INTRODUCTION*

Welcome to the February issue of our newsletter.

January might sometimes be thought of as a rather quiet month. It has been busy for us.

On the 20th January 2017 Richard Grogan of this office was interviewed on the George Hook show on Newstalk. For those who might be interested in listening to same we have put it in the news section of our website. In the interview we deal with the issue of Au Pairs. Richard Grogan of this office had previously in December 2015 been interviewed for the RTE Investigates programme on the issue of Au Pairs.

In the January 2017 issue of The Phoenix Richard Grogan comments on the WRC were commented on in the Hot Water Brigade section under the heading Workplace Relations Commission "grinding to a halt".

We are continuing with our publication of employment law issues in Irish Legal News. We are delighted we have been requested to submit regular updates on employment law.

On 2nd February next Richard Grogan has been asked to participate in a roundtable discussion with numbers of the EU Parliament on the Posted Workers Directive.

Arising out of a letter which we sent to the Minister Shane Ross relating to SI 36 of 2012 we are now advised that the matter is a matter which the Department is getting legal advice on. Our open letter to the Minister was in a previous issue of our newsletter.

The reality of matters is that there are claims coming down the road that are going to run against the State for failing to implement SI 36 of 2012. Hopefully the appropriate amendments will be put in place sooner rather than later so as to ensure that the potential claims against the State which are potentially quite expensive for the State are minimised.

In relation to the Civil Liability (Amendment) Act we have covered this in the Newsletter.

We have raised the issue with the Minister for Justice Equality and Law Reform in relation to the issue of the Social Welfare treatment of periodic payments proposed under the Bill.

We are quite satisfied that they will be exempt from Income Tax but have concerns that they will not be exempt from Social Security or any future levies such as a health levy or something like that that could arise in the future and certainly not from USC. The Minister has responded very quickly to our submission and it is being reviewed at this stage by the Department.

We are seeing significant changes in the type of cases that are coming into us in the last few months. There has been a considerable rise in the number of Redundancy claims and Unfair Dismissal claims arriving on our desk. We are also now seeing a lot more senior employees including people at senior management level coming to us in relation to issues concerning excessive hours of work and lack of breaks and rest periods. A lot of this is caused by technology where they are effectively expected to be on call on a 24/7 basis.

We have been making a number of submissions to the Workplace Relations Commission relating to practical issues. We are seeing that the WRC are very engaged with practitioners to try to produce a better service. This office has criticised the WRC and will probably continue to do so. Saying this, credit is needed to be given where it is due and certainly we are finding that issues which we are raising with the WRC are being addressed. The WRC has produced an action plan for 2017. It is an ambitious plan. The WRC and particularly senior management in the WRC must be congratulated for being prepared to put the plan in writing and to post it on the WRC website. We are seeing a very constructive approach by staff in the WRC in trying to schedule cases and in particular where either party may require particular service such as an interpreter or other services that they are contacting the representatives in those cases to ascertain what is most appropriate and to take that into account for scheduling. They must be congratulated for this. In the Labour Court we would hope to see that a new Deputy Chairman of the Labour Court will be appointed. The

competition closed in January and hopefully a new appointment will be announced shortly.

In this publication where there are issues where we have given our opinion on we have also spent some time in reviewing recent decisions of the WRC and the Labour Court. In particular we have focused on the WRC. The reason for this is that the checking of cases is difficult currently. The WRC are aware of that and are addressing it. We however thought it was useful for practitioners that we would alert them to what we consider are some of the more important decisions. Of course this is a subjective approach. We do however hope that our review of cases does help and assist colleagues in identifying the more important cases which issue. We have tried to focus on cases where there are legal issues discussed rather than the factual matrix.

We would like to thank those who contacted us in January with their very kind comments in relation to the January issue of our newsletter. We were particularly delighted that colleagues and others took the time to contact us directly and to make the very kind comments they did on the quality of our newsletter. We do appreciate this.

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Paying Women Less

In early January Julie Bradbury who was at one stage a "Countryfile" presenter announced that during her time with the BBC she had been told in salary negotiations that she should be paid less because she was a mother.

Firstly, it takes guts for any person to come out and make such a statement. Secondly, it indicates an attitude towards women which is unacceptable.

We have previously written in this newsletter the issue of the gender pay gap. It itself is discrimination, in our view, that an employee would be paid less because they are a woman. It is equally discrimination if a woman is paid less because she has children. Women are an integral part of the workplace. The days of a male only business are long gone. However the days of discrimination on the gender ground are still with us. The issue of gender discrimination does not always surface. Women are fired because they are pregnant. This office sees these claims all the time. A significant percentage of those cases never get on for hearing because they are settled. However, the attitude towards women prevails. It is just that the cases are bought off. It should not be assumed that this negative attitude towards women and particularly those with children is driven solely by males. Our experience is that the attitudes towards women with children where discrimination cases are taken by this office are split fairly evenly between cases where the person taking the decision or performing the discriminatory act is a female as opposed to a male. This indicates to us that there is an issue in society which needs to be addressed sooner rather than later. It also needs people to speak up about such activities in the workplace. Only by challenging such inappropriate attitudes can attitudes be changed. Unfortunately these issues are often swept under the carpet.

The Importance of getting Legal Advice

In a mortgage repossession case Mr. Justice Noonan questioned the issue in relation to individuals getting legal advice from non-Solicitors and persons who are not Barristers.

The sad reality of matters is that a number of people in cases before the Courts, and we see regularly in cases before the Workplace Relations Commission, obtain advice from people who are neither Solicitors nor Barristers and have no real experience in the area of Employment Law.

A review of decisions from the WRC would indicate that a considerable number of people represent themselves whether they are employers or employees. Some of them might do a very good job but the vast majority, from the cases we have reviewed, do themselves no favours.

In the case of employees, very often wrong claims are brought under the wrong Act. The fact that you can lodge a claim online does not mean that you are legally qualified. You bring the wrong claim under the wrong Act and you receive less than you should have received. For example if you have a claim for holiday pay if you bring it under the Organisation of Working Time Act you can obtain both the economic loss being the underpaid wages plus compensation. If you bring the claim under the Payment of Wages Act you just receive the economic loss and no compensation.

What is worse is that people bring claims under the entirely wrong Act and receive nothing. We have seen equality claims being brought under the Equal Status legislation.

In the case of employers equally there can be a significant misunderstanding of the law.

All areas of law are complex.

Individuals need legal advice from Solicitors and Barristers when bringing employment law claims.

Solicitors in this country have to undertake continuing professional development known as CPD. This involves hours of work each year being trained to be kept up to date in their areas of practice. This is checked by the Law Society each year. If you use a Solicitor you are guaranteed to get a professional regulated service. You cannot get that service from a non-Solicitor. Barristers equally undergo training. This office does have specialist knowledge in the area of employment law and personal injury work. There are many other fine Solicitors

practices in this country that have specialist knowledge in these areas. We would encourage anybody bringing any claim to get legal advice from a Solicitor.

