Introduction

Welcome to the July issue of our Newsletter Keeping In Touch
June has been an interesting month for this firm. Due to the continued growth and expansion of our practice we will be moving from 16/17 College Green where this firm has been based since the practice commenced in January 2009 to 9 Herbert Place beside Baggot Street Bridge. We are moving to newly renovated premises which will provide us with facilities to provide a better quality service to our clients in a more modern environment.

As a firm we are extremely proud of the way the practice is developing. We are now in a position where a considerable percentage of our work is work which is referred to us by colleagues. We have a very simply method of taking referrals. Where a client is referred to us from a colleague the basis under which we will act for that individual client whether an individual or a company is that that client must agree that the only matter which this office will act for them on is in relation to the matter which has been directly referred to us by the referring Solicitor. It is a condition of our engagement with such individuals or companies that no other work will be undertaken by this office on their behalf other than with the express consent of the firm originally referring the client to us. Because we are a specialist firm many colleagues are happy to refer clients to us for a particular purpose. We are more than happy to take such assignments from colleagues.

We are certainly seeing changes in employment law. A considerable number of cases are now going to the High Court and on appeal to the Court of Appeal and in some cases to the Supreme Court. Those who read this Newsletter will see that a number of these decisions are reviewed by us in our Newsletter on a regular basis. In our own practice we are seeing a far higher number of cases going on appeal on a Point of Law or Judicial Review to the High Court. This year already we have had four hearings in the High Court. Three being Points of Law and one being a Judicial Review. In respect of two Points of Law cases these settled either on the day or shortly before the hearing in favour of our clients being matters which have been appealed by the Labour Court. Interestingly in respect of both cases which we settled the representatives in the Labour Court had not been Solicitors or Barristers. We have one Judicial Review case where we won on behalf of our client in the Labour Court which was appealed

on a Judicial Review to the High Court which had been heard and where judgement will be delivered on 18 July. We have a second case which was heard and where judgement will be delivered in September. We have two other cases listed for hearing in November. We also have a further Judicial Review against a decision of the Employment Appeals Tribunal where in late June the notice party being the employer came on record to defend the Judicial Review application as the Employment Appeals Tribunal will not be taking part in the process. We would expect to be seeking a hearing date this month although we would not expect a hearing at this stage before December or early 2018.

There is a worrying trend in employment cases. We would have a large volume of cases that go to the Workplace Relations Commission. Previously we would have gone to the Labour Relations Commission, the Employment Appeals Tribunal and the Equality Tribunal. What we are finding now is that the percentage of cases which are going on appeal as a percentage of our workload, is far higher than we previously had when we had the other three Tribunals. Previously some 20% approximately of cases which we had would go on appeal. That figure has now risen to approximately 60%. Previously the appeals would primarily have been relating to the level of quantum or the interpretation of facts. Currently we are seeing that the cases which are being brought by us on appeal are more and more relating to the application of the law. In previous issues of this Newsletter we have highlighted some of the cases which we are bringing. We do believe that there is a reason for this. Previously before the Labour Relations Commission, for example, or the Equality Tribunal, the persons hearing the cases all would have had considerable resources immediately to hand. This would have included such fantastic publications as Kerr's Irish Employment Legislation. Each Rights Commissioner or Equality Officer would have had a copy of that publication. That facility has not been made available to the Adjudication Officers in the Workplace Relations Commission. It is said that they have access to an online version. However, because of the complexity of Irish employment legislation and the fact that in any case an Adjudication Officer may be dealing with not only the law but relevant statutory instruments. The hard copy book is a lot easier to operate. There is also the issue of the resources in the WRC. The Equality Tribunal had a legally trained individual who is now the registrar of the WRC. However to be fair the amount of additional

workload that individuals has to take on appears to us to be a huge additional burden in going from effectively very complex legislation but limited to a significant volume of equally complex legislation. This required, in our opinion, additional resources in the WRC to ensure that Adjudication Officers have access to legal advice on the application of the law. We have written to the Minister for Jobs Enterprise and Innovation in relation to the resources which we believe is required to be given to both the WRC and to the Labour Court. While our submission has been acknowledged we have no idea as to whether any of our proposals will be taken on board. It should not be believed that we are being critical of the WRC or the Labour Court. Adjudication officers are doing their best. The majority staff and management in the WRC are doing their best. What they cannot say, but we can, is that they are not being properly resourced. It is quite evident that for example the Labour Court has insufficient resources. In the original Rules submissions could be sent in online. That ceased. No reason was given other than it was for "operational and administrative reasons". Reading between the lines this indicates to us that the Labour Court does not have a state of the art computer system nor the resources to copy the relevant submissions. One would have thought that if such submissions were able to be sent in online that the Court would have, when hearings take place, laptops sitting in front of them with submissions on them. We have yet to see a division of the Labour Court with laptops. In reality we would accept that if there is to be online submissions to the Labour Court or the WRC very sophisticated software and computer systems would be needed.

We continue to contribute regularly to Irish Legal News. We are delighted that we were asked to do so. For those who follow us on LinkedIn we do attempt to provide information on a regular basis in a simple straight forward fashion. This Newsletter has expanded considerably since its inception. It is now becoming quite a bulky document. Employment law is becoming very complex.

While a considerable amount of time has to be spent in putting this together we believe that it is a useful service not only for our clients and for colleagues and those interested in Employment Law but effectively a useful exercise for ourselves in making sure that we keep up to date with developments in our areas of specialisms.

Finally we would like to thank those colleagues who continually contact us in relation to our Newsletter and for the very kind comments which have been made.

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In the News

On the 27th June Richard Grogan was quoted in articles by Gordon Deegan in *The Journal, The Irish Examiner,* and *The Irish Times* concerning a review of a recent Workplace Relations Commission decision. Richard was also interviewed by George Hook of *Newstalk* in his programme *High Noon* on the issue of pregnancy related dismissals, which the articles related to.

We are delighted with the level of press and radio coverage we received.

2017 has been a very busy year for us for press coverage and except for the month of May our comments have been sought by various journalists for publications. It is humbling that journalists consider us as a suitable source for obtaining comments on employment law cases. In our opinion it is important that employment law cases like any other form of law is reported in the media both the print media, radio and television. Public awareness of employment law rights whether these are employers or employees is important in our opinion.

If you would like to read the articles or listen to the podcast they are available on our website in the News section.

The importance of flexible working clauses in Contracts of Employment

In the case of Helen Early and the Health Service Executive being a decision of the Court of Appeal under reference 2017 IECA 158 the Court looked at the position of an employee who was being required to undertake additional work. The Court of Appeal referred to the decision of Mr. Justice Kelly in Rafferty -v- Bus Eireann [1997] 2IR442 where he said that

"*At Common Law an employee is not required to do a fundamentally different job from that contracted for*".

The Court of Appeal in the decision delivered by Mr. Justice Hogan stated:-

"*It is accordingly clear that this was a very peculiar contractual position which entailed the mix of clinical and manager responsibilities in the Galway and Roscommon Mental Health Service Area. While the Plaintiff could be assigned for the duties (including performance duties outside of that area as occasions might require) these additional duties will require to be* "appropriate" *to their position. It follows that any additional responsibilities which the Plaintiff might have to perform would have to be consistent with her position as an Area Director of Nursing*".

An argument was made by the HSE that the Contract of Employment contains an implied term permitting the HSE to reassign the Plaintiff to other non-operational or non-clinical duties. The Court of Appeal referred to the case of Sweeney -v- Duggan [1997] 2ILRM211 and 217 where the Supreme Court outlined the test for the importation of terms into a contract where Mr. Justice Murphy emphasised the requirement of a necessity before a Court could imply a term in a contract stating :-

"*Where there a term is implied pursuant to a presumed intention of the parties or as a legal incident of a definable category of contract it must be not merely reasonable but also necessary. Clearly it cannot be implied if it is inconsistent with the express wording of the contract and furthermore it may be difficult to infer a term where it cannot be formulated with reasonable precision*".

The Court of Appeal in this case held that it was sufficient to state that an implied term of the kind claimed by the HSE would be inconsistent with the express wording of the Contract of Employment. This is an extremely important decision of the Court of Appeal.

The case is an important reminder for employers of the importance of having flexibility incorporated into employment contracts.

However, it is not a matter of effectively putting in a contract that the employee would do "*whatever the employer wants the employee to do*". There are limits of what can be allowed. Flexibility must be exercised reasonably in the particular circumstances of a case.

It would appear to us that it is important that contracts of employment would clearly set out that the employer may reassign an employee to additional or other duties, roles or reporting lines which are reasonably required by the employer.

It would also be important that employers have appropriate clauses allowing employees to be suspended in the event of an investigation of wrong doing and that where employees are subject to a disciplinary sanction that suspension, demotion or reduction in salary are all permitted in the contract. This recent decision of the Court of Appeal is a timely reminder for employers on the importance of properly drafted contracts of employment.

Review of decisions

In reviewing decisions of the WRC we have placed a cut off on the 21st June as regards cases posted on the WRC website. The cases which were posted up to the 21st June are those which issued on the 7th June 2016. We will be covering the other cases in the August issue of our newsletter.

We have covered Labour Court decisions up to those posted on 13 June last.

The Gig Economy

In the June issue of our Newsletter we raised a case where the issue as to whether a person was an employee or not was a central part of the case.

This issue has again arisen in ADJ6800 with a claim under the Payment of Wages Act.

The Adjudication Officer in this case has very helpfully set out a detailed overview of the law.

We have covered this issue in some depth in the June issue of our Newsletter. This however is a further case in which we would recommend colleagues to read as a very useful review of the law.

Review of Decisions of the WRC and the Labour Court

In this publication we do review decisions of both the WRC and the Labour Court. These have important precedent value.

In some cases which we comment on we may be critical of decisions. The opposite is also the position and there are many cases which we highlight as important for those interested in employment law as precedents.

This is simply the function of reviewing decisions.

