We would like to welcome you to the February issue of our newsletter Keeping In Touch.

With so much happening in employment law we are somewhat changing the format. While we will still be covering what we consider the most significant decisions we are changing, somewhat, to commenting more on cases as to what we believe can be learnt from the various decisions.

Some of this will of course be a very personal take on these cases. They should never be regarded as criticisms and we try to comment as to what can be learnt, particularly as regards best practice going forward and how best to act in cases whether acting for employers or employees.

Where as in any case there may be some criticisms raised by us they are intended to be constructive. There are still issues with the WRC and some of these have come to light in cases heard in the Labour Court and these are one of the issues which we would be commenting on in this newsletter particularly as regards the WRC claim form.

We also have a situation where the Maternity Protection Act has been amended by the Social Welfare Act 2017. We have significant concerns that employment legislation is being slotted into whatever piece of legislation happens to be coming alone rather than having specific amending legislation, which is specific to The Act which is being amended, which in this case should have been the Maternity protection (Amendment) Act 2017 rather than the amendment to the Maternity Protection Act being inserted into the Social Welfare Act 2017. It is extremely difficult for employers, employees, HR/IR Practitioners, Solicitors and Barristers and even Adjudicators to keep up to date with these amendments.

We hope in the coming year to continue to develop this newsletter to be relevant to those interested particularly in employment law.

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Out and About

On Tuesday 16th January Richard Grogan of this firm was interviewed by Ivan Yates on The Hard Shoulder on Newstalk FM on the issue of cyclists. The interview can be downloaded and listened to and it is in the Publications Section of our website.

On 14th February Richard Grogan will be speaking at the IOSH Ireland South Branch. Their conference is on Resilience in Safety in Times of Change. Richard will be dealing with the issue of the organisation of Working Time Act as a piece of Health and Safety Legislation and its importance for both workers and the potential impact of non compliance with same for employers particularly from a health and safety perspective.

On 9th March Richard will be a speaker at the Law Society Finuas training day on employment law.

Mediation Rules in the Courts

Statutory Instruments numbers 9, 11 and 13 all of 2018 which were effective from the 22nd January 2018 are the new Mediation Rules which follow from the Mediation Act for the District Court, Circuit Court and High Court.
The effect of these Rules is that any of the Courts can, at their own instigation, require parties to proceedings to attend a mediation meeting.
We would remind practitioners that it is important now to advise clients of the importance of mediation.
The Law Society have produced a precedent letter to clients about mediation.

Industrial Relations Act 1990 (Code of Practice on Longer Working) (Declaration) Order 2017 S.I. 600/17.

This Statutory Instrument sets out a Code of Practice for the purposes of the Industrial Relations Act 1990 relating to the accommodation of

employees who want to work longer. This means after what could be termed normal retirement age.

For employers dealing with the issue of retirement it is important that this Code of Practice is looked at as it is particularly relevant in setting out any retirement policy and is looking at the issue of employees working after 65 years of age. The Code of Practice deals with managing requests to work longer, developing employment practices and changing the Statutory legal framework in regard to retirement and pension entitlements.

The Code sets out that essentially the law is now that compulsory retirement ages set by employers must be capable of objective justification both by the existence of a legitimate aim and evidence that the means of achieving that aim is appropriate and necessary.

The Code is also particularly relevant to employees who wish to seek to work longer as regards how they should request same.

Income Tax – (Employments) Regulations 2017 S.I. 623/17

These Regulations amend the Income Tax (Employments) Consolidated Regulations 2001 S.I. 599/2001.

Regulations 43&44 which provide for the Taxation of Disability and Injury benefits by employers are deleted for the year of assessment 2018 and all subsequent years.

This is a Statutory Instrument which is important your payroll providers and internal operators are aware of it.

Additional Maternity Leave in the case of Premature Birth

In the Social Welfare Act, 2017 which was enacted in part on the 23rd December 2017 extended Maternity Leave entitlements together with related State Maternity Benefit now apply where a baby is born prematurely.
The Act in Section 16 amends the Maternity Protection Act, 1994. This provides for a further period of Maternity Leave for mothers of babies

born prematurely on or after the 1st October 2017. This additional period of Maternity Leave is equal to the "premature born period" which is defined in Section 15 (2) of that Act. It is the period commencing on the actual date of birth and expiring two weeks before the expected week of birth. Provision has also made for an extended payment of State Maternity Benefit for the length of the premature birth period.

This means that the entitlements apply until after the end of the standard 26 week period of Maternity Leave.

It is important that employers understand that those staff who gave birth to premature babies will be entitled to a longer period of Maternity Leave.

This does create certain difficulties. It is necessary for employers now to review their policies and procedures particularly in the case where payments are being paid during periods of Maternity Leave. It may be that employers will want to consider reviewing their policies where Maternity Pay is paid to cover such periods also. The legislation does not make any obligation for employers to pay enhanced Maternity Benefit to employees during the premature birth period.

The amendment to the legislation makes perfect sense. However, there is a serious issue. This was included in the Social Welfare Act, 2017. It would have been very easy to amend the Maternity Protection Act, 1994 by bringing in an amended piece of legislation. This is another example of how difficult it is for employers, employees and representatives to keep up to date with amendments in employment legislation where the legislation is inserted into completely unrelated legislation. Any employee or employer who would undertake a search of Maternity Protection Law in Ireland would not find this Act. It is sloppy action by the legislature. Instead of putting in place a Maternity Protection (Amendment) Act, which would have made it very clear for anybody checking amendments to employment legislation, they have instead inserted it in Social Welfare Legislation. We have this with the Workplace Relations Act 2015 which was amended by pieces of legislation where not in a month of Sundays could anybody have reasonably believed that they would have anything to do with employment legislation.

There are well over 700 pieces of employment legislation, both Acts and Statutory Instruments, applying in Ireland. We now have the Social Welfare Act 2017 as now also being a piece of employment legislation. The Government is making it extremely difficult for employers, employees, HR/IR practitioners and lawyers to keep up to date with legislation.

The amendment however is to be welcomed but hopefully going forward the State could consider where changes to employment legislation are being put in place specific legislation which would be easy to see relating to amending legislation could be enacted so that we have a system which is easy to navigate. When the new procedures were brought in place we were told we were going to get a world class service. On that basis the Department of Employment Rights and Social Protection which is responsible for the Social Welfare Act really should have taken the time to have the Maternity Protection Act amended directly by an amending Act rather than by the Social Welfare Act, 2017.

Asylum Seekers Entitlement to Work

The Department of Justice, Equality and Law Reform have advised that from the 9th February next those seeking asylum in the country will be entitled to apply in certain circumstances for a permit under the Employment Permit Act, 2003. They will, however, have to pay a fee of between €500 to a €1,000. This will be for six to twelve month permit.

They will only be able to take a work if they receive a job which has a starting salary of €30,000 or more.

They will not be entitled to work in certain sectors such as health care, hospitality, child care, general care services, sales, marketing, construction or effectively any of the listed jobs where work permits would not be currently granted.

This move by the Department is in response to the Supreme Court having held that asylum seekers would be allow to work.

The reality of matters is that this is a very simply method of effectively circumventing the matters set out by the Supreme Court. For a person to earn €30,000 a year, they are going to have to be earning well in excess of the National Minimum Wage. The effect of this scheme is to effectively close down, what could be termed, normal employments for those in the asylum process.

