revenue Commissioners website.

When you make a claim for tax relief on medical and dental expenses you must keep receipts. It is worthwhile to get in the habit of asking for receipts every time you or your family attend the Doctor or purchase medicines. You do not need to send these receipts with your tax claim. You may however be asked to produce them if the Revenue requests same. The questions often asked as to what you can claim tax relief on. These include;

- The cost of visits to a Doctor or consultant
- Hospital treatment
- Orthoptic treatment
- Maintenance in an approved nursing home
- Transport by ambulance
- Kidney patient treatments such as hospital dialysis or home dialysis or CAPD
- The cost of prescribed medicines
- The cost of diagnostic procedures
- Hearing aids
- Orthopaedic beds and chairs
- Wheelchairs and wheelchair lifts however there is no relief on adapting a home or premises to accommodate a lift
- Physiotherapy
- Dental crowns
- Veneers
- Gold inlays
- Root Canal treatment
- Wisdom tooth extraction
- Bridgework

These are just some of the expenses which can be claimed back. You cannot claim for routine dental or maternity treatment or for routine ophthalmic treatment. Teeth extracting, filling and dental repair are not covered by the MED 2 form nor are sight tests, spectacles or contact lenses covered by the MED 1 form. You can get some of the costs of a sight test and glasses back if you pay PRSI and your optician will give you the relevant form for this.

Many people fail to claim all the tax reliefs which they are entitled to. We thought it would be useful to set out this short Guide to remind those reading this that there are reliefs available which should be claimed. You are entitled to claims them and therefore you should do so. We hope that you have found this Guide useful. Please note this is a Guide only.

Before acting or refraining from anything contained in this Guide you should check with the Revenue / your Inspector of Taxes or your Tax Advisor about making a claim for any expenses.

Local Property Tax Relief for certain disabled and/or incapacitated individuals

On 2 May 2014 the Minister for Finance announced two Local Property Tax (LPT) reliefs for residential properties that are occupied by certain disabled and/or incapacitated individuals.

This will apply from 1 July 2013. It is intended to correct anomalies and inequities.

The two reliefs are:

1. A reduction in the chargeable value of property. This will apply to a property which has been adapted to make it more suitable for occupation by a person with a disability where the adaptation work has resulted in an increase in the chargeable value of the property. This applies where it moves the property to a higher valuation band.

2. A full exemption from LPT for properties that have been constructed or required because of their suitability for occupation by individuals who are permanently and totally incapacitated to such an extent that they are unable to maintain themselves and whose condition is so severe that it dictates the type of property they can live in.

In the case of the first relief there is no longer a requirement for the adaptation work to have been grant aided by a local authority. This is provided the other qualifying conditions are met. In the case of the second relief there is no longer a requirement for an award from a Court or the Injuries Board or the establishment of a Public Trust Fund where the other qualifying conditions for the relief are met.

The revised treatment is effective from 1 July 2013. This was announced in Revenue e-Brief no. 38/14 more detailed particulars are available at http://www.revenue.ie/en/practicioner/ebrief/2014/no-382014.html

What Types of Monsters are protected from Discrimination?

Disclaimer

Irish law being of course, sui generis in many respects, we cannot vouch for the accuracy of this legal analysis of various types of monsters as a protective class as it applies in Irish law. You should consult your own Solicitor. However with Halloween coming shortly we decided to consider are monsters protected?

Irish discrimination law, under the Employment Equality legislation, protects a wide variety of individuals. It is perfectly reasonable that if you lay awake at night thinking about monsters and wondering whether employers are allowed to discriminate against them well finally, hopefully here are the answers to your questions about what type of monsters are protected from discrimination.

Zombies – these are not protected. Being dead is not a disability.

Werewolves – not protected. Employers are not required to employ a creature who is unable to perform his or her essential duties in a manner that would not endanger the health and safety of others even with reasonable accommodation. You might think chaining employees up during full moons is a reasonable accommodation. Employers who chain employees to their work stations face serious risks of claims under the Organisation of Working Time Act for missed meals and rest period claims even where the employee is figuratively chained to their work station.

Ghosts – not protected. See Zombies.

Vampires – not protected. You can rely on the exemption for those who can't perform their jobs without endangering the health and safety of others. Just to be perfectly safe you should set a job requirement that may require a person to work during daylight hours without burning up. If you set such a condition you are especially safe from a discrimination case from vampires.

Swamp monsters – this is simply ridiculous. We all know that swamp monsters are not real.

The result is that monsters aren't protected against discrimination.

Conclusion

The firm of Richard Grogan & Associates provides specialist legal services in the areas of Personal Injuries* / Accidents*, Employment Law*, Probate and Taxation. We are not a full service firm. We never claim to be. We provide services only in specific areas of the law. Whether you use this firm or another firm for your legal services we strongly advise that you always use of a Solicitor regulated by the Law Society of Ireland for all legal services. The Law Society can help you find a Solicitor www.lawsociety.ie.

We hope you have found this Newsletter useful and of help to you.

Disclaimer

While every effort has been made to ensure the accuracy of this publication it is not intended to provide legal advice. No responsibility will be accepted for acting or refraining from anything contained in this publication. Individual situations will differ. You should discuss your individual situation with a Solicitor regulated by the Law Society of Ireland and obtain legal advice particular to your circumstances.

*Please note that in contentious cases a Solicitor may not charge a fee as a proportion or percentage of any award or settlement.