There will be cases where the Labour Court or an Adjudication Officer has given a decision. We may have a different view. However that is simply our opinion. Some WRC decisions which we may comment on as not agreeing with are overturned by the Labour Court. Others are upheld. The difficulty with employment law is that it is complex. There are various definitions as to who is or who is not an employer. There are even issues that the person who is not an employee may well be able to claim for example if they are dismissed when pregnant under Equality legislation. If they cannot claim under Equality Legislation then they have a claim against the State. It would however be our view that the claim goes against the party dismissing rather than against the State but again we may be wrong on this one way or the other an employee who is dismissed when pregnant even if they are a self employed contractor has protections.

The database of the WRC is an important database of decisions. Our comments are simply our comments. They are not intended to be critical of any individual Adjudication Officer or any division of the Labour Court. Equally, when we say that there is a decision of the Labour Court or an Adjudication Officer that we agree with that does not automatically mean equally that we are right.

It is interesting in reviewing decisions that we have yet to find any case where the Labour Court, in our opinion, applied the incorrect tax

treatment to any award made by them. The converse cannot be said of the WRC.

We try in this publication to give honest comments on cases. We try, as far as possible to give assistance to those involved in employment law on our reading of the legislation. Sometime we will be right and sometimes we will be wrong. However, we will always give our honest comments.

WRC Decision – Getting it right – ADJ5707

In this case the employee brought a claim under the Terms of Employment (Information Act).

The claim related to a claim that the employee was being required to undertake work under a change in Terms and Conditions of her employment.

From reading this case it is quite clear that there were other issues involved.

The Adjudication Officer in this case appears to have dealt with matters in a very sympathetic and pragmatic way designed to reach agreement between the parties.

This is a case where the Adjudication Officer must be commended for the approach taken. While the decision may be technically speaking outside the provisions of the claim before the Adjudication Officer it is evident from the decision that the Adjudication Officer arrived at a situation where an agreement was reached between the parties relating to obtaining medical evidence as to the ability or not of the employee to undertake certain works.

This type of approach must be welcomed.

Safety Health and Welfare at Work Act – Warning to Employers

Case ADJ4808 should be a warning to employers when they receive any issue which could come under the provisions of the Safety Health

and Welfare at Work Act. This is a case which employers should read as the Adjudication Officer awarded a sum of €159,705.00 in compensation to the employee for being dismissed after raising a complaint under the Safety Health and Welfare at Work Act.

Claims under the Safety Health and Welfare at Work Act where a person is victimised provide for unlimited jurisdiction for an Adjudication Officer or the Labour Court on appeal.

Parental Leave Act 1998-2006

In the case of Thermo King Europe and Brian Nolan PLD171 the Labour Court had to deal with an issue in relation to the Statutory Entitlement to leave on grounds of Force Majeure.

The Court helpfully set out the provisions of Section 13 of the Act.

In this case a family member was injured on 24th May and was medically treated on 25th May 2015. Force Majeure Leave was given to the employee on 25th and 26th May 2016. Those issues were not before the Court. The issue related to the refusal to grant further leave on 27th May.

The Court concluded that the complainant had not established that for urgent family reasons arising from an injury to a family member the presence of the complainant at the place where the family member was on 27th May 2015, was indispensable.

The Court helpfully set out that the Act can only have application on a day when all of the circumstances set out in Section 13 (1) are present. The Court stated they were not satisfied that those circumstances can reasonably be taken to have been present more than three days after the occurrence of the injury which occurred to the family member on 24th May.

Section 13 is very clear. There must be an urgent family reason owing to the injury to or the illness of a person specified in subsection 2, being an immediate family member, the immediate presence of the employee at the place where the person is, must be indispensible.

There are relatively few claims under this Act and therefore this is an important decision.

Protected Disclosure Act 2014

There has been some commentaries recently in relation to a case before the WRC relating to a nursing home employee who was dismissed after making a Protected Disclosure to the Health Information and Quality Authority (HIQA). The employee was awarded 2 years' salary.
We are not proposing to comment on the actual case itself. The Adjudication Officer confirmed that a Protected Disclosure had been made under the 2014 Act. The Adjudication Officer found that the nursing home had commenced the disciplinary procedure in an attempt to dismiss the employee before she accrued 12 months service as a result of her Protected Disclosure. The Adjudication Officer found that had it not been for the Protected Disclosure made by the employee she would not have been dismissed. Her dismissal was deemed to be unfair and she was awarded 2 years' salary amounting to €52,416 in compensation.

This decision is important. An individual employee does not need 12 months service to bring an Unfair Dismissal where the individual is dismissed for having made a Protected Disclosure. The Unfair Dismissal Act has a number of protections where employees do not require 12 months' service and this is one of them. This is an issue which employers need to keep in mind.

The compensation under the 2014 Act increases the compensation which can be awarded for an Unfair Dismissal as a result of making a Protected Disclosure to a maximum of 5 years remuneration. Normally under the Unfair Dismissal Legislation it is 2 years. The Act of 2014 refers to compensation for infringement of employees' rights. In this case the compensation was awarded as compensation not subject to Tax.

There are two issues which now arise in relation to this.

The first is what is "compensation" under the 2014 Act. There is an argument that the compensation is linked to the Unfair Dismissal Act. On that basis there is an argument that the award can only be for the

economic loss. Therefore if an individual is on a net salary and it will be the net pay that has to be taken into account under the Unfair Dismissal Legislation as the 2014 Act amends the Unfair Dismissal Act of say €52,000 per annum and they are dismissed and 6 weeks later get a new job on the same salary the compensation which can be awarded for having been dismissed is, in our view, not to €260,000 but rather €6,000. By this we mean 6 weeks wages. In relation to the taxation of any such compensation, against, it is covered by the Unfair Dismissal Legislation. Section 192A TCA does not exempt any payment from Tax which is in the nature of remuneration. All awards under the Unfair Dismissal Acts, and this would include the Protected Disclosure Act 2014, are deemed remuneration and are therefore taxable, in our view.

Clearly we and the Adjudication Officer have a different view in relation to this case. We are perfectly happy to admit that we may well be wrong. There is confusion in relation to this Act. There are some commentators and colleagues who specialise in Employment Law who would take the same view as we do in relation to what can be awarded for Protected Disclosure which results in the dismissal and the Tax treatment of same. In a recent lecture to the Dublin Solicitors Bar Association both Mr. Tom Mallon BL and Richard Grogan of this office spoke. Mr. Mallon was of the view that compensation is only for the "economic loss" and we agree with him. There are others who would disagree with us.

We would anticipate at some stage that this issue is going to be litigated in the Labour Court on the questions of:

1. How is the compensation calculated, by which we mean is the Act limited only to economic loss or whether there is a compensation element on top of the economic loss the very fact of having been dismissed from making a Protected Disclosure?;
2. Whether such awards are taxable or not. It may well be that at some stage this issue will go to the High Court on either the Point of Law or Judicial Review. In the interim it would be useful if the Revenue gave some guidance as to how they will treat an award for a dismissal under the Unfair Dismissal Legislation for having made the Protected Disclosure.

The issue of the Tax treatment is extremely important for employers. If an award is made by the WRC and marked "Exempt from Tax" that does not necessary mean that it is exempt from Tax. If an employer pays the amount without deducting Tax and the Revenue subsequently seek the Tax on that payment effectively they will gross up the award because of the way the Tax System works effectively it works out as a doubling up so that additional €56,000 would have to be paid to the Revenue. It would be no defence if the Revenue seeks Tax and it is subsequently found that the award should be taxable for the employer to say that they were simply complying with a WRC ruling.

There is a converse problem. An employer against whom an award is made if they have a concern that the incorrect Tax treatment has applied have the choice of having to run an appeal to the Labour Court or issue Judicial Review proceedings. Both are costly.

We are raising no criticism of the Adjudication Officer in this case. The Legislation is complex for a non specialist. It does require a definitive ruling by the Labour Court coupled probably by a Statement of Practice from the Revenue Commissioners as to how they believe such awards should be treated for tax purposes.

It is unsatisfactory that there would be a lack of clarity on such an important piece of legislation. Once we have a case which goes to the Labour Court we will receive clarity from the Labour Court as to their interpretation of the Legislation. Taking into account the way in which the Labour Court address issues it would be normal that the Legislation would be reviewed and that they would set out how the compensation could be awarded, in that it would be clear whether it was being awarded as economic loss/economic loss into the future which is also allowed or is just straight compensation and equally that the Labour Court would deal with the Tax treatment of same.
It may take some time for a case to get to the Labour Court and in the interim it would be useful if the Revenue took the step of giving clarification as to their reading of what the Tax Law on such compensation payments is.

We have written to the Employment and Equality Law Committee and the Taxation Committee of the Law Society asking that they would request the Revenue to give a Statement of Practice on same.

Penalisation

In Case ADJ1721 the Adjudication Officer had to deal with an issue of a claim of penalisation under the Protected Disclosures Act. The Adjudication Officer dealt with matters in some detail on the relevant facts. The Adjudication Officer referred to the case of McGrath Partnership –v- Monaghan PDD162 where the Labour Court held that the Protected Disclosures Act in its provisions regarding penalisation are broadly similar to those provided in the Safety Health and Welfare at Work Act, 2005.

The Adjudication Officer pointed out that the Labour Court had referred to the case of O Neill –v- Toni & Guy Blackrock Limited [2010] E.L.R.21 where it was made clear from the language of Section 27 of the 2005 Act that in order to make a complaint of penalisation it is necessary for the complainant to establish that the detriment of which he/she complains was imposed "for" having committed one of the Acts protected by Section 27 (3) in the 2005 Act.

Thus, the detriment giving rise to the complaint must have been incurred because of or in retaliation for, the complainant having committed a protected Act.

The Adjudication Officer pointed out that this suggests that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of a protected Act must be an operative cause in the sense that "but for" the complainant having committed the protected act he /she would not have suffered any detriment. He pointed out that this involves a consideration of the motives or reasons which influence the decision maker imposing the impugned detriment. This is absolutely in line with the decision of the Labour Court.

In this case the Adjudication Officer held against the employee.