Disciplinary Hearings - How not to run them

Case UDD1758 being the case of Select Service Partner Ireland -and- Albert Fordjour is one of those decision which any person interested in employment law whether they are an employment law Solicitor, Barrister, HR/IR Professional or a business owner is a decision which should be read by all.

The facts of the case have been outlined in some depth in press coverage. What is however interesting from an employment Solicitor's perspective, is the excellent overview of the law set out by the Labour Court. The Court has taken the time and effort to set out what the right to fair procedures is and has quoted a number of cases including Leary -v- National Union of Vehicle Builders [1971] 1Ch being a decision of Magarry J as one where it was held that an employee was entitled to natural justice both before an original Tribunal and an Appellant Tribunal. The Court pointed out at page 49 of that Decision Megarry J had stated:

"If a man has never had a fair trial by the appropriate trial body, is it open to an appellant body to disregard its appellant functions and itself give the fair trial which he never had? I very must doubt the existence of any such doctrine."

And again on the same page he said:

"As a general rule to all events I hold that a failure of natural justice in the trial body cannot be cured by sufficiency of natural justice in an appellant body."

The Court quoted the case of State (Irish Pharmaceutical Union) -v- Employment Appeals Tribunal [1987] ILRM36 where McCarthy J at page 40-41 of the decision stated:

"It is a fundamental requirement of justice that a person or property should not be at risk without the party charged being given an adequate opportunity of meeting the claim as identified and pursued. If the proceedings derive from statute, then, in the absence of any set or fixed procedures, the relevant authority must create and carry out the necessary procedure; if the said or fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice, for which proposition there is a wealth of authority."

The Court quoted a number of the cases which had been quoted then by Mr Justice McCarthy. The Court then helpfully pointed out the duty to establish the truth through proper procedures and quoted the case of the Galway-Mayo Institute of Technology -v- Employment Appeals Tribunal and others [2007] IEHC 2001 and the decision of Mr Justice Charlton at paragraph 14 of that decision.

The Court quoted extensively but the portion which we believe is particularly relevant is the Section where Mr Justice Charlton stated:
"A Judge, Tribunal or quasi-judicial Tribunal, cannot divert from its duty to discover the law and then to apply it. The law cannot be made up. It must be applied whether it is attractive or unattractive; subject only to the power of the Superior Courts to declare a law unconstitutional as a last resort if the principles of constitutional interpretation cannot otherwise be applied to save it and so to respect the will of the people as expressed in the Oireachtas."

In that case His Honour also stated:

"When decision making body is drawn into the process of attempting to find out the facts, then it does so in fulfilling the fundamental principle that justice requires to know the truth before it can decide on the remedy. Secondly, a Judge applies a rule of law to his or her decision and a Tribunal is no different from that. Certainty of legal principle is the opposite end of the spectrum to the arbitrary decision making that characterises a totalitarian society."

This is a very extensive statement of the law and the principles that have to be applied.

In this case the Court pointed out the Court would find that the Complainant's behaviour appear to be totally unacceptable but they found that he was not give fair procedures in which the Respondent decided that appearances and reality were identical and they did not properly investigate and decide one major element of the Complainant's defence. This was that during the disciplinary process at no stage was the woman who made the complaint interviewed. A letter from her simply was accepted. None of those involved in the disciplinary process ever interviewed the witnesses nominated by the Complainant. The Court determined that because of the procedural deficiencies associated with the complaint and the Complainant's contribution to the dismissal, that the Complainant's was entitled to reengagement and they held that he would be reengaged from the 8 January 2018 with the period from the 23rd May to the 8 January 2018 to be considered a period of suspension without pay. The employee was also to be given a final written warning with effect from the 8 January 2018 and he would be reengaged at one level below the grade of unit manger which he had prior to the dismissal. This is the case where it had been alleged that the employee had sought to kiss another employee when they were they coming out of a lift. There are some lessons which must be learn from a case like this.

1. Every employee, no matter how serious the allegation against them, is entitled to fair procedures.
2. All witnesses need to be interviewed and not simply taking written statements.
3. If an employee puts forward witnesses in his or her defence the person investigating same should not simply dismiss them as being irrelevant because they were not there at the time.

In this case the employee had contended that the relationship with the relevant employee was more than just dealing with the fellow employee. That may or may not have been the truth. The difficulty is that when such a defence is put forward and it is not investigated there is no way of knowing whether fair procedures had been applied.
It is always our advice to employers in dealing with a disciplinary matter that any defence put forward by an employee should be listened to and investigated. No matter how farfetched it might appear that the person undertaking the disciplinary process either initially or on appeal must ensure at all stages that the employee receives fair

procedures. These should be in line with the company disciplinary procedures and if they are not comprehensive enough in line with the Code of Practice and Grievance and Disciplinary Procedure. In addition, employers should ensure that those who will be undertaking disciplinary process on behalf of the employer are trained in how to run a disciplinary process. Where they have not been trained, legal advice from a Solicitor should always be obtained. The role of the Solicitor in such circumstances is not to decide on the disciplinary matter but merely to ensure and to assist the person undertaking their process that fair procedures are applied.

This is a case which we will recommend colleagues who are interested in employment law to read as it is one that shows how an employer can end up on the wrong side of a decision against them simply because fair procedures have not been applied.

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Unfair Dismissal and Fair Procedure

In Case UDD181 the Labour Court in this case reviewed a case involving an unfair dismissal claim. It is an excellent decision in relation to the law but also significant guidance for employers as to how to properly deal with a disciplinary procedure or the alternative how now to deal with matters.

What is clear from the decision is that there was an original disciplinary matter. That initial disciplinary matter appears to have been dealt with from our reading of the decision in a fair and impartial manner both at the initial disciplinary hearing and on the appeal. The employer in this case as pointed out by the Court on its face had a very fair procedure which allowed the employee to be aware of charges the employee was facing, to prepare a defence and to be heard and represented in his defence before any decision to dismiss the employee was made.

However, the problem arose after the initial disciplinary matter where the employee was issued with a final written warning. It appears thereafter that the employee was requested to attend mediation which the employee refused. The Court pointed out that it was not open then

for the company when the employee refused to go to mediation to dismiss the employee. The Court pointed out that such a serious consequence should have been outlined in advance and should have been linked to the disciplinary sanction which had previously been put in place. The Court pointed out that this did not happen and that it was a failure of natural justice and cannot be easily overlooked.

The Court pointed out that the employer had a comprehensive procedure and that this procedure was not followed in the case of the dismissal as it was determined that trust and confidence had broken down. The Court reviewed the provisions of Section 6 and Section 14 of the Act. The Court pointed out that the employer did not comply with any part of the procedures as regards the dismissal. The Court pointed out that in those circumstances it was an unfair dismissal. What is interesting in this case is that compensation of €35,000 was awarded. The employee was earning approximately €58,000 per annum and the Court was of the view that the employee was 70% responsible. The Court awarded effectively the maximum 2 year compensation but reduced it by 70% on the basis that the decision to dismiss did not stand in isolation and the Court had found that the employee had become unmanageable and was increasingly occupying management time and recourses addressing unfounded and unsubstantiated accusations against other employees and members of management and that this had a severe adverse impact on other members of staff and the operation of the business. The Court found that the bond of trust between the employer and employee had been fractured if not completely broken.