Rules for appeals to the Labour Court

The case of The Public Appointment Service and Cillian Flynn EDA1637 is one all practitioners should read. The Appellant Mr Flynn was awarded €5,000 by the Adjudication Officer. The case came on on appeal. It was expressly stated that it was not brought in relation to quantum only. At the outset of the hearing Mr. Allen referred to himself as a "McKenzie friend" to the claimant. The Court considered this and heard that the term "McKenzie friend" is used to refer to a person who is attending Court for the purposes only of taking notes or making quiet suggestions to or for assisting a lay litigant during the course of a hearing but who is not qualified as a Solicitor or Barrister and does not act as an Advocate at the hearing. (McKenzie –v- McKenzie [1970] 3 AllER1034). The Court heard that it was clear that Mr. Allen was present as an Advocate in the appeal on behalf of the complainant and that he had informed the Court that although he was not a practicing lawyer he in fact had been called to the Bar some years previously. The Court held he was not a McKenzie friend for the purposes of the appeal.

The Appellant lost the case as the relevant legal issue was a De Novo Appeal. The Court set out that it considered all matters coming before it on appeal as a De Novo basis. In other words the Court is not a forum for the purposes of which is to merely review the findings and its decisions of an inferior Tribunal. The Court considers all matters of fact and law encompassing any particular appeal afresh. The Court helpfully set out that Clarke J of the Supreme Court explained with clarity the principle characteristics of a De Novo appeal in the judgement of Fitzgibbon –v- Law Society [2014] IESC 48. In that case it was said in paragraph

"4.2 It seems to me that the critical characteristics of a De Novo appeal are twofold. Firstly, the decision taken by the first instant body against whose decision an appeal is brought is wholly irrelevant. Secondly, the appeal body is required to come to its own conclusions on the evidence and material properly available to it. The evidence and materials which were properly before the first instant body were not

automatically properly before the Appeal body. It seems to be that, by defining an appeal as a De Novo Appeal, any legally effected instrument necessarily carries with it these two requirements.

4.3 However, the matter does not end there, it is sometimes argued that, where providing for a De Novo appeal, what happened at first instance becomes entirely irrelevant and, indeed, inadmissible. This is not necessarily the case. First, it is important to recognise that the process of first instance may narrow the issues which truly remain alive in whatever adjudicative proceedings are under consideration. To take a simple example from the appellate structure of the Courts, there is available that is in substance a De Novo appeal to the High Court from almost all civil proceedings of the Circuit Court. The High Court Judge considers the case afresh on the basis of all the evidence presented on the appeal and without attaching any weight to the decision made by the Circuit Judge. However, what happened in the Circuit Court is not, in those circumstances necessarily entirely irrelevant. The pleadings which were exchanged pre-trial in the Circuit Court may have narrowed the issue between the parties so that at least, in the absence of leave to amend, the issue remains thus narrowed on any appeal. An appeal may not, by its term, extend to the entirety of the decision made at the first instance so that, in the example of an appeal from the Circuit Court to the High Court the appeal may be brought only against the quantum of an award of damages made by the Circuit Judge and not against the Judges finding of liability.

4.4 Second, and apart from such matters of form and process, evidence given in the first instance proceedings will not, necessarily, be entirely irrelevant to the process on appeal. It seem to me that the default position, in the absence of any specific rules to the contrary, must be that, in the case of a De Novo appeal, it remains for the parties to again present to the appellant body whatever evidence or material may be considered necessary for their case. Likewise, if, and to the extent that, the process may be inquisitorial, then, again in the absence of rules to the contrary, the inquisitorial process must start afresh before the appellate body.

4.5 However, there are obvious exceptions to this position even in the absence of specific rules. First, it is always open to a party to question the credibility of an account being given or a position being taken on

appeal by reference to evidence given or a position taken at first instance. Just as a previous inconsistent account can always be put to a witness in Court proceedings so also can a previous inconsistent account be given at first instance be put to a witness at the De Novo appeal hearing for the purposes of testing the credibility of any new account given. It will of course, be a matter for the appellate body to form its own judgement on the credibility of the new account in the light of the extent to which any difference may be established between the account given to the appellate body and the account given to the first instance body and also having regard to any explanation given for any change of position.

4.6 Likewise, it is always possible to place before an adjudicative body evidence of previous admissions made by any party against whom any adverse finding on appeal might be made. In the law of evidence as applied in the Courts, previous admissions would amount to well-recognised exceptions to the hearsay rules. It seems to me that the default position, in the absence of any rule to the contrary, must be that an admission, made by a party at first instance hearing or otherwise made during the first instance process, can be the subject of evidence at a De Novo appeal. It is not that the party concerned is, necessarily, bound by an admission previously made. It is, on a De Novo appeal, a matter for the appellate body to make its own mind up based on the evidence and material before it. However, just as an admission made by a party against its own interests outside the context of hearings altogether can be the subject of evidence, so also can a similar admission made at first instance be the subject of evidence. The weight to be attached to the evidence in the overall assessment of the issues before the appeal body will of course be a matter for it.

4.7 In summary, therefore, it seems to me that the use of the term "De Novo appeal" or similar terminology, carries with it a requirement that the appellate body exercise its own judgement on the issues before it without any regard to the decision made by the first instance body against whom the appeal lies.

4.8 In addition, and in the absence of any specific rules to the contrary, the default position will be that it will be necessary that all material on which the appellant body is to reach its adjudication are properly re-presented to that body in whatever form may be

appropriate to the type of proceedings concerned. Where the proceedings involve oral evidence, then witnesses will have to be called again. Where the procedures involve enquiries by the decision maker then those enquires will have to be made afresh.

4.9 However, even in the absence of specific rules that latter proposition is subject to some qualifications. The process at first instance may have reduced the scope of issues which are properly before the appeal body. Likewise, that scope may be influenced by the terms of any appeal brought. Furthermore there may be circumstances, such as those which I have identified where statements made, evidence given or positions adopted at the first instance may, in themselves, be properly admissible as part of the appellate process".

This case is an extremely useful reminder to practitioners as to the process of an appeal to the Labour Court on the basis of same. The case also raises an interesting issue. The issue is whether a person appealing can appeal simply the quantum. It would appear from this case that that option is actually open to an appellant. This may well be useful. It could be that an employer or an employee will accept the facts found but simply be appealing the level of the compensation awarded.

It may even be that a decision of the WRC is appealed in relation to possibly the tax treatment of any award that has been made.

Up until now it has been presumed that all appeals to the Labour Court are De Novo appeals of a full rehearing of all the issues of fact and law but it may be that it is possible to have more limited appeals. This is an issue which would clearly arise in years to come.

Presenting Submissions to the WRC

There are issues arising now in relation to the presenting of submissions to the WRC. Where submissions are sent in soft copy format they are being sent out in soft copy format. There are issues with this. First of all, because these are pdf documents and are quite lengthy can take a considerable amount of time and is an economic cost to the other side to have to print them off. The converse of this is that while the WRC state that it is sufficient for same to be sent in soft

copy format to representatives of employers or employees Adjudication Officers are still seeking to have hard copies of submissions given to them. We note the new Rules preclude this.

The problem is that the systems that are there are not interrelated. There is a technology cost in having systems in place in representative offices to accommodate same.

In addition the potential for causing significant difficulties to other parties is huge. It would be a relatively simple matter if a party wished to create difficulties to scan in for example on a section by section basis all the decisions of the Labour Court under the Organisation of Working Time Act and any case that related to the Organisation of Working Time Act to send these through on a section by section basis on the basis that these may be cases that they will be relying upon. Effectively it would be possible to serve thousands of pages on each side unnecessarily.

It is one thing for parties to furnish a submission but the backup documentation can be significant. For practitioners who do not wish to get emailed documentation then it is possible on systems now to effectively ban particular email addresses. It would be possible to ban anything from the Workplace Relations Commission so that service could not be by way of email.