Unfair Dismissal and Protected Disclosure

In Case ADJ1930 the Adjudication Officer had to deal with the issue of a claim under the Unfair Dismissal Act where the employee had less than twelve months service. The Adjudication Officer held that there had been no protected disclosure issue. The employee would therefore not have the benefit of the Protected Disclosure Legislation and therefore the Unfair Dismissal claim failed. This case is interesting as a reminder that an employee does not require twelve months service to bring a claim of Unfair Dismissal where they have made a Protected Disclosure and are later dismissed. If an employee makes a Protected Disclosure and is subsequently dismissed they do not need twelve months service to bring a claim under the Unfair Dismissal Legislation.

Protection of Employees (Fixed-Term Work) Act 2003

In the case of Dun Laoghaire County Council and Mary Hanrahan FTD172 the Court was dealing with a situation where effectively the employee was, what could be termed, "acting-up". This is common in local authorities. The Court in this case has helpfully set out the Directive and has quoted the case of Railway Recruitment Agency and Alan Bell and others FTD097 and Kelly -v- Louth County Council FTD1320. In the Louth County Council case the Court found that the complainant was at all times a permanent employee of the Respondent Council. The Court held that in order to come within the ambit of the Act the complainant must have a status of a fixed-term worker. The Court interpreted in that case that the complainant's employment must be coterminous with the expiry of a Fixed-Term or Fixed-Purpose Contract of Employment and that a complainant who refers to their substantive grade and whose employment continues at the end of a fixed term assignment does not enjoy the protection of the act. In this case the employee accepted at all material times she was employed by the Respondent as a permanent employee she contended that she worked on a Fixed-Term Contract with the Respondent and that the Court held that these are irreconcilable. The Court held that the employee did not have the locus standi to maintain the appeal.
This case is consistent with the jurisdiction of the Labour Court. The effect of this is somewhat unusual. Effectively an employer can engage somebody at quite a low level. They can then promote them to an

acting-up position for a period of a year. That could then be renewed annually for a number of years. That employee will never get the protection of the Fixed-Term Work Act and at any stage when the acting-up position is terminated by the employer the employee can be reverted back to their original position.

Certainly the Labour Court is applying the law consistently. The question however is whether the Irish Legislation in the 2003 Act is in conformity with the Directive. At some stage this issue will go to the European Court of Justice. The Directive in Paragraph 14 of Directive of 1999/70/EC is specific in stating that the Directive was brought in to prevent abuse arising from the use of successive Fixed-Term Employment Contract or Relationships.

It would appear to this office that the Labour Court is fully applying the Irish Legislation. At the same time it is quite evident that many local authorities are effectively structuring working relationships in a way which seeks to circumvent, at least, the spirit of the Directive.

Case ADJ4862 is a case in which an employee claimed that the employee was entitled to a Contract of Indefinite Duration.
The decision is useful in reviewing the legislation in depth and for review of relevant case law.
Claims for Contracts of Indefinite Duration are becoming more common. It is a complex are of law and again this is a case that we would recommend colleagues to read.

In FTD171 the Labour Court in dismissing a claim set out the criteria to be applied in determining the objective grounds which are relevant for Section 7 and 9(4) of the Act.

The Court set out;

In considering what constitutes objective grounds for the purposes of the Act, this Court has consistently adopted that three-tiered test for objective justification set out by the ECJ in Bilka-Kaufhaus case 170/84. This test requires that the Court be satisfied that the impugned measure.

(a) Correspond to a real need on the part of the undertakings;
(b) Are appropriate with a view to achieving the objective perused; and

(c) are necessary to that end.

The case is a very helpful restatement of the law.

Constructive Dismissal

In ADJ5699 the Adjudication Officer has again set out the requirement for an employee to ground a claim for constructive dismissal that the employee must have fully utilised the internal grievance procedures.

We have mentioned this is in a number of our issues of Keeping in Touch.

It is surprising that the issue of resigning without going through grievance procedures and without getting legal advice seems to be at epidemic levels as regards employees resigning.

These cases are being consistently lost.

Possibly there needs to be a publication undertaken by the WRC that sets out very clearly the law relating to constructive dismissal as a guide to employees so as to facilitate employees not bringing claims before having gone through the grievance procedures.

In ADJ4939 the Adjudication Officer in this case has taken the time to set out a considerable amount of the case law relating to an employee's claiming constructive dismissal that we would certainly commend this case to colleagues as a very useful outline of the law in this area.

In case ADJ5901 the Adjudication Officer had to deal with a case of Constructive Dismissal.

The Adjudication Officer held that the employee to bring a Constructive Dismissal claim must show that the actions of the employer were so unreasonable as to make it impossible for the employee to remain in the workplace.

The Adjudication Officer, in our opinion, rightly held that in most cases it is necessary for the employee to raise these concerns with the employer.

In our view the Adjudication Officer has got this decision right. We think it is right that the Adjudication Officer has used the phrase "*most cases*".

There will be cases where the action of the employer is so unreasonable such that trust and confidence is so badly broken that the employee is entitled to resign without going through the grievance procedure or raising the issue with the employer. However, in most cases this will not be the position and the employee will need to show that they at least attempted to raise the issue with the employer.

In cases coming to this firm we are consistently finding that people believe that they can simply resign. In a limited number of cases that is the position but in the majority it is not and certainly not without going through the grievance procedures or at least raising the grievance with the employer.

Published by us in Irish Legal News June 28th.

Unfair Dismissal – Fair Minded Employer?

An interesting case is ADJ2976 involving a receptionist in a guest house.

The employee was engaged as a receptionist. With the downturn in the economy the hotel entered into an arrangement with Dublin City Council for providing accommodation to Dublin City Council clients. The employee outlined very difficult experience she had to deal with. These ranged from actual suicides to near deaths relating to overdosing. There were needles in bedrooms, bloody fights, shouting and screaming. The employee and other staff members watched as babies and children seemed to be neglected by parents who had been afforded accommodation. The employee resigned.

The Adjudication Officer in this case set out that absolutely no normal rules or criteria can apply when people are overdosing and committing

suicide. The Adjudication Officer held that while the employee never sought help the reality is that any reasonable fair minded employer could reasonably be expected to see that this kind of working environment is hazardous to the mental wellbeing of any individual. The Adjudication Officer pointed out that there was a failure by the Respondent to recognise this in any objective way. The Adjudication Officer held there was no real effort to assist in training ordinary hotel staff on how to cope with the special needs of the homeless and the Adjudication Officer was surprised especially when staff was asked to deal with drugs and other addiction addicts.

The Adjudication Officer awarded €15,000 compensation.
This case is a reminder that employers where there are hazardous situations need to be training employees as to how to deal with them

Unfair Dismissal – Compensation

In ADJ6169 the Adjudication Officer in this case awarded a sum of €31,200 in the equivalent of 52 weeks' pay in compensation. The Adjudication Officer has held that the total award is redress of the complainant statutory rights and is therefore not subject to Income Tax as per Section 192A of the Taxes Consolidation Act 1997 as amended by Section 7 of the Finance Act 2004. The compensation in this is compensation under the Unfair Dismissals Act.

Under the Unfair Dismissals Act this is a compensation which is specified in a legislation to be a net loss. However, Section 192A of the Taxes Consolidation Act specifically provides that such compensation which is in respect of wages is subject to tax. That is how the Unfair Dismissal Legislation is set out. On that basis it is subject to income tax.

In the last issue of our newsletter we raised an issue relating to correspondence we had sent about this issue to the Law Society.

In our view the Adjudication Officer in this case has got the law wrong as regards the tax treatment of the award.

Unfair Dismissal - Actions of an Employer

In case ADJ4276 the Adjudication Officer dealt with a case where a Head Chef took time off to go back to see his father who was ill. This was consented to. When the employee was there his father died. Under the employee's religion the employee was required to remain there in Mauritius for 40 days. It appears that the employer was aware of this. When the employee returned to work the employee was not given work. The attitude of the employer was when the issue of cultural differences which arose was that the respondent employer indicated that these cultures did not operate here. The Adjudication Officer has stated that this is an unusual stand for an employer to take in a pluralistic society. The Adjudication Officer in this case awarded €23,500 for Unfair Dismissal.

This case is one which employers need to take the principles on board. We are in a pluralistic society. There are different cultural requirements. These cultural requirements have to be accommodated in the workplace.

Failing to accommodate these can well result in an Unfair Dismissal claim.

Equally an Equality Claim could have been taken where an award of up to 2 years gross wages could have been awarded free of tax.

Unfair Dismissal - The Importance of communicating with an employee

In case UDD1723 Britesavers Limited and Zhong. The Court issued an extensive decision which turns on the facts. The employer contented that the employee had resigned. The employee contended that she had been dismissed.

What is interesting in this case is that the Court pointed out that it was clear to the Court that the employee believed that the employer had terminated her employment and that the employer did nothing to correct that misunderstanding.

The Court pointed out that there was a lack of correspondence formal or otherwise from the employer and that it was not unreasonable for

the employee to be in the view that her employment had been terminated.

The Court helpfully set out the provisions of Section 6 of the Unfair Dismissal Legislation.

This is a case which is worth reading. It highlights the importance of employers when there is any investigation or disciplinary process going through to ensure that employees are kept informed as to what is happening and that employees are at all times advised that until any disciplinary or investigation process is completed their employment continues.

The Adjudication Officer found against the employee. The Labour Court found in favour of the employee and was awarded a sum of over €7,000.

This case is a very useful case to read for what an employer should not do as much as to what the Labour Court set out an employer should do.

Unfair Dismissal – Failure to comply with Health and Safety Measures

In Case Enva Ireland Limited and Davis UDD1722 the Labour Court has followed a decision in Besebvei –v- Rosderra Irish Meats Group Limited UD37/214 in holding that it was unacceptable that an employee should arbitrarily decide not to comply with Health and Safety measures where such strong emphasis had been placed on it in a situation of potential danger.

In this case the employee was working for a company which provided services to Irish Rail. The employee entered the work area without wearing a high-vis jacket. A complaint was made by Irish Rail. Subsequently following a disciplinary hearing the employee was dismissed. The Labour Court confirmed in line with the decision of the Adjudication Officer that the employee had contributed 90% to his own dismissal.