In our view some lessons can be taken from this case.

1. The first as regards employees would be that if employees are requested to take part in a mediation process that it is probably beneficial that they do if it is there to attempt to resolve difficulties.

2. The employers at all stages should ensure that at a very minimum their own procedures are complied with. Failing to comply with their own procedures will invariably mean that employers can be held to have unfairly dismissed an employee.

3. That employers do need to make sure that their policies and procedures are fair and it is important to make sure that their policies and procedures comply with the Code of Practice and Grievance and Disciplinary Procedures. In addition, it is necessary to take account of relevant case law as regards the rights of employees to be represented and which would now appear to include in disciplinary cases legal representation and that they are advised of their entitlement. There is of course no obligation to cover the cost of an employee's representation at a disciplinary matter.

4. That in setting compensation the Court will look at the actions of an employee to ascertain the extent to which the employee has contributed to their own dismissal; and

5. That in assessing compensation the Court does look at the efforts of the employee to obtain work and minimise their loss.

Unfair Dismissal – Employees Raising Issues of Illegality

In the case of Swissport Ireland Limited and Pejazyr Cakolli an issue arose about the employee being requested to drive a vehicle on a roadway to which the public had access where the employee asserted there was no road tax, insurance, NCT or licence issued in the context of driving the respondents vehicle on a roadway to which the public had access. In the case an award of €50,000 was awarded. The Court noted that the appellants pay exceed €25,000 per annum and measured the compensation at €50,000.

This case is interesting on its facts but particularly in relation to the issue of the approach of the employer. The Court pointed out that it is not the duty of the Labour Court to establish the legitimacy or otherwise of the employees concerns as regards the applicability of road traffic legislation. However, the Court pointed out that the evidence of a sergeant in An Garda Siochana would suggest that there is at a minimum a matter of law under pinning the issue. The Court pointed out that the employee raised with his employer issues as regards the legality of the instructions. The Court pointed out that the employer took no steps to take qualified advice on such matters and did not make an inquiry of An Garda Siochana or its insurers to

establish expert sources on the matter at issue. They instead sought the opinion of two persons who may not have had any knowledge or expertise of road traffic legislation or motor insurance. The Court pointed out that the employee in this case was left with guidance from An Garda Siochana on the one hand and the employer on the other hand which were irreconcilable. The Court pointed out that it is not the role of the Court to put itself in the place of the employer. Rather the Court properly pointed out that it is for the Court to determine whether the actions of the employer fell within the range of actions which a reasonable employer would take in the circumstances. The Court concluded that the actions of the employer in addressing the concerns raised by the employee were inadequate. The Court pointed out that where an employee raises a question as regards the legality of instructions being given to him or her there is a responsibility upon the employer to properly establish the legal facts and where the concern is unfounded to provide sufficient information to the employee to allow him to understand that fact.

This is a very important statement of the law by the Court. The Court in this case was critical of the actions of the employer in relation to the entire process relating to dismissal. They found there was no adequate basis for assumptions made by the employer as regards the right to drive on a roadway to which the public have access and that the investigation process was deficient. This is a case where a significant award was made. The employee had sought to minimise his loss but had been unable to obtain other work.

This is an important case for setting out the duty which an employer must undertake where an employee raises issues of illegality as regards instruction he is given.

Published in Irish Legal News on 22 January 2018

Fair Procedures in Unfair Dismissal Cases

Recently two cases have issued from the Labour Court being the case of Martin-Brower Ireland Limited and William Clancy UDD1761 and Max Stone Systems Limited and Wieslaw Tyka. Both cases dealt with the issue of fair procedures. In UDD1961 involved a case where an employee had failed to adhere to new health and safety procedures.

The Court found that the process had begun but was at a very early stage and had not gained widespread understanding or adoption in the warehouse. The Court held that the reaction to the incident was premature and excessive and would not have been similarly reacted to by a good employer in similar circumstances, The Court awarded reengagement for the employee. The period between the date of dismissal and 1st January 2018 being the date the reengagement was to take place was to be held according to the Court as a period of suspension without pay and that that period would be non reckonable for all statutory purposes. This of course would be except for the issue of continuity of service under the Unfair Dismissal legislation.

In UDD1762 the Court decided that the action of the employee was sufficiently grave to justify dismissal due to the serious risks involved and the impact on the business and a reputational interest of the employer. However, the Court pointed out importantly that the employee had not been given an opportunity to put his side of the events and a decision was made to discipline him without any recourse to mitigation on his behalf. The Court pointed out that in not conducting an investigation the respondents were in breach of their own disciplinary procedure and that the complainant had never been supplied with a copy of the disciplinary procedure and could not have known what to expect. The Court pointed out that the case of Gearon –v- Dunnes Stores Limited UD367/88 is one where the EAT has held;

“the right to defend herself and have her arguments and submissions listened to and evaluated by the respondent in relation to the threat to her employment is a right of the claimant and is not the gift of the respondent or the Tribunal... as the right is a fundamental one under natural and constitutional justice; it is not open to the Tribunal to forgive its breach”.

The Court pointed out that it was of the view the failure to properly and fully investigate allegations of misconduct and to afford an employee who was accused of misconduct with fair and sufficient opportunity to advance a defence will take the decision to dismiss outside the range of reasonable responses which will probably render any resulting dismissal unfair. In this case an award of €6,580 was awarded.

These two cases are important decisions of the Court. They indicate the importance of employers taking a reasonable approach to any sanction and at the same time also the importance of having fair procedures.

Unfair Dismissal - Setting Compensation

In ADJ-8133 the AO in this case found that the employer had not applied fair procedures. That is evident from the case. Therefore the AO found that this was an unfair dismissal. This is a very reasonable approach for the AO to take.

However, in setting compensation of a little over €9,000 the AO held that the employee had been ill from August 2016 but would be available for work shortly. Compensation of 6 months wages was awarded.

In setting compensation it is our understanding of matter, and we may be wrong, but that the compensation must be based on economic loss and foreseeable economic loss.

If an employee is dismissed with no procedures whatsoever in the most appalling fashion, and we are not saying that that happened in this case, but then gets a job immediately afterwards within a week or two, the maximum compensation that can be awarded is four weeks.

We accept that AO's now are going to have a difficulty in setting compensation where they are looking into the future as to what the likelihood is of an employee getting employment. This does raise the issue as to whether going forward there are going to be more appeals to the Labour Court by employers who will seek to see what the position is as regards the employee's availability to obtain work or obtain work where at the time they go for a hearing they have been ill.

To a significant extent the problems which any AO has are that the legislation is badly drafted. It relates to economic loss only and it would be far better if the legislation was modernised so that the mental gymnastics which AO's must go through in setting compensation which involves to a certain extent crystal bowl approach

to look to see what the likely position is going to be into the future as regards an employee obtaining employment is an outmoded concept.

When cases were before the EAT because of the delays there the two year period was fully up and it was quite clear what the economic loss was. We now have a system where cases are supposed to come on earlier and therefore there is a legitimate reason to look at the Unfair Dismissal Legislation to change their criteria so as to get rid of this crystal bowl gating which an AO must go through in setting compensation and simply have compensation set without the necessity of future loss having to be looked at in such cases as being the only criteria in setting compensation but rather changed to be just one of the criteria.