There is a divergence between the WRC and this office in relation to legislation. Section 6 refers to the service of documents and refers to a notice or other documents that is required to be served on or given to a person under the Act. The provisions of Section 6 would appear to indicate that unless you have consented to transfers by electronic format then documents cannot be served by electronic format unless the party has consented to receiving same by electronic format. There is probably going to be a row between this office and the WRC at some stage in relation to the service of documentation. Our reading of the legislation is that Section 6 covers matters. The WRC believes that it is under Section 49. It is an issue which is obviously going to develop over time and we will see what happens.

Excessive Length of Proceedings before the WRC

Due to a recent Judgement in Case T-577/14being a case of Gascogne Sak Deutschland and Gascogne v. European Union. The EU was ordered to pay more than €50,000 in damages to the company's as a result of the excessive length of the proceedings before the Court.

The case concerned issues concerning compensation.

The ECJ stated that the EU may incur non-contractual liability where three cumulative conditions are fulfilled. Namely,

(1) The institutions conduct must be unlawful;
(2) Actual damage must have been suffered; and
(3) There must be a causal link between the conduct and the damage pleaded.

The ECJ concluded that as regards the first condition namely the unlawfulness of the conduct of the Court of Justice as an EU institution the Court considered that the right to adjudication within a reasonable period enshrined in the Charter of Fundamental Rights of the European Union being the 2nd paragraph of Article 47 of the Charter was breached as a result of the excessive length of the proceedings. These proceedings lasted more than 5 years.

In particular the Court noted that in the field of competition law (a field which is characterised by a greater degree of complexity than any other type of cases) it appeared 15 months between the end of the written part of the procedure and the opening of the oral part of the procedure generally constituted an appropriate period. In this case 46 months separated the two parts.

The Court considered that the parallel treatment of related cases may justify an increase in the length of the proceedings by a period of 1 month per additional related case.

These issues were set out in the press release no1/17. The ECJ have held that the field of competition law is one that has "a greater degree of complexity" than any other type of cases. Therefore for cases before the European Court of Justice as regards the written part of the procedure and the opening of the oral part 15 months would be

acceptable. Where you have cases relating to such matters as the Organisation of Working Time Act, an Equality Claim, Equal Status Claim or a claim under the Terms of Employment (information) Act or any other legislation which derives from European law then it would appear following the decision of the ECJ that parties may well be able to rely on the 2nd paragraph of Article 47 of the Charter to require cases to be heard within a reasonable period of time. Clearly as 15 months would be regarded as reasonable for the field of competition law which has a greater degree of complexity than any other type of cases then clearly a shorter period would apply in relation to employment cases.

As regards to the second condition which is actual damage suffered, the Court held that one party did not suffer actual damage.

As regards to the issue of non-material damage however the Court held that the failure to adjudicate within a reasonable period in those cases placed the two companies in a situation of uncertainty which went beyond the degree of uncertainty usually caused by litigation and they held that the state of prolonged uncertainty necessarily had an influence of the planning of decisions to be taken in the management of those companies and an award of €5,000 was provided for each company.

Where employees bring claims because of the fact that additional costs may arise in having to send reminders and otherwise to the WRC to have cases come on may well be that employees will actually be able to show actual damage.

At the present time there is a delay in having matters dealt with by the WRC.

There are a number of reasons for this. Namely,

(1) While 21 additional Adjudicators were appointed some Adjudicators have not heard any cases. Some Adjudicators are simply being assigned cases for a couple of days every week. They are not full time. This means that there is not effectively an additional 21 Adjudicators.

(2) The WRC has taken over all new cases that would have gone to the EAT and to the Equality Tribunal. Clearly they are under-resourced.
(3) Adjudicators do not have, for example, hard copies of Kerr's Employment Legislation. They do have the online version of it but this often lags behind the hard copy version for ease of use in a hearing. This is a practical problem.
(4) There is a shortage of staff. This is compounded by the fact that part of the staff are in Carlow and part of the staff are in Dublin.
(5) Not only is there delay in getting cases on for hearing there is also a delay in getting decisions issued.

This office was at the start a supporter of the new WRC. This was on the basis of the undertakings given by the then Minister Richard Bruton that we were going to get a world class service. The reality of matters is that it is now quicker to get a case on before the District Court for a breach of contract for non-payment of wages than it would be to get a claim before the WRC under the Payment of Wages Act.

Where cases are adjourned which is occurring on the WRC because for example an additional submission is required or documentation has only been produced by one side on the day and the other side require an adjournment which is not unfair. It can take months to get the case relisted. This is a problem with the computer system. It was not "designed" to deal with adjournments.

Where letters are sent in requesting updates there is a standard reply letter, which can take weeks to issue, if at all.

It is not uncommon for this office to have to send a number of reminders to try and get a hearing date.

The issue of delays in the WRC has become a significant problem. The recent Decision of the European Court may well give a basis for bringing a claim against the State for failing to vindicate rights quickly in the WRC.

The solution is very simple. Significant increased resources are needed for the WRC to work effectively and efficiently and for cases to come on quickly. It will be interesting to see does anybody bring a claim against the WRC and what the outcome of it might be.

EAT Ruling on Consultants

Two consultants brought a claim to the EAT concerning their contracts and won. The matter was appealed to the High Court and was due to be heard on 26 January. The two cases in question were effectively the test cases for a number of consultants. The effect of the ruling is that there is an estimated €700 million that will be due by the HSE to consultant doctors.

This is a very significant move. It has significant implications financially for both the consultants going forward and an immediate cost to the exchequer of some €700 million which is going to have to be funded from somewhere.

Privilege in Litigation cases which include employment law cases

A recent case in the RBS Rights Issue litigation [2016] EWHC 3161 the UK High Court considered a claim on legal advice privilege by a bank over direct communications between employees of the bank, its in-house lawyers and its external lawyers. What is interesting is that the UK High Court held that legal advice privilege did not apply.

This is a UK case which may have significant implications here in Ireland being of persuasive authority.

In this case the UK High Court decided that the correct law to apply is the Lex Fori being the Law of the Forum.

In this case the bank claimed legal advice privilege over what were interview notes. These included records of interviews conducted by or on behalf of the bank with employees and ex-employees. These were mainly prepared by the banks Solicitors.

What is interesting in this case is that the bank claimed privilege on the basis that the notes were communications by an employee authorised to communicate with a legal advisor for the purposes of his or her employer seeking legal advice.

The claimant in the case contended that legal advice privilege only covers communications between a client and his/her lawyer for the purposes of the lawyer giving and that client seeking or receiving legal

advice and the gathering and communication of information by a person who not the client is not protected by privilege even where it is gathered and communicated to an employer's lawyer with the authority and at the request of the client and/or its lawyers.

In this case Mr. Justice Hildyard said that there can be no real doubt as to the present state of law in England and that the Three Rivers (5) confines legal advice privilege to communications between lawyers and clients and the fact that an employee may be authorised to communicate with the corporations lawyers does not constitute that employee that client or a recognised emanation of the client. The client for the purposes of privilege consists only of those employees authorised to seek and receive legal advice from the lawyer.

The bank sought to claim privilege over the interview notes on the basis that they were lawyer's working papers. Under English law such papers are privileged under the legal professional privileged document.