This is an important statement of the law as regards the obligation to comply with Health and Safety.

We feel it appropriate to comment on this case. This has always been the attitude of the Labour Court that Health and Safety is a very important issue. It is not a one way street. By this we mean that it is not simply an issue which applies to employees only. The Labour Court has consistently placed a high emphasis on employers complying with health and safety legislation.

In this case there was a significant review of case law including the role of a Tribunal which was set out in the case of Looney and Co. Ltd –v- Looney UD843/1984. That case is also very useful in setting out what the role of Adjudication Officer is or the Labour Court in reviewing a decision of an employer to dismiss.

Unfair Dismissal - Lack of fair procedures

In ADJ4653 the Adjudication Officer had to deal with a case where an employee had been accused of a serious disciplinary matter. The employee after an external review was dismissed. The employee appealed. The appeal succeeded mainly because of the fact that the company had to admit that they had not complied with their own disciplinary procedures. Subsequently, a new board of management decided to dismiss the employee. The Adjudication Officer has held helpfully pointed out that it was unfair that the employee would be put through double jeopardy. The Adjudication Officer held that the actions of the employee were such that effectively the employee had contributed 50% to his own dismissal and awarded €8,000. What is interesting in this case is that the Adjudication Officer had found that fair procedures have not been applied. If fair procedures had been applied then in those circumstances the employer may well have been successful in defending the Unfair Dismissal claim. This case highlights the importance of fair procedures.

Unfair Dismissal and Related Claims

In ADJ2115 this Office represented the employee.

The employee was awarded €12,000 under the Unfair Dismissal Legislation. The Adjudication Officer held that the maximum compensation could have been €23,000.

In this case the Adjudication Officer dismissed the claims for no Sunday premium on the basis that no evidence was forthcoming as to what the Sunday premium should be. This issue is under appeal to the Labour Court. Where a party sets out what the Sunday premium should be the Labour Court has consistently held that the burden of proof is on the party asserting what the level of Sunday Premium should be.

The Labour Court has also set out that the Labour Court has the jurisdiction to determine what a reasonable Sunday Premium should be. The same criteria we believe should apply to an Adjudication Officer and on that basis this matter is under appeal.

The Adjudication Officer also rejected the claim for rest intervals under the provisions of Section 12 of the Organisation of Working Time Act on the basis that the employee was a manager and failed to particularise matters. We have a certain difficulty in relation to this in that the employee did particularise in written submission when she was not getting breaks and what they actually were and the employer's records for the relevant period are, in our view, less than specific as breaks are not recorded. It is not the role of an employee, in our view, to have to maintain records. They need only set out matters with sufficient particularity and we will be contending before the Labour Court that was actually done.

Fair procedures in disciplinary matters

In the case of E.G. and the Society of Actuaries in Ireland [2017] IEHC 392 Mr. Justice McDermott delivered a Judgment on the 16th June. This is an extremely important decision relating to the issue of fair procedures in disciplinary matters. While the case revolves around the particular fact it is interesting that the Court determined that it is an

implied term of the applicant's agreement with the Society that he would be treated fairly in accordance with the principles of natural justice under the scheme and appropriate to the various stages of the disciplinary process including the investigative stage.

The Court has taken a considerable length of time to review the various judgments in relation to the issue of private law and fair procedures. It is outside the scope of this newsletter to deal with it in any greater detail and it is a case we would however recommend to colleagues.

Dismissal due to being medically unfit

In ADJ4138 the Adjudication Officer had to deal with a situation where an employee had been determined to be medically unfit for perform manual work.

What is evident from the decision dismissing the Unfair Dismissal claim is that the employer in this case not only obtained medical evidence. The employer also ensured that the employee had every opportunity to comment on the medical evidence. The employer also fully investigated whether there were alternative roles which would be available for the employee to undertake.

This case is a useful reminder that where employers go through fair procedures the dismissal will not be deemed to be unfair.

Unfair Dismissal

In Case ADJ2684 the Adjudication Officer in this case had to deal with an employee bringing a claim who was dismissed. The employee was an assistant manager. She had instructed another member of staff to give €100 to the employee's husband. It was the intention of the employee to replace this money subsequently.

The Adjudication Officer in this case has taken some considerable time to review the case law. The Adjudication Officer has found that the procedures adopted by the employer in relation to investigating the matter were not in line with fair procedures.

The Adjudication Officer has held that certain actions of the employer were heavy handed.

In this case the Adjudication Officer found that the employee had contributed 20% to the dismissal and was still awarded a sum of in excess of €26,000.

This case is an important reminder for employers of the importance of complying with fair procedures.

Suspension even with pay as found by the Adjudication Officer must follow fair procedures and must be appropriate.

In this case the Adjudication Officer found that taking the keys from the employee and having the employee escorted outside the shop was heavy handed.

This is a case that I would recommend those interested in employment law and particularly employers to read as the importance of following fair procedures.

The WRC and the Labour Court have consistently held that fair procedures must be applied.

In ADJ5197 the Adjudication Officer in this case has helpfully set out the legislation relating to the reliefs which are available. In this case the employee has secured alternative employment.

The Adjudication Officer determined in this case that compensation was the appropriate remedy. Almost €6,500 was awarded.

It is useful that the Adjudication Officer has taken the time to set out the law as to what the relevant remedies are.

This is going to be one of the great benefits of decisions once the work on the website is completed. It will then enable those interested in employment law whether practitioners, employers or individuals thinking of bringing claims to research rights and the options available.

Unfair Dismissal – Level of Compensation

In Case ADJ4851 the Adjudication Officer in this case has very helpfully set out Section 1 of the Unfair Dismissals Act and Section 7(1) along with Section 3.

Where Section 1 deals with the issue of effectively constructive dismissal Section 7 deals with the amount of compensation which can be awarded. Section 3 deals with financial loss. The Adjudication Officer has set out that financial loss in relation to the dismissal of an employee includes any actual loss and any estimated prospective loss of income attributable to the dismissal and the value of any loss or diminution attributable to the dismissal of the rights of the employee under the Redundancy Payments Acts 1967-1973 or in relation to superannuation. The Adjudication Officer set out that remuneration includes allowances in respect of pay and benefits in lieu of or in addition to pay.

The Adjudication Officer in this case has helpfully set out the legislation as to how compensation can be awarded.

While the case dealt with constructive dismissal and the Adjudication Officer found that the employee had been constructively dismissed the Adjudication Officer pointed out that as the employee had not been seeking work that the Adjudication Officer was limited to awarding four weeks remuneration.

This case highlights the importance of employees understanding that compensation for unfair dismissal is limited to financial loss.

The employee must be seen to minimise that loss. Effectively that means applying for new jobs.

While the Adjudication Officer has not dealt with it in this case it is not simply a matter of applying for the same type of job. It is a matter for applying for jobs. If an employee was earning for example 50,000 per annum and they can obtain a new job at €40,000 at say a more junior level the employee must still minimise their loss which may mean taking that job.

If they do not take that job then their loss is not €50,000 per annum or effectively over a 104 week period €100,000. The loss is effectively €10,000 per annum being a total of €20,000 figure.

This is an issue which is often hard to explain to employees.

What is the date of dismissal?

The issue of the dismissal date is an issue which often arises.
Take a situation of an employee who commences employment on the 1st January 2017. They are summarily dismissed on 30th December 2017.

At first sight it might appeal that the employee does not have one year service as they are a day short. This would be wrong. The employee would have added to the service the Minimum Notice which the employee would be entitled to which would bring over the one year service and they would be entitled to pursue a claim for Unfair Dismissal on the basis that they have more than one year service.

In many cases a contract will provide for a notice period. For some senior individuals it can be two or three months. In such circumstances even if the employee is not required to work their notice the date of termination may well not be the day that they were terminated and paid in lieu of notice but the actual time that the notice period expires. It is better practice in those circumstances to make sure that a claim for Unfair Dismissal issues as quickly as possible and that a follow on subsequent claim issues once the notice under either the Minimum Notice Legislation or under the contract whichever is the longer expires.

In allocating service for the purposes of Unfair Dismissal legislation any other acquired periods of service are not included.
By this we mean take e.g. an employee who was engaged on the 1st April 2016. They were dismissed on the 31st March 2017. During that period of time the employee, e.g. took no holidays, as of the 31st March they would have been entitled to four weeks holidays. Under the Minimum Notice Legislation they would be entitled to one week's notice. In such circumstances the date of dismissal would be Friday the 7th April 2017 not Friday the 28th April.

The issue as to the correct dismissal date often causes confusion. There is some relief for an employee if they issue a claim to early relying on the Bohemian Football case. However it is better practice to make sure that proceedings are issued for every possible termination date within six months of that date. In such circumstances the employee is protected in an Unfair Dismissal claim.

The reason we mention the Minimum Notice Legislation is that some colleagues do forget that Minimum Notice must be added to the notice period for the termination date and therefore dismissing an employee very close to the one year service period may mean that with Minimum Notice the employee is deemed to acquire a period of service of over one year.

Some employers believe that an employer can dismiss an employee for whatever reason within one year of service. This is to a certain extent true for the Unfair Dismissal Legislation. However, it is not for any Equality Legislation. We regularly see situations where an employee is dismissed. The employee is pregnant at the time of the dismissal. A defence that regularly arises is that the employee was an individual with less than one year service. There are a number of exceptions to the Unfair Dismissal Legislation where the employee does not need 12 months service to bring a claim and this is one of them.

Unfair Dismissal – Redundancy

In Case ADJ5454 the Adjudication Officer had to deal with a situation where the employer contended that there was a redundancy. The employee contended there was not. The Adjudication Officer on the basis of the evidence given was not convinced a genuine redundancy existed. The Adjudication Officer found that there were other matters at play including a grievance raised by the complainant.