Unfair Dismissal Claims – Level of Awards

In ADJ7074 the AO in this case set out what the gross loss of earnings were. The AO in this case found that the employee had contributed 50% to the termination and awarded 50% of the gross loss of wages.

The AO in this case advised that before any payment is made advice from the Revenue would be required. In our view the AO in this case has got the compensation wrong. Our understanding of matters is from reading the legislation that the Unfair Dismissal Act refers to the loss the employee occasioned. This is effectively the net wages. The fact that under the Taxes Act the award will be deemed to be a gross amount subject to tax is an irrelevancy as that is a matter outside the remit of the WRC. It is simply the way that legislation is drafted in Ireland. The issue as to whether the loss is gross or net is one that regularly comes up. Clearly some definitive ruling on this is going to be needed.

There is also no method of getting an advance ruling from the Revenue.

Retirement Ages and Equality Cases

This issue is becoming a lot more relevant. In ADJ-4755 the AO deal with a case of worker and a health service provider. The employee had

a claim under the Organisation of Working Time Act in respect of rest periods where an award of €3,500 was awarded. In respect of the claim for being forced to retire an award of €17,420 was made.

In this case the employee had a contract which would have provided a retirement age at 65. On reaching 65 the employer did not apply the contractual retirement age and continue to employ the employee as before. The employee felt that she had a legitimate expectation of working up to at least 70 years of age. Details of comparators were given, some of whom had worked well over that age. It was claimed by the employee that, as the employer had numerous opportunities to be included in the defined retirement age by way of a fixed term contract but had failed to do so that this would be persuasive in determining whether there was a relevant retirement age in existence. The employer relied on a collective agreement. No documentary evidence of a collective agreement was advanced and the employee who was accompanied by her SIPTU Shop Steward said she was unaware of any such collective agreement.

The Adjudication Officer concluded that by failing to apply the contractual retirement age to the Claimant and eight of her colleagues and by then rehiring the Claimant on age grounds in June 2016 the employee had presented the *prima facie* case of discrimination on the age ground. The argument that the objective test put forward by the employer was rejected even though the employer argued that this was on safety grounds because of the type of job being undertaken. The AO took into account the facts that the employer was unable to establish the existence of a contractual retirement age. The AO did not consider the defence of justification on the basis the grade was a safety critical worker as relevant. The AO pointed out that the Claimant had an unblemished work record. The absence of any complaints or concerns regarding the matter of capacity and the fact that the Claimant did not work in a promotional grade the AO found the Respondent's arguments to be unconvincing.

This case highlights the importance of employers having proper contractual retirement age that are able to be justified and where an employee is going to work after their normal retirement age that this is dealt with properly at that time and the justification for any extension is set out and that a new contractual age is set out therein.

These cases are now becoming more relevant particularly with issues relating to lack of pensions by some employees and the rise in the age at which an employee can obtain the State's pension.

We would expect to see more of these cases arising in the future. It is important that employers in this situation get legal advice at the earliest stage possible where, in particular, retirement is coming up and that matters are structured and managed in a professional way so as to assist in avoiding claims to the WRC.

Equality Claims

In EGA1732 being a case of Boxmore Plastics Limited and Zinareva. The Labour Court reviewed Section 6 of the Employment Equality Act. The Court pointed out that discrimination can be direct or indirect and the Court set out Article 2 of Council Directive 2000/43EC on the principle of equal treatment between persons in respect of racial of ethnical origin.

The Court pointed out that Section 31 of the Act prohibits indirect discrimination on non-gender grounds and must be similarly construed. The Court then dealt with Section 85 A of the Act which provides for the allocation of the probative burden as between parties. The Court helpfully set out that the established test for deciding if the probative burden shifts by application of this Subsection being Section 85 A (1) is that formulated by the Labour Court in Southern Health Board -v- Mitchell 2001 ELR 201 where the Court considered the extent of the evidential burden that the Complainant must discharge before the Respondent is fixed with the burden of proof and pointed out in this case that the Court in that case has held:

"The first requirement is that the Claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a Claimant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the Respondent to prove that there is no infringement of the principle of equal treatment."

The Court in this case pointed out that the Court later elaborated on the application of that test in case EDA 0821 Cork City Council -v- McCarthy where the Court commented as follows:

"The type or range of facts which may be relied upon by Complainant may vary significantly from case to case. The law provides that the probative burden shifts where the Complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicates that where the primary facts alleged it remains for the Court to decide if the inference of presumption contended for can properly be drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or set of facts which are proved in evidence. At the initial stage the Complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proven facts. It is sufficient that the presumption is within the range inferences which can reasonably be drawn from those facts."

In this case the Complainant claimed that she suffered discrimination on the grounds of race. The substance of the complaint was a lack of linguistic skills rather than her nationality per se which gave rise to a disadvantage. In this case the employee was in a situation where there was a prohibition on any outside party attending the meeting. The Court pointed out that the next question was whether the Complainant was denied similar opportunity to fairly advance her grievance by application of the rule as would a person who had good English language. The Court set out the case of Campbell Catering Limited -v- Rasaq 2004 ELR 301. The Court in this case pointed out that it was clear from a particular letter from the Manging Director that there was an issue of the limited English knowledge of the employee. The Court held that the Complainant was denied a process in which she could fully participate whereas others who are fully proficient in English would be afforded a process in which he or she could fully participate.

In this case the Court held that under Section 85 A the Complainant had raised an inference that she was subjected to a disadvantage. The employer in this case also dealt with the issue of objective justification and the Court set out the four criteria being:

(a) is unrelated to a discriminatory ground;
(b) corresponds to real and legitimate need of the party of the undertaking;
(c) is an appropriate means of achieving that need; and
(d) there are no less discriminatory means of achieving that need.

The respondent company relied on the need to preserve the integrity of its agreed grievance procedure by refusing to allow an interpreter to be present during the investigation process. The Court stated they could not accept that any procedures could be so inflexible as not to allow for translation services where they may be required.

An award of €8,000 was made.

Pregnancy - Discrimination and Victimisation

In the case EDA 1735 in the Labour Court the employee alleged she suffered discrimination and victimisation on grounds of gender arising from her pregnancy while employed as a shop/checkout assistant.

The employee in this case set out that she obtained a letter from her GP confirming her pregnancy and advised her supervisor. The following day she was reprimanded for allegedly making a number of mistakes and was told that she would have to work harder. At the time the employee was suffering from morning sickness. Few weeks later she was informed that her weekly hours have been cut, from 39 to 24 hours, because she was not working as hard as her colleagues. She stated that she was also reprimanded about her appearance and that she needed to look better and "appear happy". She alleged than no other employees' hours were reduced.

On her return from maternity her hours were reduced further from 24 to just 8 hours.

The employer in this case contended that they were not aware of her pregnancy and therefore the reductions in her hours were unrelated to her pregnancy.

The Labour Court found that the Complainants version of events were credible and coherent. The Court pointed out that there was no evidence that the employer had engaged in a disciplinary process.
The Court awarded €12,000 for the effect of the discrimination and €6,000 for the subsequent victimisation. Taking into account the rate of pay the employee was being paid this equates to some 47 weeks gross wages as compensation.