In this case the bank also sought on the basis that the jurisdiction where the interview notes were made was in the US rather than the UK and therefore the US law should apply was rejected.

The case is a timely reminder for companies that care must always be taken with preparatory or fact gathering exercises carried out with a view to seeking legal advice should be done by individuals who are "clients". This exercise will not attract legal advice privilege if not done by a "client". This means a person within the company who is authorised to both seek and receive legal advice. This is particularly important when litigation advice privilege may be sought.

The issue of litigation advice privilege as it applies to non-Solicitors and not Barristers in Ireland is the subject of a case currently before the High Court which relates to an appeal from the Labour Court. This case is due to be heard in May.

It is therefore unlikely that this issue will be resolved prior to October or November of 2017.

We can expect significant developments one way or the other in this area in the coming twelve months. Either litigation advice privilege will be limited to a situation where advice is obtained from a Solicitor or a

Barrister or it will be extended to apply to persons who are not Solicitors or Barristers. Either scenario will have significant impact on employment litigation and litigation in general in Ireland.

We will see how matters develop.

Zero Hour Contracts

It is now two years since the University of Limerick produced their excellent report on the issue of zero hour contracts in Ireland. Since then absolutely nothing has been done. The report is there gathering dust in the Department of Jobs Enterprise and Innovation.

The sad reality of matters is the prevalence of zero hour contracts is, or at least appears to be, increasing.

Our experience in dealing with individuals on such contracts is that sometimes they do not recognise the contract they have received as being a zero hour contract and believe that they are on full time contracts.

You might ask why this is.

The answer is very simple. It is relatively easy for an experienced employment law Solicitor to draft a contract which is in effect a zero hour contract but which to the untrained eye will appear to be anything but a zero hour contract.

Of course there are occasions when a zero hour contract is appropriate. However, in the vast majority of situations where zero hour contracts are used there is no legitimate business reason other than to have a situation whereby the employer has this additional level of "control" over the employee. Make a complaint – get no hours. The word gets out very quickly in the workplace. By using such contracts and a combination of understanding the Social Welfare Code in Ireland it is possible to create effectively bonded labour. By structuring matters correctly an employer can ensure that the employee gets maximum Social Welfare in addition to their wages subject to certain conditions being achieved. Vary those and the loss to the employee may not be just a couple of hours work a week but a complete loss of certain Social Welfare entitlements. This creates a

form of bonded labour. It has the other downside that taxpayers are actually paying for these forms of bonded labour to be created by way of effectively a Social Welfare subsidy. As we have said there are always times when there are legitimate reasons for having zero hour contracts. However, they should not be open ended. There is legislation in this country which limits the use of casual employment. It does not apply to those on zero hour contracts. Whether it should is a political decision but it is also an economic decision as to whether taxpayers are prepared to continue funding the potential abuse of employees. There has been no real public debate on the report which came from the University of Limerick. With the gig economy the increased use of so called self-employed individuals and the increasing use of what could be termed uber type contracts the whole issue of the classification of employees and what rights they have seriously needs to be addressed. Will it happen? We doubt it but there is little or no political appetite to seriously address these issues.

Checking Emails / Text Messages Out of Hours

We do have a presence on LinkedIn. In late December we put up a post concerning a ruling in France that workers did not have to check emails out of office hours. We were significantly surprised by the action. In ten working days we had on LinkedIn 5500 reviews of our post.

The site this was on is very much a business site. The feedback we received both directly on LinkedIn and directly to us indicated that the issue of being required to check emails and mobile phones out of office hours has become a significant issue for many in middle management.

The law in Ireland is very clear. An employee is entitled to an 11 hour uninterrupted break each day between finishing work and starting the next day. In the case of an office worker starting at 9am in the morning it would mean that certainly after 10pm they should not be checking emails or text messages. The requirement to check emails and in particular to respond to them is one which employers need to be very careful of. If an employer is sending emails or receiving emails late in the evening then the employer may well be on notice that an employee is not getting the 11 hour break.

In addition where employees have to check emails out of office hours the issue of excessive hours of work will raise its head.

There are other claims which could also rise namely relating to the 35 hour uninterrupted rest period each employee must receive each week and the issue of working on Sundays. If an employee has to answer emails or is seen to be answering emails on Sundays then they are entitled to a Sunday premium payment. Very few managers from junior to senior will receive a Sunday premium. If they are dealing with work over the weekend particularly on Sundays they may have an additional claim then against an employer under the provisions of the Organisation of Working Time Act for not getting paid proper public holidays or annual leave as these Sunday premiums which have not been paid would be a valid claim and if upheld would have to have been taken into account in calculating these also.

Electronic communication can be a significant benefit to a business. However, it is not a recipe for employers to provide a 24 hour 7 day a week 365 day a year service. The argument that it is necessary for the business will not stand up in a claim under the Organisation of Working Time Act. A counter argument is that the employee sets their own hours. This is a dangerous defence for an employer to run as the effect of same is that the employee can then say "you have said I set my own hours so I don't like working on Mondays". Employers who run the defence that the employee sets their own hours will find it extremely difficult to dictate when employees take holidays or what hours they work. If you require an employee to be in the office from 9am in the morning until 5.30 in the evening then they do not set their own hours.

An issue which is going to arise and is arising at the present time is in relation to employees on holidays. It now appears common that those in management positions while on holidays are regularly being sent emails and contacted on mobile phones and are expected to deal with them. This is potentially a significant breach of the Organisation of Working Time Act. There have been criticisms particularly from those in the SME sector, that the Organisation of Working Time Act is not business friendly. The Act is a piece of Health and Safety Legislation. It is designed to protect the Health and Safety of workers. If flows from an EU Directive. It is necessary for employers to organise work to be in compliance with the Organisation of Working Time Act. We have

been consulted by some small businesses which say that they need to have people available to take and respond to emails where their clients are in a different time zone. This means being available to take emails late at night. There is no problem with that. There is nothing in our legislation that says that you cannot have an employee start at 4pm in the evening and work through to 12 midnight or 1am. That response is rarely greeted with great approval. The employer in these cases will want the employee to be in work at 9am in the morning but then to be available also late at night. That is not an option.

We are now seeing claims coming more often from middle and senior managers who are objecting to having to work excessive hours and claims are issuing. These individuals are invariably still in employment and wish to continue in the employment. An employer who has such a claim and it goes against them will be struck with a situation where the employee will have won a case and will be able to turn around and tell an employer I am finishing at this time. The fact that they win a case will probably be well known in the business going forward and other employees will seek to exercise their rights whether by bringing a claim against the employer or simply advising the employer that they don't have to take or respond to emails after a particular time. They may also seek additional payments for having to be available on Sundays. We accept that many businesses work on a 24 hour 7 day a week 265 day a year basis. That is a fact of life. However, individual employees cannot be expected to work on that basis. It is a matter for an employer to organise work in such a way and if necessary to take on additional staff, to ensure compliance with the Organisation of Working Time Act.

This is a message few SME's may want to hear but sometimes it needs to be stated.

The New Mediation Bill

There has been a lot said about the new Mediation Bill. This office has written to the Minister for Justice Equality and Law Reform and copied it to the Minister of Jobs Enterprise and Innovation in relation to submissions we have made in relation to mediation including employment law.