In this case the Adjudication Officer importantly pointed out that if a genuine redundancy was being contemplated by the school in this case, it would only have been right that they opened a dialogue with those who might be impacted most. He held that they chose not to do so claiming the need for confidentiality. He held that this was not a good reason. He pointed out that notwithstanding the existence of a genuine redundancy or not where an employer is terminating the

employment of an employee it is incumbent on that employer to affect the termination by recourse to fair and open procedures. He referred to the case of Morrissey –v- Galmor Limited UD2237/210. He pointed out that in the case in question he was dealing with an individual who was given no notice of her redundancy, there was no consultation, no discussion on alternative positions, no process and disrespect for correspondence from her union and subsequently from her Solicitor. He pointed out that lack of any appeal mechanism is particularly telling. He held that the complainant was waylaid and sent packing with no regard to the requirements of law. The Adjudication Officer in this case helpfully set out the legislation in Section 7.

He pointed out that letting a teacher go at the start of a school year must lessen the chance of that teacher finding alternative employment. There was also a delay in the payment of notice and the redundancy lump sum which would have multiplied the employee's financial difficulties. In this case a sum of over €34,000 was awarded. What is interesting is that the Adjudication Officer took into account the payment of the redundancy lump sum in setting the compensation. Effectively the employee received the redundancy money plus the award under the Unfair Dismissal legislation.

In this case the employee was employed from April 2008 until May 2016 on a salary of over €45,000 per annum.

With Statutory Redundancy being taken into account the level of compensation is effectively nearly one year's wages.

Pregnancy Related Dismissal /The Importance of Notification

In ADJ2075 an employee brought a claim claiming she had been dismissed because of pregnancy.

The Adjudication Officer in this case felt that the evidence of the employee was not credible. There had been no written notification to the employer. No medical documentation had been furnished. The employee contended that she told her Manager. The Manager denied this.

This case was dismissed

It would be our view that where an employee is pregnant it is important that she notifies the employer. It is preferable that it is given by way of a certificate from a medical practitioner.

At a very minimum, if the employee does not have such a certificate from a medical practitioner the employee should email the HR Department and/or her manager or somebody in authority in the company notifying them that she is pregnant and advising that the appropriate documentation will be furnished in due course.

Once an employee notifies an employer that she is pregnant and particularly where the employee has evidence, in writing that same has been sent the employee can be sure she is fully protected.

Unfortunately simply telling a manager is not sufficient if a manager or owner subsequently denies that such a notification was furnished.

Redundancy - Change of Location

In case ADJ5444 an unusual situation arose. The employee's contract provided that the employee would work on a particular motorway and at sites around Ireland. Subsequently, he was asked to move to Poland. The issue of Section 9 of the Redundancy Payment Acts was raised, this states:

"*For the purposes of this part an employee shall, subject to this part, be taken to be dismissed by his employer if but only the employee terminates the contract under which he is employed by the employer without notice in circumstances such that he is entitled so to terminate it by reason of the employer's conduct".*

This is a very specific provision. The employee cannot give notice. The employee must resign effectively immediately. In this case the employer had worked for the employee in Northern Ireland. The contract did refer to the word "Ireland". The Adjudication Officer has pointed out that having considered the matter at some length and having taken legal advice on the issue the term "Ireland" in legal terms is defined as a 26 Counties of the Republic of Ireland and does not include the North of Ireland. Therefore, under Section 9 (c) of the

Claimant was entitled to terminate his contract due to redundancy as no work was available to him in the jurisdiction of his Contract of Employment.

The Adjudication Officer pointed out that normally an employee is expected to lodge a formal grievance to his location of work or continue to work on the protest until the matter where he was assigned could be adjudicated on.

However, as the employment opportunities had ceased in the relevant jurisdiction these factors had no merit in the case. The employee's representatives argued that the principle of *contra proferentem* should apply in that the employer should have been more specific as regards to its intention in the contracts.

The Adjudication Officer held that the claim for Redundancy was a valid claim. This matter is dealt with under ADJ5444.

Selection for Redundancy

In the case of Student Union Commercial Services Limited and Alan Traynor UDD1726 the Court dealt with a situation where the Court held that there was a general redundancy situation which existed. One might think that this therefore was the end of the Unfair Dismissal case. Far from it. The Court in this case looked at the case of Mulcahy -v- Kelly 1993 E.L.R. 35 where the EAT held that it was well established that there is an obligation on an employer to look for an alternative to redundancy.

The Labour Court pointed out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Court pointed out in Thomas and Beets Manufacturing Limited -v- Harding 1980 I.R.L.R 225 the English EAT found the complainants dismissal unfair because she could have found work as a packer even though this would have meant dismissing a recently employed packer. The Labour Court pointed out that where there is no agreed procedure in relation to selection for redundancy then the employer must act fairly and reasonably. The Court referred to Section 6 (7) of the Act as amended and set that out in detail.

In the incident case the Court was satisfied that the respondent employer did follow a consultation process with the complainant. The Court noted that the complainant has almost 12 years' service. The Court noted that the company had a number of business units which had fluctuating numbers of staff employed. The Court pointed out that it was presented with no information to demonstrate that the respondent carried out an exercise to consider alternative options/suggestions. The Court went on to say that the Court accept that had such an exercise been carried out it may not have identified any alternative positions suitable to the complainant. However, the Court pointed out importantly that it seemed still that no such exercise was engaged and on that basis the Court found that the approach adopted by the respondent was somewhat arbitrary and therefore the dismissal of the employee pursuant to Section 6 (7) was unfair.

The Court awarded the sum of €12,000 on top of the existing redundancy payment which had been made. This is an extremely important decision of the Labour Court. It highlights the importance of employers having a procedure in place for selection for redundancy. The case highlights the importance of considering alternative employment within the organisation. The decision highlights the importance of considering any alternative options or suggestions that are put forward.

The fact that an employer might believe that such process may not change the ultimate decision does not impact on the obligation to do so and failure to do so may well result in an Unfair Dismissal claim being upheld against an employer.

It is very useful that the Labour Court have taken the time to set out in some detail the approach which an employer should adopt.

Claiming Redundancy

In ADJ5427 the Adjudication Officer in setting out the decision at the end has set out a very useful note as to what the employee should do for the purposes of claiming redundancy.

The Adjudication Officer has set out the procedures for claiming the Redundancy from the Department of Social Protection. This includes the employee completing a Form RP50. This document can be completed online.

It is always advisable that the form is printed of and sent in hard copy along with the decision. In addition the Department, although it is not set out in the decision, do seek to have the person claiming Redundancy complete a redundancy calculation in accordance with the redundancy calculator produced by the Department. This should be completed and printed of and included with the RP50. A copy of any decision of an Adjudication Officer should of course also be sent along with any supporting documentation to prove insurable employment.

However, the requirement to show supporting documentation is not of itself a requirement to claim redundancy. The decision is also useful in that it confirms that the Department is entitled to pursue an employer who has not paid redundancy in respect to any monies paid to an employee pursuing a redundancy claim.

Payment of Wages Claims

In case ADJ5841 while these were a wide variety of issues one of the important issues which has been highlighted by the Adjudication Officer is that claims for expenses cannot be made under the Payment of Wages Act as expenses are specifically excluded under that legislation.

Where an employee seeks to recover expenses due then that can be separately brought as a breach of contract case. Equally, though it was not part of this case, allowances are not wages that can be sued for under the Payment of Wages Act.

Compensation for non payment of wages

In ADJ4196 the Adjudication Officer had to deal with a case about the underpayment of wages to an employee.

The Adjudication Officer in this case applied the provisions of Section 6 of the Payment of Wages Act to award a further sum of €2,000 in general compensation.

The case is interesting in that the issue of Section 6 of the Payment of Wages is now becoming a more regular feature of Payment of Wages claims and compensation figures in excess of the actual loss are now regularly being provided in decisions by Adjudication Officers.

Claim for Holiday Pay

In Case ADJ4578 the Adjudication Officer had to deal with a claim for holiday pay for the year 2015.

The Adjudication Officer found the claim was issued on 25th August 2016.

It is not clear from the decision as to what actual annual leave year the employee was claiming.

If it was the annual leave year as set out in Section 2 of the Organisation of Working Time Act then that is the annual leave year which would have finished on 31st March 2016. The reason for this is that under Section 2 of the Organisation of Working Time Act the annual leave year runs from 1 April until the following 31st March.

The employment ended in May 2016. The employee had claimed for her holiday year in 2016 as well but that holiday year would in accordance with the Statute only have run from 1 April 2016.

While we do not have a copy of the relevant complaint form and it would appear to us that the decision maker may well have operated

on the calendar year rather than on the statutory year set out in the Organisation of Working Time Act.

We of course may be wrong. If however we were right the employees claim was not statute barred for the leave year which would have ended not on 31st December 2015 but rather on 31st March 2016.

The Labour Court has consistently held that any claim in respect of annual leave cannot be made until 1st April in any year and has up until the end of September to bring a claim and that the rights to annual leave only arise on 31st March. This approach of the Labour Court makes absolute sense. The employer and employee can, under the Organisation of Working Time Act agree to a carryover of the leave. That right to carry over will effectively run up until 31st March of any year. If of course the employee was claiming in respect of a year that ended on 31st March 2015 then of course the claim was statute barred.

Public Holiday Entitlement

In ADJ2054 the Adjudication Officer found that the employee was out sick. The employer stated that the employee was due €190.80 but owed the employer over €1,000 and that on the employees return to work the employee would be entitled to the said Public Holiday pay less the amount owed to the employer.

The Adjudication Officer found that the case was not well founded.

The provisions of the Organisation of Working Time Act are specific as regards Public Holidays. There are certain provisions where an employee goes out sick but are still entitled to be paid for Public Holidays. An employer is not entitled, in our opinion, to deduct a Public Holiday payment against monies owed. This is even when the employee owes money to the employer. In such circumstances any deduction must be in accordance with the provisions of the Payment Wages Act. That deduction must be fair in all the circumstances. In our view, it would be hard to understand how a Public Holiday entitlement which fell due while the employee was out sick could be off set in full against monies owed by the employee without an appropriate notification under the Payment of Wages Act.

Weekly Rest Periods

The ECJ in the case of Da Rosa and Varzim Sol Case C-306-16 had to interpret Article 5 of Directive 2003/88.