It is a sad fact that cases of pregnancy related discrimination are continuing to occur. Because of some of the defences which are being raised by employers when claims are brought, it is our advice that where an employee becomes pregnant that she takes the following actions.

1. The employer is notified in writing of the fact that the employee is pregnant.
2. That a medical certificate is furnished.
3. That communication is sent by email and by registered letters and that receipts for same are retained.
4. Also because of the attitude of some employers it is important that employees give the appropriate notification of their intention to return to work and/or their intention to avail of additional Maternity Leave.

In this case it is interesting that the employee's hours were cut when retuned from Maternity but other part time workers had been taken on and given work.

In this case because the employee was only getting 8 hours work, she was forced to resign because she was not receiving sufficient funds to be able to continue working.

It is also interesting in this case that the original Adjudication Officer had awarded €6,000 and that this was on appeal by the employer. The employee had not cross-appealed. Despite this the Court trebled the compensation.

The fact that these types of cases continue to come to prominence is a disturbing fact. It is however to be noted that the vast majority of these types of cases normally settled before they ever get to the WRC

or the Labour Court. It is our experience that settlements are more likely to happen where the employee is an Irish National. That is just our experience in this office.

Dealing with a pregnant employee

Case ADJ-7060 is a prime example of how not to deal with matters. In this case the employee shortly after she advised the employer that she was pregnant was moved. She was moved to a different role within the hotel where she worked. It was acknowledged that moving the employee was part and parcel of her Contract of Employment but there was no indication of any intention to move her in any role prior to advising that she was pregnant. The AO in this case found on the balance of probabilities that the Operations Manager had stated to the employee when advising that she was pregnant that this could be "a problem".

The AO in this case found that after the employee had been in hospital for a short period of time that she was given no particulars from the employer as to how to return to work even though she had contacted the employer about doing so.

While a risk assessment was carried out, the AO in this case pointed out that the assessment was only undertaken in respect of the particular role the employee was working in and not in relation to a number of other roles where the employer might have been able to be accommodated.

Once an employee advises an employer she is pregnant there are some basic steps which an employer should take.

1. Pregnancy is not an illness. It is a fact of life in workplaces. It is never a "problem". It should never be referred to as a "problem".

2. A risk assessment should be carried out. If the employee is in a role where there is a health risk then it is important to ascertain whether there are any other roles within the organisation which the employee could reasonably perform which would not be a danger to the health of the employee.

3. Employees getting ill during pregnancy, is a fact of life. If an employee gets ill every effort should be made to assist them in getting back to work.

4. Employees should not be changed from particular roles just because their contract provides that they can simply because they are pregnant. If an employee is to be changed in roles during her pregnancy then it is important that this is explained to the employee as to the reasons why and it must be absolutely clear that none of these relate to the employee's pregnancy, unless this is based on a health and safety assessment.

5. In undertaking a health and safety assessment at times it will be necessary to get an appropriate report from a doctor and, where a particular employee has been ill, it is important to obtain same.

6. Employees who are pregnant should be treated with respect.

In the case which was before the WRC an award of €15,000 was made. This is an award exempt from tax.

Only a small fraction of these cases ever come to Court. It is quite frightening that there are still employers there who treat pregnant women this way.

The decision in this case is one which clearly sets out the law but also all the relevant facts and it is one for those who are interested in this area. The case on its facts is interesting to read, both as regards the fact that the employee acted in a very reasonable way and the actions of the employer were far from reasonable.

Sexual Harassment in the Workplace

It has been announced that there is to be a survey undertaken relating to the issue of the level of sexual harassment that is occurring in the workplace which is to be undertaken by the Governmnet.

It is going to be interesting to find out where the figures are going to be got from.

There are a number of reasons for this. Namely;

1. A significant percentage of these claims when they arise are settled prior to ever getting to any hearing.
2. Where settlements are entered into there is usually a non disclosure and confidentiality agreement as regards the said settlement.
3. There is no easy method of reviewing decisions in the WRC to ascertain the number of cases that actually go to hearing and the number of cases which would be withdrawn prior to going to hearing.
4. It is useful that this survey is going to be undertaken. However, it is likely that any results are going to underestimate the level of sexual harassment that is occurring in the workplace which is now at quite serious levels.

Gender Pay Gap

In the UK recently the first round of reports relating to the Gender Pay Gap issued. There is talk about the whole issue of the gender pay gap being looked at here in Ireland.

There are difficulties with a simplistic gender pay gap report. Let us explain.

Let us take the example of a company where at management and senior management level there is a 50/50 split at all levels between males and females. They are all paid at the relevant levels the same rate of pay.

Management amounts to 5% of the workforce. In respect of the other 95% of the workforce due to the type of industry nearly all of those workers are of a particular gender.

In a gender pay gap report in line with UK legislation it will come out regardless as to whether the balance of the workforce is male or female that there is a gender pay gap. The reason is they will be compared with individual's in management of a different gender. In some companies it will give a valid differential. In others it will not.

The original UK legislation proposed that there would be effectively an equal pay provision that would look at how individuals are paid at particular grades and would effectively be an equal pay gender gap based on roles rather than on the entire company. This would be a much more useful basis for determining whether there is actually a gender pay gap in particular companies.

In the example that we set out above if the reporting was on the basis of roles rather than on the entire company then in that circumstances when considering like jobs the company would report that there was no gender pay gap.

In addition to looking at the issue of roles there is the issue as to reporting on the percentage of male and female that are in management roles or senior roles within an organisation. Pay is only one element of gender equality.

Hopefully in Ireland we will not simply copy the UK legislation but will produce s system which actually gives relevant information and actually encourages real gender equality and eliminates gender pay gaps rather than reports which may indicate a gender pay gap when in fact, as we set out in the example above, there may be none.

Compliance Notices

Case CNN181 is a decision which has issued related to Golden Dale T/A Ballydoyle Racing and the Workplace Relations Commission.
This is the decision which is extremely helpful for those involved in employment law in reviewing the law relating to compliance notices which is a new procedure introduced by the 2015 Act.

The case itself related to the issue of whether the entity Golden Dale was involved in agricultural activities and the review of same in itself is extremely interesting.

For practitioners one of the particular issues is whether Section 28 of the Workplace Relations Act 2015 is a criminal provision and whether the Labour Court is obliged to construe strictly same as such.

There was a considerable amount of discussion in relation to this as to whether strict interpretation was necessary. The Court found that Section 28 in Subsection 14 does create a new criminal offence being the failure to comply with a Compliance Notice by the date specified therein. However, the Court pointed out it does not exercise a criminal jurisdiction and that it statutory function under the 2015 Act is circumscribed by Section 28 which allows the Court to do one of the following, namely to affirm the Compliance Notice concerned, withdraw the Compliance Notice concerned or withdraw the Compliance Notice and require the employer to whom the Notice applies to comply with such directions as may be given by the Labour Court. The Court pointed out that its functions is to conduct a hearing in accordance with Section 28 Subsection 7 in accordance with the principle of natural and constitutional justice but cannot, under the Constitution, exercise the criminal jurisdiction.