The issue is however, will mediation in the Bill cover employment law. It certainly won't cover family law as family law already has mediation provisions. We would certainly be concerned that if a similar approach is taken as regards employment law on the basis that the is a mediation process in the legislation for the Workplace Relations Commission that effectively advising clients of the benefit of mediation will not apply to employment law. Currently under the Workplace Relations Act there is a mediation process. However, there is no requirement for a Solicitor to advise a client to undertake such mediation. When matters were with the Equality Tribunal you had to opt out of mediation. This made it relatively easy for Solicitors whether advising employers or employees in that mediation was the default process. Now in the WRC while the legislation would appear to state that you have to opt out the form in the WRC provides that you must opt in. The other party being the employer will then be written to asking do they consent to mediation. Solicitors must then advise their clients of the importance of opting in. However, if there is no legislative provision requiring a Solicitor to advise a client on the benefit of mediation and that they should seriously consider it, it is our experience that what is happening is effectively nobody is going to mediation.

The other problem of course is that mediation is nowhere defined in the Act as to what mediation is. I am not surprised. There are diversions of views as to what mediation actually is. In employment cases where an employment has ended in reality you are talking about negotiating a settlement.

This office is in favour of mediation. However, if the requirement to advise parties on the importance of mediation to support the idea of going to mediation is not going to apply to employment law then the reality of matters is that mediation is not going to occur in the WRC. Family law is entirely different. There are very specific rules in relation to family law as regards mediation. If employment law is not included it is a lost opportunity. We have sought in the strongest way that we can to have mediation included as applied to employment law and that the obligation to advise would apply not only to Solicitors and Barristers but to anybody representing in employment law cases that are doing so for financial gain.

Classification as an Employee

A decision which was issued on 16th November 2016 but which appeared on the Courts website on 9th January being a case on McKayed and Forbidden City Limited trading as translations.ie 2016 IEHC722 is a case where the High Court has held that the plaintiff in the proceedings was not an employee.

In this case the High Court has very helpfully set out the employment documentation.

There is a detailed discussion of the authorities and the application of mutuality of obligation. While the High Court has not said that the mutuality of obligation is the only test the claim by the plaintiff failed on the issue of mutuality on the basis that the defendant only stated that they would endeavour to provide work and that they would prioritise work for the relevant individual. The High Court held that there was no such words such as guarantee or "shall provide work". This case is an important decision. It does raise the issue that it is now more likely to be able to structure a contract in Ireland between a company and an individual so that the individual is not an employee. In the UK we have such cases as the Uber case. In this case the Court held;

"I am of the view that the defendant company was not under a contractual obligation to furnish the defendant with any, or any particular, volume of work into the future and that the requisite mutuality of obligation for an employment contract was therefore absent".

It would therefore appear that it might be a lot easier to classify individuals as not being employees as was previously thought. There are serious issues in relation to this.

The first of course is that it may well be now possible to completely avoid employment legislation in respect of various individuals while maintaining the benefits from an employer's perspective such as confidentiality and effectively non-compete clauses.

Secondly, there is the issue that if individuals are not employees then they are self-employed which means you no longer have issues such as employer PRSI which will be a significant saving to employers.

The only down side to an employer is the employee does not have to provide the work by which we mean that if employees are called to work they can simply refuse as there will be no mutuality of obligation. However, for some employers that might be a benefit.

This is an important decision. It may have a significant impact on employment rights of a significant number of individuals and it will be interesting to see how matters develop.

Terms of Employment (Information) Act

A recent case of the Labour Court in Gencat Limited and Romain Daboust, reference TED1632, is an extremely useful decision from the Labour Court.

In this case the Adjudication Officer had originally awarded a sum of €750. The matter was appealed to the Labour Court. The Labour Court increased the compensation to four weeks wages being €1,538.48.

The case is a very useful case for practitioners for the fact that the Labour Court has taken the time in setting out the full provisions of Section 3 of the Act as amended.

This is extremely useful. Unfortunately, for practitioners and employers the opportunity to obtain consolidated legislation is not always available. The Labour Court in setting out the legislation in full, as amended, has provided a very useful service for practitioners.

The Labour Court in this case importantly found that the statement furnished had not been signed “by or on behalf of the employer” and that there were a number of the items specified in Section 3 (1) of the Act which had not been set out. The Court decided in this case that it was not required to make finding as to whether or not the document had been furnished within the statutory two months period of time as there were these existing defects.

The Labour Court must be commended for having taken the time to set out the full legislation in its amended format. Such an approach by the Court, we believe, should be recognised and commented on.

Sunday Premiums and Trinity Leisure Holdings Limited

In a case of Trinity Leisure Holdings Limited trading as Trinity Citi Hotel and Natalia Alfimova DTW173 the Labour Court reaffirmed the position regarding Sunday premiums for those working on Sunday. Ms. Alfimova and another employee whose case was decided under DWT174 had both brought cases. The employees were represented by this office and the employer a top tier law firm and one of the most experienced Barristers in Ireland in this area of law. The case among other issues related to Sunday Premiums.

The contract provided that the rate of pay specified "includes (her) Sunday premium based on (her) getting every third Sunday off".

The employer submitted that the requirements of Section 14 (1) of the Organisation of Working Time Act were therefore being met.

The employer's case referred to a case of Duesbury Limited and Frost DWT1032 where the Court found that it was clear from subsection (1) (b) that the right to compensation for Sunday working can be satisfied where the requirement is taken into account in determining the employee's rate of pay. The Court in that case had also held;

"This suggests that some element of the employee's pay must be specifically referable to the obligation to work on Sundays".

The Court held that the Respondent company had failed to render any evidence as to what if any element of the hourly rate of pay was specifically referable to her contractual obligation to work on Sundays.

At the relevant time the employee was paid €9.53 per hour when the minimum wage at that stage was €8.65.

The Court in this case determined that a premium of 30% of the basic rate for hours worked on Sundays would apply.

This is an extremely old case that has taken some time to get through what was originally the Labour Relations Commission.

At this stage the relevant employees have further claims awaiting determination or hearings in the WRC all of which relate to issues relating to Sunday premiums and associated claims arising from same.

Von Colson and Kamann

The Von Colson and Kamann principle is that where compensation is being awarded in cases which are brought under legislation which has been put in place by virtue of a Directive or Regulation of the European Union then in those circumstances the compensation cannot simply be the economic loss which the employee suffered.

Arguments in the past have been raised that the Von Colson and Kamann principles do not apply to cases involving the Organisation of Working Time Act.

In a recent case a Step1 Permanent Solutions (In Liquidation) and Kamila Marzeda DWT172 the Labour Court confirmed that the Von Colson and Kamann principles which are set out in case 14/83 of the ECJ does apply in such cases following the decision in the High Court in Bryszewski –v- Fitzpatricks and Hanleys Limited trading as Caterway and the Labour Court [2014] IEHC263.

This is an important restatement of the law by the Labour Court.

Dismissal and Selection for Redundancy

In case ADJ1516 the employer contended that the employee was dismissed by reason of redundancy. It was claimed that the employee had been offered alternative employment on reduced hours but turned it down. The employee contended that while he was on sick leave another individual was taken on and was now doing his job.

The Adjudication Officer in this case helpfully reviewed the provisions of Section 6(1) of the Unfair Dismissal Act 1977. The Adjudication Officer also referred to Section 6(4).

The Adjudication Officer found that the employee had been employed on a contract of indefinite duration commonly called a permanent contract. The argument of covering for maternity leave was rejected.