The Advocate General in this case has determined that the Court should answer the question referred for a preliminary ruling on the basis that Article 2 of Directive 93-104-EEC of 23 November 1993, Article 5 of Directive 2003/ADA/EC and Article 31 of the Charter of Fundamental Rights of the European Union must be interpreted not as requiring the weekly rest period to be granted at the latest on the 7th day following six consecutive working days but as requiring such a period to be granted within each 7 day period.

This is an interesting opinion. When you consider Section 13 of the Organisation of Working Time Act it provides in subsection 3 that an employer may in lieu of granting an employee in any period of 7 days the rest period grant to him or her in the next following period of seven days two rest periods each of which shall be a period of at least 24 consecutive hours.

In the case before the Advocate General the Advocate General. The Advocate General held that the expression “per each seven day period” appearing in Article 5 of Directive 2003/88 does not contain any express reference to the laws of the member States and therefore must in accordance with the case law of the Court be given an independent and uniform interpretation throughout the European Union.

The Advocate General has proposed that the consequence of that interpretation is that pursuant to Article 5 a worker may in principle be required to work up to 12 consecutive days as long as the other minimum requirements of Directive 2003/88 are complied with particularly relating to daily rest and maximum weekly working time.

It may be asked how this could apply in practice. As the seven day period is not specified as to when it starts you could have the following situation, namely that a worker received a 24 hour rest period on a Monday. The worker can then work for a further 12

consecutive days, effectively up to the following Saturday week, and will then receive a 24 hour rest period.

This would appear to be at variance with Section 13 (3) of our legislation. In our legislation you could have a worker who would work for 7 days and could in the following seven day period get two days off. This would not appear to be in line with the Advocate General's Opinion as that opinion is that in every seven day period there must be a 24 hour rest interval.

In practice it may not apply very often but it certainly is interesting that Section 13(3) may not exactly be inline. What is also interesting is that opinions coming from Advocate Generals and decisions from the Court are consistently referring to the Community Charter of the Fundamental Social Rights. Point A provides that every worker of the European Community should have a right to a weekly rest period and to annual paid leave the duration of which must be progressively harmonised in accordance with National Practice. It is useful to look at the Judgement of 19th September 2013 Reexamen Commission –v- Strack C-579-12.

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Rest Breaks at Work - OWTA 1997

In case ADJ1998 the employee contended that she has not received her appropriate 30 minute break. The employer contended that the employee was entitled to a 15 minute break only. Working Time records for the period from February to August 2015 and from March 2014 when the complainant worked full time hours were furnished. There were 57 days in which the complainant worked from 8 am to 2 pm being a shift of 6 hours and during which she was recorded as having received the 15 minute break only. The Adjudication Officer held that this did not comply with Section 12 of the Organisation of Working Time Act and pointed out that there was other occasion when it was unclear from the records whether the employee got a rest period or not and therefore could not make a ruling on this matter. The Adjudication Officer awarded €1,500 for the breaches which were shown from the records.

In relation to these matters we would some difficulties with this decision. If the records are not clear then this is a breach of Section 25 of the Act. Section 25 of the Act places a burden on the employer where records are not maintained. Where the records are not maintained in the statutory form then in those circumstances it is a matter for the employer to prove that the employee received her breaks. Where the records are not clear then in those circumstances the Adjudication Officer is entitled to find in favour of the employee as the employer would not have discharged their statutory duty for the burden of proof. The High Court in a case being an appeal from the Labour Court held that it was sufficient for an employee to set out matters with sufficient particularity for the employer to know what the claim was. Once that is done then in the absence or records in accordance with the Organisation of Working Time Act, we contend, the obligation is on the employer to prove that the employee received the relevant rest intervals. These rest intervals are provided for health and safety purposes and the obligation is on the employer to ensure that those rest intervals are given.

Sunday Premium

In ADJ5595 the Adjudication Officer held a contract which provided that the pay shall include a Sunday Premium without specifying what element related to a Sunday Premium held that the employee had received a Sunday Premium.

This will be at variance with the decisions in Viking Security Limited –v- Valent DWT89/2004 when the Labour Court held that it could only be satisfied that an employee had obtained his or her entitlement under the Section.

"Where the element of compensation for the obligation to work on Sunday is clearly discernible from the contract of employment or from the circumstances surrounding its conclusion".

The Court when on to state that consequently a mere insertion that the complainants obligation to work on Sunday was taken into account when determining his or her rate of pay cannot be taken on its own as evidence of compliance with the Section. This makes admirable sense as when you look at the National Minimum Wage Act

in the non reckonable components in Part Two of the National Minimum Wage Act any Sunday Premium is excluded in calculating the National Minimum Wage.

This very issue is subject to an appeal by Trinity Leisure Holdings Ltd against the decision of the Labour Court which is due for hearing in the High Court in November where we act for the employees.

The Trucking Industry

We are one of those offices who are known for bringing claims on behalf of drivers of transport companies. We are seeing a change in the work that we are being asked to do.

The first change that we are seeing is that significantly higher claims as regards underpayment of the National Minimum Wage are now coming to the forefront. There is a clear, what we would call tax evasion scheme, nearly at epidemic level in some companies.

The scheme is not one that we intend to set out here but it is relatively sophisticated and at the same time simple. The scheme can be unwound very simply. However the Revenue does not have the tools to do so. This may sound strange. The tool, if it can be called that, to unwind the scheme involves the evidence of the employee. Unless the employee is prepared to give evidence relating to how they worked it is difficult to unwind it. Where the claims are brought, the more sophisticated employers, if we can call them that, will admit a breaching of the National Minimum Wage Act. As few of any of these cases are reported by the WRC to the Inspector Service the employer is unlikely to be subject to an inspection. The really sophisticated employers simply settle the case. The sad reality is that many employees who bring claims who may well have a good National Minimum Wage claim in the industry do not recognise that claim and therefore do not bring it.

The second area of work which we are getting involved in, which we find very interesting, is those in the trucking industry coming to us to help them become fully compliant. This is not only with the tax law

and the National Minimum Wage but also in relation to the rules relating to driving.

Of course there are trucking companies that are fully compliant. There are others who we regularly see claims against whom will never become compliant as they have no interest in doing so. The third group are those whom may be not be fully compliant but wish to be compliant.

The trucking industry is an important industry in Ireland. However there are huge health and safety issues. These are large vehicles. They travel on our roads. Drivers who are tired because of non-compliant with driving rules often forced on them by employers are a danger. They are a danger to themselves. They are a danger to other road users.

The Adjudication Officers and the Labour Court are taking a very strong line in relation to breaches. The approach is becoming a lot more serious for those who are involved in breaking the law. The Labour Court always had an approach in relation to the Trucking Industry that the rules relating to them were Health and Safety Legislation and dealt with claims accordingly. However it is evident that because the bresches are continuing now that the Court is taking a much more serious approach to breaches even in respect of companies who may not have been before the Labour Court before. To an extent this is understandable. New rules appeared in 2012. They are now over five years old. At this stage employers have had ample opportunity to become conversant with the rules.

It will be interesting to see how matters develop in this area before the WRC and Labour Court going forward. For us while we are often known as an employee representative office having an opportunity to work with employers who want to become compliant is one of those challenges which we are more than happy to take on. We would rather see all employers in the Trucking Industry being compliant. The reason for this is very simple. If they are not someday a tragedy will occur. We have experienced that tragedy on an individual basis. We do not want to see it happen where a number of people can be killed in a single accident due to driver fatigue.

Equality Claim – Disability

In ADJ520 the Adjudication Officer dealt with a case where the employee has stated that the Respondent did not provide reasonable accommodation for his disability being a Degenerative Eye condition. The Adjudication Officer found that the employee was a long standing employee. He was a general operative.

The Adjudication Officer found that the employee had made a detailed disclosure of the diagnosis of his condition. It was serious enough to escalate to HR in a more formal meeting where notes of the meeting were taken. Documentation regarding his condition was furnished to the employer. The employee was removed from "picking duties" but was then subsequently required to do so. The employee was put under the disciplinary sanction warranting him to return to these duties.

The Adjudication Officer reviewed the case of Hurley -v- County Cork VEC EDA1124 and the Labour Court determination in respect of Section 77. The Adjudication Officer also reviewed the case of Humphreys -v- Westwood Fitness Club 2004 ELR296 again, being a decision of the Labour Court.

The Adjudication Officer in this case awarded €3,500.

The Adjudication Officer has helpfully set out that the entire award was redress for an infringement of a statutory right and was exempt under Section 192A TCA 1997. This is the correct tax treatment, in our opinion.

Equality Claims - Reasonable Accommodation

Case ADJ 278 is a useful reminder for employers of the obligation to provide reasonable accommodation to an employee who has a disability. In this case the Adjudication Officer found that the employer had provided reasonable accommodation to the employee on her return to work. However, compensation was still awarded because of the fact that pursuant to Section 16 (3) of the Acts the employer had not done so in a timely manner. Compensation was awarded on that basis. This case is an important reminder for employers of the

importance of not only providing reasonable accommodation but for providing it within a reasonable and timely manner.

CCTV Discrimination

In ADJ3084 the Adjudication Officer found that in the case involving disabilities the recording of the employee at work and the sharing of CCTV undertaking her duties at work with other members of staff amounted to discrimination and awarded €7,500.

This case is a timely reminder to employers of the importance of acting in accordance with the Equality Legislation when it comes to dealing with individuals with a disability.

The recording of such a worker on CCTV and particularly the sharing of same with other workers showing the employee working where the employee has a disability is a serious breach of the Equality Legislation.

In this case the Adjudication Officer has set out quite clearly that this is unacceptable behaviour.

Transfer of Undertaking Regulations 2003

In Case TUD177 involving Ashbrook Facility Management and Pitrik the Labour Court has issued an interesting decision.

The decision helpfully sets out the relevant Regulations in full.

Before the Adjudication Officer a sum of €500 was awarded.

The Labour Court held that the maximum compensation that could be awarded for a breach of Regulation 8 is capped at four weeks pay. The Court pointed out that because of a total failure to comply with the obligations under Regulation 8 the Court directed that the pay of equivalent of four weeks remuneration being €823.48 should be paid.