This is an extremely important statement of the law as to the role of the Labour Court in relation to an appeal. In this case it had been argued that there has not been absolute strict compliance with the statutory provisions. This could be fatal to a criminal prosecution but as the Court pointed out the Court exercises no criminal function.
The case also involved considerable amount of discussion as to what the word “agriculture” means. We would certainly be of the view that this is the decision which those interested in the construction of Statutes should read. There are detailed legal arguments in relation to the construction of the word “agriculture” but also the manner in which the statutory interpretation of legislation has to be undertaken by the Labour Court. Section 19 of the Interpretation Act 2005 is also reviewed as regards the construction of particular words. This is an important case for practitioners to read themselves as the overview of the legislation relating to the interpretation of, in this case, the word in “agriculture” is extremely useful as to the method of construction which would be applied to other words in other pieces of legislation. It

is also particularly relevant that the Court has reaffirmed the view that, where an exemption applies, it has to be strictly and narrowly construed.

This case brought a considerable amount of publicity relating to the relevant facts. This case is however far more important than the relevant facts. It is an important overview of the legislation. It brings clarity in relation to the issue of compliance notices. This decision was appealed. It will be the definitive authority on the issue of Compliance Notices. In this case there was Senior and Junior Counsel and the case was fought over a number of days. This is a lengthy decision but is well worth reading.

Transfer of Undertakings and Contractual Bonuses

The starting point on any transfer under the Transfer of Undertakings ("TUPE") is that the transferee being the new employer effectively steps into the shoes of the transferor being the previous employer. Basically this means that the old employment terms have effect. These are set out in Regulation 4 S.I. 131 of 2003. Rights under the provisions relating to old age, invalidity or survivors benefits do not fall in the Regulations.

Issue do arise where there is a Bonus Scheme. This is particularly so where it is contractual right rather than a discretionary Bonus Scheme. It must be pointed out that it is reasonably unusual to see a contractual right to a bonus which is calculated by reference to any particular formula. However, from time to time these schemes do arise. Where it does it is important that the transferee being the new employer checks out how the new scheme will work.

Let us take a situation where you have two Solicitor firms. One firm is involved in litigation. The other firm is involved in probate work. There is a successful large litigation firm which takes over a smaller probate firm. The staff in the probate firm have a contractual bonus to 10% of the turnover, for example, in excess of €1 million turnover. Let us assume that the litigation practice has a turnover of €3 million per annum. In theory the employees of the probate firm are going to receive a windfall. So how are matters dealt with?

The first issue that can be looked at is whether it is possible to operate the practice as standalone business units so that the existing scheme can stay in place for those working in the probate section. It would therefore be necessary to ensure that the appropriate documentation is put in place to ensure that it is simply not a merger of the two firms but there would be effectively instead of now one firm still two firms but possibly operating under the same title.
The next issue to look at is whether there is a right to vary or withdraw any scheme. Where there are contractual schemes put in place, this is unusual. The Regulations in Ireland do not allow a unilateral change in terms and conditions of employment and certainly any change can be no less beneficial.

Where there is no right to vary, there are difficulties. The UK Employment Appeals Tribunal took a very pragmatic approach. In a case of Mitie Managed Services Ltd -v- French 2002 ICR 1395 the UK EAT held that where the right for employees to receive contractual benefits would give rise to an absurdity or injustice what transfers is a right to a scheme which is substantially equivalent.

The issue of what is substantially equivalent is a term which is difficult to implement to actually define in practice. It is unlikely that the transferees own scheme will be substantially equivalent. It may be possible to set up an equivalent scheme but may also be difficult.
Some employers might take the view they can unilaterally change the terms. This is dangerous as a unilateral change in terms, which means that the employee will not have the same terms and conditions, will give rights to the employee being entitled to bring a claim for unfair dismissal.

Some employers would consider a buyout. This is of course an option. However, it would involve a substantial change of the terms and conditions of the employees transferring, it would, in our view, be important to ensure that the employees are not only advised of the right to be legally represented and get legal advice but that any buyout documentation would specifically provide for a fee to be paid to a Solicitor of their choice to advise them and that this Solicitor would witness their signature to any agreement to accept the buyout. Of course there is going to have to be consultations. This is the very basis of any change of any terms and conditions. When looking at any transfer it is important, particularly when acting for the transferee

being the new employer, that all terms and conditions of employment of all employees are very clearly identified prior to any transfer. It is useful as part of the consultation process for the new employer before the transfer takes place to seek confirmation from the employees who are transferring from the transferor being the old employer as to their terms and conditions of employment. This can be done by sending them a letter and asking them to confirm that the information therein is correct. This is a useful exercise anyway in that it can set out start dates and other relevant information which would be needed going forward by the new employer.

The issue of bonus payments is the one issue which raises significant issues. In setting any bonus scheme, it is important for any employer to ensure that that bonus scheme does not limit their ability to take part in a Transfer of Undertakings. On that basis any Bonus Scheme should be discretionary. When acting for the transferee, being the new employer, it is important that if there is a contractual Bonus Scheme that various options are looked at before any transfer takes place so as to ensure that the new employer will not get saddled with a scheme which could be more beneficial to employees than the one they currently have.

Transfer of Undertaking Regulations

In ADJ1118 the AO in this case had to deal with a situation where the respondent did not inform employee representative of details of the transfer and did not consult in relation to the transfer.

The AO in this case referred to the Labour Court determination being TUD177 where the Labour Court found that no information or consultation process took place with the employees representatives and that by their own admission the respondent had told the employees collectively and individually that no transfer would take place. It was determined that consequently the respondent was in breach of Regulation 8 (1) (C) and (D) and the Labour Court awarded four weeks wages as compensation.

The AO in this case took an exactly similar approach and awarded four weeks wages.

In ADJ8229 the AO in this case had to deal with a situation where there had been no consultation prior to the transfer. The AO in this case held that all parties had accepted that no consultation with employees or their representatives took place before the transfer took place. The AO in this case referred to Section 8 of the Regulations which includes the phrase "where reasonably practicable". In relation to the dissemination of information to employees. The employee relied on the Labour Court determination in TUD176 to support his claim. The respondents stressed the importance of confidentiality across the deal which included a transfer of the UK business and stated that if the negotiations were public knowledge that any deal might have been jeopardised. The AO in this case referred to the fact that there are times when it is not practicable for the parties negotiating the transfer to open up details of the transfer until the deal has been closed. The AO in this case held that it was reasonable in the particular circumstances to wait until the deal was done.

It is interesting that in this latter case this particular defence seemed to have been accepted. It would mean if it was generally applied that there would be considerable number of transfers where the employees will not know about matters until the transfer actually occurs.

Selection for Redundancy

Case ADJ-6893 is an interesting case and a warning for employers on the importance of applying proper procedures in selecting for redundancy. In this case the employee was selected for redundancy and was offered a little over €8,000 as part of the redundancy package which the employee declined. The employee brought a claim for unfair dismissal. An award of over €36,000 was made. The AO in this case went through the facts and pointed out that in selection for redundancy it is important that fair procedures are applied.

Our commentary in relation to the selection for redundancy is that employers now are failing to fully comprehend the basis on which redundancies apply. A redundancy has nothing to do with individuals. It has to do with the job. Therefore, for example, if you have four waiters and you only need three waiters the basis for selection is not on who are the best three waiters. Because redundancy is deemed to be impersonal selecting on the basis of who is the best will

automatically mean that you are running the risk of an unfair dismissal case. The absolute guarantee that an employee has that they cannot be caught for an unfair dismissal claim is that they apply "LIFO" being "Last In, First Out". However, this is an extremely blunt instrument.