The Adjudication Officer set out the case of UD206/2011 where the EAT stated,

"When an employer is making an employee redundant, while retaining other employees, the selection criteria being used should be objectively applied in a fair manner".

The EAT in that case went on to state,

"there were no serious or worthwhile consultations with the Claimant prior to making her redundant. The consultation should be real and substantial".

The EAT in that case also stated,

"There was no worthwhile discussion in relation to the criteria used for selecting the Claimant. The selection criteria should apply to all employees working in the same area as the Claimant but should also consider other positions which the claimant is capable of doing".

The Adjudication Officer in this case held that no evidence was presented as regards any objective and transparent selection criteria being used prior to deciding that the employee be made redundant. He held that an offer of a two day week could not be considered a suitable alternative employment as it constituted a 60% reduction in working times from earnings. The employee was not advised that he could appeal the decision.

An award of €21,750 was made.

This case is a timely reminder that in making an employee redundant an employer must,

1. Have a selection criteria
2. Make sure that the selection criteria is communicated to the employee.
3. Discuss the proposed redundancy with the employee.

4. Consider other alternative positions for the employee.
5. Apply the selection criteria equally to all staff.
6. Make sure that the employee has a right of representation at any discussion.
7. If it is decided that the employee be made redundant give the employee a right of appeal.

Redundancy is a process where it is the job or the position that is being made redundant. It is the effect of that position being made redundant that the employee becomes redundant. Where redundancies are being considered it is not a question of keeping the best employees. It is an issue of deciding which jobs will go and then applying the selection criteria to the people in those jobs.

If an employer has three sandwich makers and three food servers. The employer decides that only two sandwich makers are needed and two servers. Then one sandwich maker and one food server will be made redundant. It is not a matter of deciding that all three sandwich makers are really good workers and therefore making two of the server's redundant and moving one of the sandwich makers to become a server. This might be a very simple example but it is surprising how often employers believe that when it comes to redundancy the selection process is on the basis of who is the best employees or employers seek to move people around so as to maintain the best employees that is not redundancy. Redundancy is the actual job which is going and it is only as a result of the job going that an individual loses their employment.

Get a redundancy wrong and an employer can be on the wrong end of an Unfair Dismissal case which can be expensive.

Unfair Dismissal in Redundancy Situations

The Labour Court in the case of Tolerance Technologies Limited and Joe Foran UDD1638 is a case where an employee was dismissed.

The employer contended that there was a redundancy necessitated by challenges facing the business. The Court in this case accepted that the employees position became redundant in October 2015. The Court however stated that the manner of the Dismissal was procedurally unfair. The Court noted that the employee was not consulted

adequately. He was no afforded representation at a meeting and was denied the opportunity to engage with the Board when he requested that facility in a situation where he was not satisfied with the termination of his employment which had been communicated to him at two meetings.

The Court decided that notwithstanding the fact of redundancy of a position the conduct of the employer in relation to the dismissal could not have been reasonable. The Court held it was therefore a dismissal. The employee had been awarded €35,000 before the Adjudication Officer. The Court reduced this to €20,000.

Again this is an important reminder for employers of the importance of fair procedures. The fact that an employee is being made redundant does not mean that they are not entitled to fair procedures. They must get fair procedures. In the event that they do not there is every likelihood that an unfair dismissal award will be made against the employer.

Published in Irish Legal News 16 January 2017.

Unfair Dismissal - Incapacity

In the case of Noonan Services Group Limited and Elwira Kravcova the employee was dismissed. The company submitted that the dismissal arose out of the incapacity to undertake the duties, for which she was employed, namely a cleaner.
Evidence was given by the employer as to the procedures and reason for dismissal.

The Court found that the medical evidence available to the company stated that it was clear that the employee was at best partially fit for the demanding task of a cleaner and would benefit from a change of work and/or work environment. The Court found that the company did not contact the doctor to discuss the complainant's conditions nor did it notify the employee that her continuing employment was at risk arising out of her growing incapacity to undertake the duties for which she was employed.

The Court found that the medical evidence clearly stated that the complainant was partially fit for the demanding task of a cleaner. The

Court found that the company took no steps to establish the extent of the incapacity, the task she could undertake and those she could not or to advise her to consult her own medical advisors in this regard. The Court found that the medical evidence on which the employer relied on did not support its conclusions and further that the procedures adopted by the company in dealing with the employee were flawed in that they did not afford her procedural fairness or natural justice in a manner in which it was administered.

The Court in this case found that there was no evidence of job applications or interviews and that she was certified unfit for work and will be claiming Social Welfare. The employee had been unemployed for the period from the end of September 2015 until July 2016. The Court awarded 20 weeks pay in the sum of €8,160 as compensation.

This case is important for employer in understanding that fair procedures must be applied at all times. When dismissing for incapacity it is important that the full medical evidence is obtained and that the employee has an opportunity to review same. That all steps are taken to ascertain the extent of the incapacity and what work could or could not be done.

Unfair Dismissal/Non Payment of Wages

In case UDD1639 being the case of Barry O'Hea T/A O'Hea Landscaping and Robertas Gailius the employee in this case brought an Unfair Dismissal case and before the Adjudication Officer was awarded €2,000. He appealed.

The Labour Court held that it was common case that the employer failed to pay the appropriate wages to the employee over an extended period of time.

The Labour Court has helpfully restated the law in this area when they held,

"The Court accepts that the Respondent's failure over an extended period to pay wages which were properly due to the Appellant in full or occasionally at all undermined a basic tenet of the employment relationship in a manner which goes to the heart of the contract of

employment. In those circumstances the Court finds that it was reasonable for the Appellant to terminate the contract of employment".

The Labour Court increased the compensation to €13,000.

Equal Pay Claims

In the Labour Court case of G4S Secure Solutions (IRE) Limited and Noel Cantwell EDA1638 the Labour Court stated that;

"It is settled law that an Equal Pay claim must be grounded on the differences in remuneration of the complainant relative to that of a real as opposed to a hypothetical comparator with whom he or she is engaged on like work. This was made clear in Brides -v- Minister for Agriculture [1998] 4 IR 250".

The Court then went on to consider whether the nominated comparator was employed under a Contract of Employment. The Court held that the comparator was operating in a voluntary capacity when he was engaged to assist in events and was not on a Contract of Employment on such occasions. The Court quoted the case of Allomby -v- Accrington & Rosendale College C-256/01 where the CJEU considered the definition of a "worker" in Article 141 being a person "(…) who for a certain period of time, performs services for and under the direction of another person in return for which he received remuneration".

The Court pointed out this application gives a wider application of equal pay then a narrow Common Law based definition of a contract for service.

The Court determined in this case that the appellant and the comparator were not performing like work. The case was dismissed.
This case is a very useful reminder of the law as applies in the area of Equal Pay. It is extremely useful that the Court took the time to set out the law on this matter. It is the practice of the Labour Court to do so and it does help in understanding to a great extend the basis under which the Court arrives at its decisions.

Published in Irish Legal News 26 January 2017.

Equality Cases – Disability – Dismissal

The case of Arrabasc Limited and Gerard Cahill EDA1635 is one where the employee contended that he was discriminated against on a disability ground and was dismissed as a direct consequence of his disability and that he was not afforded reasonable accommodation in failing to properly ascertain the nature, and extent, or likely duration of his illness and consequent incapacity.