The Court has pointed out that this is compensation for a breach of an entitlement it is therefore exempt from income tax.

In addition the Court pointed out that as the Respondent employer did not ensure that the employee was retained on no less favourable terms and conditions of employment than those enjoyed while in the employment of the transferor and neither did the respondent employer ensure that the continuity of employment was preserved and the failure to accept liability for the employees accrued annual leave that the Adjudication officer had awarded the employee compensation of €1,500 for breaches of Regulation 4.

The Court found that the compensation of €3,000 would be more equitable. Again the Court has very properly set out that as this is compensation it is exempt from tax.

Transfer of Undertakings

An interesting case has issued from the ECJ under decision C-126/16. The issue relates to what could be called a "pre pack". This applies in the Netherlands. This is a transfer of assets prepared before the Declaration of Insolvency with the consent of a prospective Insolvency Administrator appointment by the Court and has put in to effect by that Administrator immediately after the Declaration of Solvency. The Court appoints a prospective supervisory Judge.

The ECJ has determined that in such circumstances employees maintain the rights being the Protection of Workers guaranteed by Directive 2001/23/EC on the transfer.

Security Industry Minimum Rates

In ADJ456370 the Adjudication Officer had to deal with a situation where the employee was not being paid the relevant rates for the Security Industry. The employer argued that the employee was on a site where the tender price did not allow for such payment to be made which at that time was €10.75 per hour. The Adjudication Officer found that the monies were due and awarded same.

The issue of an ability to pay either the minimum wage or wages due under an Employment Regulation Order is not a defence to such a

claim. Such claims are brought under the provisions of Section 45A of The Industrial Relations Act 1946.

SI No 231 of 2017 which issued on 30 May sets out the rates of pay and other conditions of employees employed as Security Operatives. From 1 June 2017 the rate of pay is €11.05 per hour. There are important provisions on minimum hours and what form of contract is provided. Shifts of less than four hours must be paid as 4 hour shifts as just one example.

Security Operatives

New rates of pay were introduced from 1st June for security operatives. From 1 June 2017 the basic rate of pay is €11.05 per hour. There are changes as to the sick pay benefits. Instead of an entitlement of three weeks being available after two years of service, it would be available after eighteen months. The entitlement of four weeks would now be available after thirty months service and five week benefit would be available after 42 months service.

The Order provides that increased rates of €11:35 would apply on 1 June 2018 and €11:65 would apply on 1 June 2019.

Electrical Contracting Industry

The Labour Court has announced that it will be conducting an examination of the terms and conditions relating to the remuneration and sick pay schemes and pension schemes for the Electrical Contracting Sector. Relevant submissions have to be in by the 26th June 2017. All of the submissions will be published as is the procedures of the Labour Court.

Bullying in the Workplace

The issue of being bullied and harassed in the workplace is often brought to an office such as ours.

There seems to be a misunderstanding as to what bullying and harassment means. Usually when we are told that a person is being bullied and harassed by that they mean they are being bullied.

Let us explain. Harassment usually occurs under Equality Legislation on one of the protected grounds. Bullying is separate.
What is bullying? We are constantly being told that people are being bullied because of the fact that they are not being treated nicely. We are told that they have a report from a GP saying that they are suffering from stress.

The issue of bullying was dealt with recently in the Supreme Court in a case of Una Ruffley and the Board of Management of St. Anne's School which was delivered on 26th May 2017 by Mr. Justice O Donnell. In that case, he agreed with the views expressed by Finlay Geoghan J that in relation to a claim for bullying the Bullying must be

- Repeated
- Inappropriate
- Undermine the dignity of the employee at work

Effectively this means that it has to be repeated inappropriate behaviour and reasonably capable of undermining dignity at work.

Where a person has been bullied and has suffered either a physically or mentally because of this then in those circumstances compensation can be obtained. However, the injury must be measurable and the conduct severe.

In reality many individuals will come with a certificate from a general practitioner stating that they are suffering from stress. That will not be sufficient. A specialist report is going to be required and the specialist is going to have to be able to say that the injuries suffered were as a result of the bullying whether that is a mental or physical injury. Certainly a physical injury is easier to prove.

The Court has held;

"The employer owes a duty of care to the employee to protect them from conduct or matters causing distress amounting to recognisable psychiatric injury.

He went on in that decision to state;

"The so called corporate liability for bullying is slightly different. The conduct must be intentional and calculated to cause distress." It was stated that they would reserve the question whether malice in the sense of intent to injure is an essential component of a corporate bullying claim. However it is clear that a claim for bullying will be strengthened significantly by proof of malice.

Where an employee has not suffered a psychiatric or physical injury then in those circumstances the only claim is to the Workplace Relations Commission and on appeal to the Labour Court. Such cases are brought under the Industrial Relations Acts. The problem with those cases are that any award made by the WRC or the Labour Court on appeal are not enforceable. By that they mean they are brought under the Industrial Relations Act and such a decision binds nobody.

That may be unfair but that is the law. Therefore to bring a claim to the WRC, and on appeal to the Labour Court, is expensive. Bringing claims for bullying involving psychiatric or physical injury are also very expensive claims for an employee to bring.

If considering a claim an employee has to look at how they can show there was repeated inappropriate behaviour that was likely to impact on their dignity at work. All three of these have to be shown.

This involves effectively a what we call a who what where and when. The employee has to be able to set out who did what, where it was done and when it was done. It is not a matter simply of saying I was bullied and harassed. It is not simply a matter of saying that there was inappropriate action. It is a question of setting out what was actually done.

We come across many cases where employees resigned due to what they term bullying and harassment. However, rarely will they have gone through the grievance procedure. This is a requirement to bring a constructive dismissal case. Only in the case of the most severe forms of bullying and harassment would an employee be entitled to walk out without going through the grievance procedure. Even if the employee goes through the grievance procedure to prove a case of

constructive dismissal the employee will have to show if they were relying on the fact that they were bullied and harassed what the repeated inappropriate behaviour was that caused their dignity at work to be undermined. This again goes back to the four W's as set out above.

Of course there are legitimate claims. In the majority of cases that we see coming across our desks the greatest problem in bringing a claim is the fact that the employee cannot set out the particulars they are claiming as to how they were bullied.

In any claim of bullying and harassment the employee will have to get into the witness box to give evidence on who what where and when as regards the items of bullying that they are complaining about. Unfortunately this fact is sometimes not recognised and often not accepted by employees and believe that it is sufficient to say that they were bullied and harassed.

Tax treatment of Employment Law awards

In ADJ-6169 the Adjudication Officer held that an award under the Unfair Dismissal Legislation was exempt from Tax.

In our view this is wrong at law.

There appears to be a misunderstanding in the WRC, which is happening on a regular basis not only in respect of Unfair Dismissal claim but also in relation to matters under the Payment of Wages Act especially that because compensation is being awarded that this is exempt from Tax.

The provisions of Section 192A TCA 97 are very specific. Anything which is for "loss of wages" is subject to Tax.

The Revenue Manual 9.1.27 which you can access by typing in "Revenue Manual 9.1.27" on Google and it will come up. In Section 6 (b) of the Revenue Manual which was updated in February 2016 it is clearly stated that an award under the Unfair Dismissal Legislation is not exempt under the provisions of Section 192A TCA 97.

This does not mean that every Unfair Dismissal award is fully taxable. The provisions of Section 123 TCA 97 automatically apply an allowance of €10,650 together with a sum of €765 for each complete year of service. In the case in question a sum of over €32,000 was awarded and it was declared to be exempt from Tax. This is incorrect, in our opinion.

The first €10,650 and €765 per each complete year of service would be payable Tax free but the entire award is not exempt.

Arguments would be raised that this is compensation. That may be so. However, as has been said by judges in the past "*There is no equity in Tax*" the Tax Legislation is very specific. An award of Payment of Wages, an award for any loss of earnings (which includes an Unfair Dismissal claim) is taxable. Under the Unfair Dismissal Legislation an Adjudication Officer can only award the net loss of earnings for person who is paid a gross wage of €500 a week and receives a net payment of €400 per week maximum award is not €52,000 but €41,600.

There is an anomaly in the Tax Legislation. The Unfair Dismissal states that the award must be made but only the net loss. However, the Tax Legislation, because of the provisions of Section 192A TCA 97 then provides that the sum of €41,600 is subject to Tax assuming the employee worked for 1 year and 1 day in calculating the amount that is subject to Tax the exemption would have been €10,925. The taxable element would be €30,675.

We appreciate that Tax Law is complex. We understand and are often told by clients and colleagues that this treatment is not equitable. Well there is no equity in Tax. Tax follows the event. That is the law.

In the case in question if the employer pays the amount out exempt from Tax on the example given by us on subsequent Revenue Audit an employer could be liable for over €60,000 in interest and penalties. The reason for this is that if an award is paid out gross in these circumstances, the Revenue gross it up. Revenue audits can take place many years later. With interest in penalties you could be looking at a figure in excess of €60,000 as a cost to an employer.

The Adjudication Officers, currently sitting in the WRC, had training on this area of law. There is a lecture note on our website which we

delivered to the Adjudication Officers, at the request of the WRC, at the time the training was being undertaken.

Unfortunately, that training took place on a Saturday afternoon. The lecture was the last lecture of the day. It was after the afternoon coffee break and approximately 50% of those who were supposed to attend that portion of the training that day went home early and did not attend. Saying this, copies of the lecture notes were available to all Adjudication Officers as part of the training.

In the last issue of our newsletter we published a copy of the letter which we have sent to the Law Society. A copy of that letter was also sent to the WRC.

In respect of the above case we have written to the Director General and to others in the WRC at senior management level.

We have a significant concern that Adjudication Officers are not properly applying the Tax Law.

In the case referred to above it is not clear whether either party was represented. The difficulty with the decision is that if it is not appealed then any application to the District Court for implementation the employee would be entitled to seek the full sum. This would mean in the case in question the employer would be liable to pay the sum of €31,200 to the employee and a further figure of approximately €33,000 to the Revenue and the Department of Social Protection for Tax and Social Welfare payments. That is how serious it is where these type of decisions are issued which are not in accordance with the Tax Law and specify a payment to be exempt from Tax when it is not, in our opinion.