It is our view when we advise employers in relation to redundancy is that they set out criteria for selection. This is what attributes or abilities are going to be needed. Employees who may be liable to be made redundant should be advised that their jobs are possibly at risk.

Employees should be encouraged to put forward alternative proposals to redundancy. Alternatives to redundancy should be considered. For example, would a salary cut mean that all employees could be retained. If it is ascertained that redundancies are going to be necessary then in those circumstances those employees who are at risk should be marked on the basis of a set criteria. They should be allowed input in respect of same and they should be given a right of appeal. The redundancy process should be transparent at all stages. It must be pointed out to employees that this is not personal and relates solely to the job and not to them. In setting the criteria, again, this is something that needs to be kept in mind.

Where employers get it wrong, the difference can be a substantial unfair dismissal award where there is incorrect selection for redundancy. The case above is a prime example where the employer got it wrong and where effectively the amount that had to be paid was four times what would have been paid in a proper redundancy situation which had been undertaken in accordance with proper procedures.

Organisation of Working Time Act - Excessive Hours

In case ADJ-3169 the employee in this case produced evidence that showed that in a four month period he was working in excess of 48 hours per week. The employee was paid €10 per hour. The employer did not produce any records. The employee relied on his payslips. In this case compensation of €2,000 was awarded.

This may seem a reasonably high figure. The question that must be asked is - is it? The level of compensation is a little over four week wages. An employee who was working in excess of 48 hours is working in excess of the Organisation of Working Time Act. This is a piece of Health and Safety Legislation. It is there to protect the health and safety of employees. The issue which does need to be asked is - will such a figure act as a deterrent against an employer in the future? Where cases were reported then to a certain extent there would be a history. The issue could be checked and it would be able to be ascertained where there are previous cases. Because cases are now reported with no names, in those circumstances it is virtually impossible to be aware of whether there were any previous claims.

An issue which has to be asked is - what level of compensation is going to start acting as a deterrent and being persuasive of an employer going forward being compliant with the Organisation of Working Time Act? There is no criticism by us of the AO in this case. However, you can see reasonably large awards to employees in cases where there an Unfair Dismissal award even where the employee is deemed to have contributed to their own dismissal. You have in Unfair Dismissal cases where an employee has taken no action to minimise their loss getting in an Unfair Dismissal award four weeks compensation, being the maximum, where the employee has suffered no economic loss. Of course in a working time claim an employee will not have suffered economic loss. The employee has been paid for all the hours. However, the effect of an employee working excessive hours can have a detrimental effect on their health.

It is an issue that needs to be addressed. Adjudication Officer's are to an extent bound by previous decisions of the Labour Court and therefore any lead in the area of setting compensation at levels that will help stop employers having employees work excessive hours will be a lead which will have to be taken by the Labour Court.

Sunday Premium

In DWT1728 the Labour Court dealt with an appeal from an AO decision. In this case the AO has held that the Sunday Premium had been paid and determined that the premium for Sundays actually worked was appropriate in the circumstances and awarded €325.50 in

compensation. The Court has helpfully set out the provisions of Section 14 of the Act and in this case awarded €750 to the employee.

Rest Periods at Work

A very helpful decision from the UK Employment Appeals Tribunal under appeal number UKEAT/0316/16/BA being a case of Crawford and Network Rail Infrastructure Limited has recently issued.

The case is useful in that His Honour Judge Shanks sitting alone dealt with the issue of a rest break under Regulation 12 of the UK Working Time Regulations 1998 and the issue of compensatory rest under their Regulation 24 (a). The employee was a railway signalman working on signalman boxes on eight hour shifts. He had no rostered breaks but was expected to take breaks when they were naturally occurring breaks in work by remaining "on call". The employee won on the basis that he claimed an equivalent rest period of compensatory rest must comprise one period lasting 20 minutes. The employee's appeal succeeded in light of the case of Hughes -v- Corps of Commissioners Management Limited [2011] EWCA Civ1061 in particular the judgment of Lord Justice Elias.

The case is interesting in relation to the issue of compensatory rest period but also actually in relation to the issue of rest periods where the right to a compensatory rest period is not the alternative.

His Honour in that case set out the EU Directive 2003/ADA/EC and referred to the Recitals being Recital 5, Article 2 and Article 4. Under the UK Regulations rest period is 20 minutes. What is interesting is His Honour in this case set out the five issues which are relevant to what could be classified as a normal rest period which would be the 15 or 30 minute break here in Ireland. Namely:

1. That the worker is away from his work stations;
2. That the period is at least 20 (in Ireland 15 or 30) continuous minutes;
3. That during that period he is not on call;
4. That the period is uninterrupted (which goes with not being on call); and

5. It is implicit that the break takes place during a shift where the workers would otherwise be working.

In this case, being the rail worker, there was an exemption which would apply in relation then to compensatory rest periods.

There was an argument that the employee at various stages would have got various rest periods at 5 or 10 minutes each. This was rejected on the basis that the period must be minimum of 20 minutes. While the employee was entitled to take rest periods where matters where not busy the UK Employment Tribunal found in practice while the employee could take short breaks from his work station which could be more than 5 minutes. However, at least during day time shift in a week it was not possible to have continues 20 minute break.

His Honour found that the Claimant had not requested and had therefore had not been refused any different arrangements from the ones which had been set out, namely that he could take breaks when it was possible. However, he did subsequently raise a grievance. In the Hughes -v- Corps of Commissioners Management Limited His Honour pointed out that in that case if a break was interrupted as it frequently was the Claimant was able to deal with the problem raised by the interruption and then be allowed to go back and start his break being a further 20 minute uninterrupted break. The Court of appeal held that this was sufficient to comply with the UK Regulations.

His Honour pointed out, following that case, that the fact that the employee would be on call throughout any break would not be sufficient to say that he was not getting a break because of the very basis that this was a compensatory rest period and the type of work being undertaken. However, His Honour held that he should get a full 20 minutes uninterrupted break. His Honour held that it would be possible to provide break by providing a relief signaler.

This is a very important point. Effectively, the UK Employment Appeals Tribunal has held that if necessary additional staff have effectively to be taken on or assigned to undertake work so that an individual can get an uninterrupted rest period, even in the case of a compensatory rest period.

Redundancy Claims

It is interesting to note in decisions issuing at the end of December from the WRC, that in these cases the AO's are now holding that the employee should be in "insurable employment".

This is exactly in line with the legislation and is an issue which we had been raising in our newsletter in the past.

We are very pleased to note that this new format seems to now have been applied a lot more regularly and consistently in the WRC.

Tax Breaks for Employers

It is reported that new tax breaks will be introduced for employers who introduce showers and fitness centres for their staff. This is very well and fine for the larger organisations. Some of them do it automatically at the present time as part of fitting out any premises. In respect of such facilities they would be normal fitting out costs and would be tax deductable anyway.

The normal writing done allowances would apply including to the equipment provided. Such tax breaks could be restructured to be immediate tax breaks for such employers. However, this affects a minority of employers. Really what should be looked at is tax breaks for the SME's sector also. There are many challenges facing our society and rather than targeting benefits which are going to benefit larger organisations there are other benefits which would benefit all organisations.