The employee in this case sued the company he was working with not the agency he was employed by. It was accepted by the representatives of the company for whom he provided the work that under the provisions of the legislation are the appropriate party to be sued. They however contended that they had no control in relation to the dismissal of the employee.

The Labour Court reviewed the case of Humphries –v- Westwood Fitness Club 2014 15E.L.R. 296 which decision was appealed to the Circuit Court and upheld. This case dealt with a disability defence which an employer can raise. The Court also looked at a case of A Worker –v- An Employer [2005] E.L.R. 159 where the Labour Court set out the statutory duty on an employer to make reasonable accommodation for disabled person. The Court also pointed out that in the case of Marie Daly –v- Nano Nagle School 2015 I.E.H.C. 785 the High Court affirmed the consistent construction of Section 16 of the legislation and the interpretation by the Labour Court of the scope of the obligation placed by Section 16 to consider what reasonable accommodation can be made for an employee with a disability within the meaning of the Act. The Court found therefore that there had been a failure to adequately consider all available options and how the disabled person could be accommodated.

The Respondent in this case accepts that it did not seek to reasonably accommodate the complainant as they had believed this was a matter for the agency. The Court stated that it was satisfied that as the provider of agency work with a statutory liability for any discrimination found to have occurred the Respondent failed in its duty and substantially and materially contributed to the circumstances which brought about the termination. The Court awarded a sum of €27,000. This case is a timely reminder for those

who use agency workers. Some employers who use agency workers believe that they have no duty whatsoever to the agency worker. This is incorrect. As it is the end user effectively the employees work for, that party not the agency bears the responsibility.

Discriminatory Dismissal

Case ADJ3686 is useful in reminding those defending claims that Section 16 may bring a Defence which is effectively if it can be shown that an employer forms a bona fide belief that the Complainant is not fully capable within the meaning of the section of performing duties for which they were engaged on the basis of the test set out by the Labour Court then this is a valid Defence. The Adjudication Officer in this case quoted the case of EED037 A Health and Fitness Club v. A Worker. This is a case which was upheld on appeal in the Circuit Court.

Equality Claims/Collective Agreements

In case ADJ2914 the Adjudication Officer in this case refused jurisdiction.

The Complainant had made a complaint relating to a collective agreement. The Adjudication Officer quoted Decision DEC-2012-048 Byrne and O'Hanlon v. Diageo as clear authority that in order to bring a valid complaint against a collective agreement pursuant to Section 86 of the Employment Equality Acts all parties to the agreement must be included. These are the employer or the employers and Trade Union or Trade Unions who negotiated the agreement.

The complaint in this case should have been brought under Section 86. It was brought under Section 77. On those ground the Adjudication Office found that he had no jurisdiction.

This case is a timely reminder of the requirement to bring a claim under the correct section of legislation.

Redundancy

In case ADJ3729 the Adjudication Officer in this case dealt with the case under the Payment of Wages Act. The Adjudication Officer in this

case made an award under the Redundancy Payment Act. What is interesting is it was made,

"Subject to the Complainant fulfilling current Social Welfare requirements in relation to PRSI contributions".

We would not agree with this view. The issue in relation to it, as we read it, under the legislation is that the employee was in insurable employment. It is not necessary that the employee is actually one where the employer has paid the insurance contributions.

The reason we say this is that if there was a requirement for the PRSI contributions by the employer to have been paid. Then effectively employees would lose out on redundancy where there is an employer who does not pay PRSI. That is not the basis of the legislation in our view.

Transfer of Undertaking Regulations

In case ADJ-578 the Adjudication Officer has reviewed the law relating to a Transfer of Undertakings.

The Adjudication Officer considered the ECJ case of Suzen being Case C-13/95.

That case held that the mere loss of a service contract to a competitor cannot therefore, by itself, disclose the existence of a transfer under TUPE and that in an order to establish TUPE that there must have been a transfer to the new contractor of significant tangible or intangible assets or the taking over by the new employer of a major part of the workforce in terms of numbers and skills.

The Adjudication Officer also quoted the case of Cavan Industrial Cleaning Services and Eight employees, case TU29-TU36/2013 where the EAT emphasised that the mere loss of a service contract to a competitor cannot therefore by itself disclose the existence of a transfer within the meaning of the Directive.

This case is an important reminder that the rules relating to a Transfer of Undertakings are complex.

In our view it is probably one of the most complex areas of law. It is one of the shortest Statutory Instruments that colleagues will come across and one of the shortest Directives. However, like the VAT Directive it is one that has created a significant amount of case law, both in Ireland and in the ECJ.

The whole basis of the TUPE Directive is under review. Hopefully this will take place sooner rather than later and we will get more user friendly piece of legislation which both employers and employees have to deal with.

Extension of Time

In case ADJ-1742 the Adjudication Officer who dealt with this case quoted the High Court case of Minister for Finance -v- CPSU and others 2007 which examined the principle of reasonable cause which was similar to extend of six month time period under the Employment Equality Act 1997.

The High Court held the absence of subjective knowledge on the basis of the applicant concerning the constitutional rights or legal rights does not prevent a cause of action accruing and time running under the 1977 Act. The employee did not submit the complaint until February 2016 which is some three months after taking advice.

This case is a timely reminder to those representing employees that it is important that claims are brought as quickly as practicable. Waiting is not an option.

Ignorance of the law is not a defence. Where an employee gets legal advice it is important that they bring the claim then as soon as possible thereafter.

There are grounds which have been held where an extension of time has been allowed but the reality of matters is that claims should be issues at the earliest date practicable.

Low Pay Commission

This firm has made a submission to the Low Pay Commission in relation to the issue of Board and Lodging deductions. Our submission has been acknowledged.

We will not be making a submission in relation to the National Minimum Rate of Pay as while we may have opinions on it we do not have the economic data to realistically be able to make a reasoned judgment and submission in respect of same.

In relation to the issue of Board and Lodging the main thrust of our submission is that there is a difference between deductions where accommodation is offered as opposed to one where the employee is required to live on site. We believe that there is a logical distinction where the employee has no choice. In such cases, we believe that there is a strong argument that the current levels of allowances which can be deducted are left as they are. We have also made submissions relating to the issue as to what happens where an employee is working a limited number of hours. The other issue which we have raised is that the legislation, as it currently stands, does not set out what level of quality of accommodation or board and lodging must be provided. This is a defect in the legislation. As the law currently stands an employee who is sharing a room with three others will have the same deduction for lodging as would an employee who has their own room with an ensuite bathroom. As regards board there is no definition as to the quality of food or the amount of food that must be provided.

Penalisation

In ADJ-2456 the Adjudication Officer in this case quoted the case of Considine -v- Limerick City and County Council HSD165 where the Labour Court stated as regards claims for penalisation under the Safety and the Welfare at Work Act that:

“The Court observes that the statutory protections are designed to ensure that a person cannot be penalised for making a complaint under the Act. However, it is not a protection against the normal and unrelated exercise of management within an employment. Where there is a coincidence of timing between the performance of a protected act

and the taking of a sanction or prospective sanction against the worker the Court will require a clear explanation for the two events. Where it is not convinced that they are independent of each other the Court will exercise the power invested in it under Statute to protect a worker's statutory rights. However, where the two incidents occur around the same time and the Court is convinced that they are independent of each other the Court must allow management to function normally".

This previous decision of the Labour Court is an important principle of how the Act applies as regards penalisation.