This would include such matters as additional allowances for employers who contribute to pension schemes on behalf of their staff. While many employers will provide bicycles or train/dart/bus tickets as a deduction from salary possibly employers should get a benefit to actually encourage these. Employers currently pay a very high level of employer PRSI. Again, any deduction in this would benefit all employers and help create jobs.

Headline proposals which will only benefit a minority of employers and particularly large employers does nothing for the SME sector which is the largest employer in the State. If there is a real desire to encourage fitness and wellbeing within the workplace then giving employers a tax credit in enrolling employees in a gym which may not necessarily be in the employers premises would be an across the board benefit for all employers whether large or small. Targeting just benefits to larger employers is a bit of a gimmick. To have a real benefit it must be targeted to the entire workforce. Not just those employed by larger organisations.

Employees with Hearing Loss

Research by the UK charity Action on Hearing Loss has found that a third of those who felt they could not be open about their hearing loss claimed it was due to the fear they would be treated unfairly at work. 60% believed that others would assume they were not competent. 42% claimed they say no point in raising the issue because their workplace would not be able to help them. Some 79% of those replying felt stressed and two-thirds experienced isolation in the workplace.

Some one in six people have some form of deafness and hearing loss.

Hearing Loss is a disability. It is an issue which has been neglected. Hearing loss can create levels of stress and isolation.

The reality is that hearing loss is only going to increase.

The UK charity Work as part of the charity's Working for Change wants to change attitudes to deafness and hearing loss in the workplace. The charity has produced guidance for employers on how to make their workplace more accessible for people with deafness and hearing loss.

Deafness is one of those impediments which can severely impact on employees.

It is an area where some form of Code of Practice is required to be issued by the WRC.

The classification of awards

We are seeing a variety of activities by some AO's as to how awards are specified. Some are quite properly determining certain awards as pay, for example under the Payment of Wages Act or as compensation and not subject to taxation, for example for breach of a right under the Organisation of Working Time Act, for example for working excessive hours or where there has been an equality dismissal. We have seen other decisions where it is stated that the parties should consult with the Revenue.

There is no basis on consulting with Revenue under matters as tax is a self-assessment tax. It is necessary for an AO in setting out the decisions to do so in such a way so that it is absolutely clear whether something is pay or whether it is compensation. For example the claim for Annual Leave, where a 100 hours Annual Leave had not been paid at for example €9.50 an hour, then there is nothing to stop an AO awarding the economic loss as being €950 and a compensation figure on top. It is then very clear what element amounts to a pay element and what element is compensation. In Unfair Dismissal claims even though it may seem to be compensation it is always taken to be taxable by the Revenue.

Of course the whole issue of taxation is complex when it comes to employment law matters but that is why the WRC in setting out decisions should set them out in such a way that both employer and employees know exactly how matters should be treated for tax purposes. The AO's do not need to set out what the tax treatment is but so long as it set out as to what element amounts to a pay element and what element amounts to compensation element then it is a matter for the parties themselves to work out the tax treatment. Unfortunately, there is no method of getting advance rulings from the Revenue on these issues any longer.

Submitting claims to the WRC

We are seeing something in relation to claims which are submitted by individuals themselves which is causing us some concerns.

We recently came across a case where an individual had submitted a claim. In the body of the claim they had sought an extension of time. Despite this, they received a letter from the WRC that, because the matter was outside the time limits, the claim was not being accepted. To be fair we have seen this attempted with this office as well on occasions in the past.

When those issues arise, and they came to the attention of this office, we have pointed out to the WRC, on a number of occasions, that the administration staff in the WRC are administration staff. They are not Adjudicators. They are not in a position to determine whether a case is in time or not. The only person, who can determine that a case is to be dismissed as being out of time, is an Adjudication Officer. There is no difficulty with the WRC determining that the matter will be dealt with by way of written submission and then an Adjudication Officer determine that matters are out of time. However, we have a concern that claims are being dismissed effectively without individuals having the matter before the WRC. The administration role and the adjudication role are separate and should be kept separate.

On the most recent occasion when it came to our attention, the individuals had lodged the claim themselves. The employer had stated that the date of termination was a particular date and the employer had fairly set this out in the claim. However, they had also set out that the first occasion on which they had become aware of the fact that they had been "dismissed" was when they received the P45 which was just before they were due to return from Maternity Leave. Of course in those cases there was going to be an issue as to what the date of termination is, whether it is the date that the employee is advised of it or whether it is the date that the employer actually terminated the employment but it would our view that where an employee has not been advised that they have been terminated and they are on Maternity Leave and do not find out about this until they are due to come back from the end of the Maternity Leave, that that would be the relevant date. In addition, Section 23 of the Maternity Protection Act 1994 would have deemed the termination void as the employee was terminated during a "protected period". It is quite appalling that such a fundamental right would have effectively sought to be rejected by the WRC. We have, in this particular case, lodged a complaint directly with Ms Oonagh Buckley, the Director General.

However, that is not a matter for a person undertaking administrative duties to decide. It is a matter for an Adjudication Officer.

Problems with the WRC Claim Form

If there ever was a case which identifies the problems with the WRC claim form is case UDD 1755 being a case of Loxam Limited and Kevin Brunkard. What is clear in relation to matters is that at the time the employee lodged the claim, the WRC claim form would not allow the claim to be submitted. This is because of the fact that the employee did not have twelve months service. However, the employee in this case contended that he was relying on Section 6 (2) of the Unfair Dismissal Act which is an exemption where the dismissal is arising wholly or mainly from one or more of the following which would include civil proceedings where there are actual, threatened or proposed against the employer to which the employee is or will be a party or in which the employee was or is likely to be a witness. The employee claimed that this is what occurred and that the only way he could submit the claim was by using the Industrial Relations claim form. The employee in this case sought to extend time. The Court went through matters in some detail and, to be very fair to the Labour Court, they held that the employee had taken little or no action to communicate with the WRC the relevant issues once the claim had been lodged. The employee's claim was dismissed.

We were promised a world class service. We have an online claim form which has difficulties. We have cases being processed in the WRC where staff in Carlow, in particular, seem to be seeking to dismiss claims way in excess of jurisdiction. While it does relate to the particular case we are referring to, we have come across situations where employees have lodged their own claim seeking an extension of time in the body of the Complaint Form and where the WRC have written back stating that the claim is out of time and would not be processed. It is our view that it is not the role of an administrator in Carlow, and this is where the problems are coming from, to make that determination. They are not Adjudication Officers. Even if they were Adjudication Officers they would have had to request a hearing or alternatively that matters be submitted in writing before any decision to be made and then that matter would be subject to an appeal.

We have now had over two and a half years of the WRC in existence. We still have a non-functioning claim form which is constantly causing problems.

Our advice to employees is that all claim forms are lodged as hard copy claim forms. In fact it is possible to print off the claim and then fill it out and submit it. There can be no difficulties with that because they can be submitted either to the WRC in Carlow as a hard copy or alternatively it can also be submitted online to the director.general@workplacerelations.ie and secure.email@workplacrelations.ie and we would advise that it is done to both addresses. It is unacceptable in our view that we do not have a claim form which is capable at dealing with the relevant provisions of the legislation and we promised a world class service and cases of this type should not be arising.

It would be our view that the Labour Court had issued a fair and reasoned decision for refusing to extend time but the reality of matters is that no such case should ever have had to be made to them if the WRC had put in place a proper claim form.

***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.**