It is our view that employers need to be very careful if they receive a complaint from an employee under the Safety, Health and Welfare at Work Act that if any form of disciplinary or other action is to be taken against an employee that it must be able to be clearly demonstrated that it has nothing to do with the fact that the employee has made a complaint.

Developments in UK Employment Law

There are a number of significant reforms which are planned in the UK.

Gender Pay Gap Reporting

We have commented previously on the Equality Act 2010 (Gender Pay Gap) Regulations 2017 which have been published. These Regulations are due to come into force in the UK on 6th April 2017.

Sunday Working

The UK Enterprise Act 2016 will place a new obligation of retail employers in relation to Sunday working. There will be extra protection for shop workers who do not wish to work on Sundays. There will be a right to object to working additional hours on Sundays. The new provisions are not yet in force. Once they are implemented retail employers will have a two month period in which to act.

Taxation of Termination Payments

The UK Government is proposing to make a number of changes to the tax and national insurance treatment of termination payments. The three main changes are;

Employer National Insurance and income tax treatment to be aligned meaning that Employer National Insurance is payable on any taxable termination benefit.

All payments in lieu of notice will be subject to income tax and national insurance contributions in full;

The Foreign Service Relief exemption will be abolished

Apprenticeship Levy

A new levy will enable employers to choose and pay for the training they want their apprentices to obtain. All UK employers in both private and public sector that have an annual wage bill of more than STG£3 million will have to pay 0.5% towards the cost of apprenticeship training.

The UK Revenue and Customs will publish amended Regulations. Draft Regulations are already available.

Service Providers to Public Sector engagers.

The UK Government has confirmed its intention to amend the IR 35 legislation from 6 April 2017 for workers who provide services through a personal service company to a public sector engager. As a result the person paying the personal service company will generally be required to operate PAYE and National Insurance contributions on those fees.

Employment Practices

The UK Government has launched an independent review on employment practices in the modern economy which was launched in October 2016. In addition, there is an inquiry into self-employment

and the gig economy with a deadline which was 16th January of this year.

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How to stamp out people trafficking?

While the UK seems to have it nailed (please excuse the pun). Nearly 100 people working in nail bars have been arrested on suspicion of immigration offences as part of a clamp down on illegal working. 280 nail bars in Edinburgh, London and Cardiff were targeted as part of risk industries.

Warning letter have been sent to 68 businesses that they will pay STG£20,000 per illegal worker if they cannot prove they carried out appropriate right to work document checks.

The UK immigration Minister has said that the operation sent a strong message to employers who abuse immigration laws and added that modern slavery is a barbaric crime which destroys the lives of some of the most vulnerable in our society". Of the 97 arrested 14 were passed to the UK National Referral Mechanism hub which is a service supporting those identified as possible victims of slavery and human trafficking. The awful issue is that people working in plain sight in UK nail bars and also some on construction sites and in agriculture are in fact suspected to be modern slaves. The UK has a Modern Slavery Act. This was actually drawn up by Theresa May when she was Home Secretary. The legislation was introduced in 2015 and since then 289 modern slavery offence prosecutions have taken place.

There is a strong argument for similar legislation to be introduced in Ireland. The financial penalty in the UK is a deterrent. One of the main areas of exploitation here in Ireland excluding the most obvious which sometimes gets covered in the papers is the area of Au Pairs. The unfortunate reality of matters is that the legislation which applies

here in Ireland actually encourages the creation of modern slavery and we expect to be writing further on this issue in due course. The reality is, and we are not really at liberty at this stage to go into it in any great detail, is that there are a number of agencies operating in Ireland providing au pairs who target particular nationalities so as to ensure they have no employment law rights except under the National Minimum Wage Act and who are able to operate because some of the English Language Schools, and we use the word some advisedly, are simply fronts to facilitate same. This issue was highlighted by RTE in an RTE Investigates program on Au Pairs in December of 2015 but little or nothing has been done since then. Unfortunately modern slavery is not a priority in Ireland to be addressed.

New Employment Regulation Order for the Security Industry

It is proposed that a new Employment Regulation Order will apply. Until the new Regulation Order comes in to effect the existing Statutory Instrument 417 of 2015 which set a rate of €10.75 per hour together with overtime rates will continue to apply.

Under the new proposed IRO the rate of pay will raise to €11.05 from the 1st April 2017. It will thereafter rise annually on the 1st April of each year to €11.35 on the 1st April 2018 to €11.65 on the 1st April 2019.

Civil Liability (Amendment) Bill 2017

We have written to the Minister for Justice, Equality and Law Reform in relation to Section 5. Section 5 exempts periodic payments from income tax. We have written to the Minister to ask her to look at the issue as to whether the current wording of Section 5 of the Bill is sufficient to exempt a periodic payment from the Social Welfare Code in particular USC.

It would in our opinion be important that the Bill is amended to ensure that if any subsequent charge to Social Welfare comes into play that these periodic payments would be exempt. This would be to effectively ensure that issues such as an Income Levy which could apply under the Social Welfare Code as has happened in the past or a Health Insurance Levy or some other form of Levy would not apply to these periodic payments.

Interest on Judgments Debts

S.I. 624/2016 - Courts Act 1981 (Interest on Judgment Debts) Order 2006 reduces the rate of interest payable on judgment debts under Section 26 of the Debtors (Ireland) Act 1840 from 8% to 2%.

One of the effects of this Statutory Instrument is that in some cases it may now actually be cheaper for a debtor to allow a judgment go against them then to pay interest at a rate specified in a contract.

Courts Act 2016 (Commencement) Order 2017, S.I. 1 Of 2017

This Commencement Order commences Section 2 of the Act from the 11th January 2017. This is the amendments to Sections 140 and 196 Civil Partnership and Certain Rights and Obligations of Co-Habitants Act 2010.

Civil Liability and Courts Act 2004 (Commencement) Order 2017, S.I. 2 of 2017.

Farming Accidents

Health and safety is important in all workplaces – manufacturing, schools, hospitals, offices, retail and the farm yard.

Agriculture is a huge part of the Irish economy. It only accounts for six percent of the workforce but more than 50% of workplace fatalities occurred on farms in 2016. Most farm fatalities involve accidents with livestock or machinery and involve both the young and the elderly.

Ensuring a safe working environment and reducing the risk of injuries in the workplace has increased significantly over the last few years. This ethos must be translated into the agricultural industry in light of the unfortunate fatalities of 2016. The Safety, Health and Welfare at Work Act, 2005 allows farmers with three or less employees to comply with the Code of Practice for Agriculture as an alternative to preparing a safety statement. It aims to improve the level of safety and health among all persons engaged in the agricultural sector – farmers, family members, employees, service providers and other persons. It sets out the risks associated with the industry and how to manage these risks.

Many farmers are self-employed with the farm being run by family. They can also be the primary breadwinners of a family. When a person dies because of the wrongful act of another person, you can bring a claim for the wrongful death of the deceased. When a loved one dies, particularly in tragic circumstances, talking to a solicitor and bringing a claim is generally the last thing on a person's mind. However, bringing a claim for fatal injuries / wrongful death may help ease the financial burden on a family after the death of a family member. If a wrongful death claim is not an option, farm insurance may include personal accident insurance cover and you should speak to your insurance company about this cover.

The primary goal should be to prevent injuries, including fatal injuries, on farms and to see a reduction in the fatalities on farms in 2017.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**