I raised this case again with the Law Society and with those in Senior Management in the WRC. This problems needs to be resolved very quickly.

Taxation of Unfair Dismissal Awards

In case ADJ3421 which deals with the issue of frustration of contracts the Adjudication Officer in this case held that there had been

frustration of the contract and awarded compensation. Compensation of €42,000 was awarded. In this case the Adjudication Officer has set out that the award of €42,000 was gross before taxation as redress for the Unfair Dismissal. The Adjudication Officer has held that it is approximately one year's remuneration in line with the information provided.

We do have a difficulty with this decision. In our opinion under the provisions of the Unfair Dismissal Legislation the compensation must be awarded as the net loss. That net loss then under the terms of Section 192A TCA 97 is then itself subject to tax.

This may appear unfair but this is the way the legislation is drafted.
This case is an extremely useful decision however, as regards the overview of the law relating to the frustration of a contract of employment. It is one that we would recommend colleagues to read.

WRC – Correct Complaint

In ADJ4763 a driver brought a claim. Unfortunately, the driver in setting out the claim used provisions relating to break periods. These were not the complaints which the employee actually had.
The Adjudication Officer held that the complaints which the Adjudication Officer was hearing were not ones covered by the complaint form.

This is a recurring problem.

It certainly means that for some people it is difficult to complete a complaint form properly. It indicates that the complaint form is not user friendly.

Jurisdiction in Employment Cases for Cross Border Workers

In the ECJ in joined cases C-168/16 and C-169/16 to rule on the provisions of Regulations 44/2001 and various other regulations.

The issue related to jurisdiction over individual contracts of employment.

The opinion of the Advocate General recently issued. The full decision of the ECJ will issue in due course.

The Advocate General concluded that Article 19 (2) (a) Council Regulation No 44/2001 on the Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters must be interpreted as meaning that, so far as a worker employed in the international air transport sector as a member of cabin crew is concerned, the "*place where the employee habitually carries out his work*" cannot be assimilated to the "*home base*" as defined in Council Regulation 3922/91.

The Advocate General was of the view that the place will be where or from the worker habitually carries out his obligations to his employer. That place must be identified by a National Court in the light of all the relevant circumstances and in particular

(a) The place where the worker starts and ends his working days;
(b) The place where the air craft on board which he carries out his work is habitually based;

(c) The place where he is made aware of the instructions communicated by his employer and where he organises his working day;

(d) The place where he is contractually required to live;

(e) The place where an office made available by the employer is situated;

(f) The place which he must attend when he is unfit for work or in the event of disciplinary problems.

While this case related to the issue of those working as cabin crew which would include pilots the opinion may have more significant implications. There will be many situations where an employee will work in more than one jurisdiction.

The test set out by the Advocate General may have wider implications in other employment law cases.

A contract of employment which, for example, simply states that an employee will be subject to the law of the United Kingdom but where the employee habitually works in Ireland or where he starts and ends his working days in Ireland or where, if there is a disciplinary matter, it would take place in Ireland these may all be issues which may indicate that the claim actually would have to be made in Ireland and would be subject to Irish Law rather than UK Law.

It will be interesting to see the decision of the ECJ when it issues.

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Obtaining Adjudication Officers decisions

The WRC Guidelines indicate that decisions should issue within a matter of 8 weeks. This is most definitely not happening. In reviewing recent decisions of the WRC the time lag between a hearing and the decision issuing is anywhere between four and six months usually.

Now there are two possible reasons for this. The first is that Adjudication Officers are being tardy in issuing decisions. That does not appear to be the position, in our view. The reason why we say this is that having appeared before the LRC we would know the time limits normally for what were previously Rights Commissioners issuing decisions.

Their normal timescale was certainly not 4-6 months. There were exceptions but normally decisions issued in 8-12 weeks.

We can also see decisions issued by individuals who would have been in the EAT or the Equality Tribunal. Equally their decisions appear to be of similar length in time for issuing as the norms in the WRC.

However this would not be in line with our experience of dealing with these individuals when the other Tribunals were in existence.

On that basis we are discounting the argument that the delays are due to WRC Adjudicators being tardy.

The problem appears to be in the processing of the decisions so that they can be put up on the website. This appears to be due to a lack of resources in the WRC to actually process the decisions once they have been submitted by an Adjudication Officer

Because of the way the legislation operates we do not know when Adjudication Officers actually submitted their decision. Now the time limit is from the date of the decision rather than the date of service. Previously before the EAT and the LRC and the Equality Tribunal the person hearing the case would sign and date their decision. It would then be sent out a couple of days later. The appeal ran from the date of delivery as determined by the normal time limit for postal delivery.

Again, we must raise the issue that it appears that the WRC are under resourced in the important area of ensuring that decision issue quickly. It is important for both employers and employees that finality can be obtained.

The Minister has a duty to properly resource the WRC to meet the promises which were made when the WRC was created.

This should not be regarded as criticism of management or the staff in the WRC. This is a resource issue and by resource we mean the number of people working in the WRC providing these services.

WRC Claims which could be Statute Barred

In ADJ5063 the Adjudication Officer in this case reviewed the law and held that under the Workplace Relations Act where a claim is made for a period outside the six month period allowed for the Act that in those circumstances the claim is limited to the six months.

We would not necessarily agree with that view.

We have covered this issue in previous issues of our newsletter. Mr. Justice Hogan in one case clearly held in Health Service Executive and

McDermott 2014 IEHC331 that where a claim is made even where there has been a continuing breach but is limited to a six month period of time then the claim is not statute barred. The converse of it is that if the claim is specified to be for any further period then the entire claim including the six month period may be statute barred unless the employee had limited the claim to the maximum period and has sought to extent time.

It would be our view that it is always wiser to seek to put in two claims in such circumstances. One for the period of six months back from the date of lodgement of the claim and a second period of six months specifying that an application to extend time is being made. However the six months time limit does not apply in certain circumstances. For example, in claiming that an employee did not receive their full annual leave entitlements whether it be holiday pay or the four weeks annual leave then in those situations as the breach can only have occurred on the 31st March the employee has up until 29th September in any year to bring any claim for the leave year ending on 31st March of that year.

In claims under the National Minim Wage Act the claim is for six years. In cases under Equality legislation where there has been continuing discrimination provided the last incident occurred within six months the employee is entitled to go back and bring up all the other elements of the alleged discrimination. That is provided of course that an Act which was discriminatory of nature occurred in the six months prior to lodging the claim or within twelve months in the event that there has been a successful application to extend time. Where individuals are not represented unfortunately the WRC guides need to be a lot more specific particularly in relation to a Payment of Wages claim to advise the employees of the statutory limit.

The Adjudication Officer in this case seems to have taken a pragmatic view in relation to matters backed up with case law and has taken an approach which would not appear to be an unreasonable approach to us.

Making a complaint

In case ADJ-3910 the Adjudication Officer had to deal with a situation where the form of complaint did not issue on the "official form".
The Adjudication Officer referred to the case of Louth VEC -v- the Equality Tribunal [2009] IEHC370 where McGovern J observed at Paragraph 6.2 and 6.3:-

"*I accept the submission on behalf of the Respondent that the form EE1 was only intended to set out, in broad outline, the nature of the complaint. It is permissible in court proceedings to amend pleadings where the justice of the case requires it,* a fortiori*, it should be permissible to amend the claim as set out in a form such as the EE1, so long as the general nature of the complaint (…) remains the same*".

"*It is clear from the foregoing that because the EE1 form is only designed to set out the generality of a complaint, complainants should be allowed to expand on matters not specified in the form. So long as respondents are not taken back by surprise or alternatively given adequate time to answer there can be no injustice therein*".

The Adjudication Officer held that a complainant is not precluded from amending his or her original claim so long as the general nature of the complaint remains the same.

This is a clear statement of the law.

As there is no statutory form for making any complaint to the WRC any form or writing, in our opinion, is sufficient to ground a complaint. In some cases an employee will lodge a claim form and subsequently, very quickly, lodge a submission. Provided both of these are done within the 6 months' time limit then effectively they are complaints. Where the submission is put in subsequently expanding on a complaint that was previously put in then that is perfectly legitimate.

Unless an employer is prejudiced there is no ground for a hearing not going ahead. Normally if the employee puts in a submission it will be copied by the WRC to the employer.

There is a converse issue as well, namely that where an employer fails to put in a submission and only arrives on the day it will appear reasonable that the employee should not be allowed to be taken short and can, if they so wish, seek an adjournment to consider any written submission which is put in.

The Labour Court does not allow ambushing. The WRC equally should not allow it.

In a recent case in which this office was involved a submission was produced on the day which was quite lengthy, which had not been furnished in advance of the hearing date by the employer. It was our view that we required an adjournment to consider the submission. An issue was raised that the Adjudication Officer could hear the case and proceed. This was a case where, to be quite honest, we just simply refused to allow that to happen. We quite simply stated that we were leaving. We were not going to have a situation where we were going to be ambushed. We said that we were not going to have a situation where the employer had our submission in advance and we did not have their submission. The employer contended that they did not have our submission but it was quite clear from the documentation that they had it with the original complaint. In addition this was a case where the employee had sought a statement under Section 14 (4) of the Unfair Dismissals Act which the employer had neglected and refused effectively to respond. Therefore the employee was not on notice in advance of the hearing date as to the grounds of the dismissal.
The issue of fair procedures before the WRC is going to become an issue. The Guide for the WRC provides that a submission needs to be put in by the employee and the employer is also obliged to put in a submission particularly in an Unfair Dismissal and Equality claims. This often is not happening.

Our approach is quite simple. If we are happy to proceed on the day we will. If we are not happy to proceed on the day we will not. We will be in attendance. If we have to go on appeal to the Labour Court we will go on appeal to the Labour Court. The issue of being ambushed by not having submissions in advance is something that we are not prepared to countenance whether acting for employers or employees.

To an extent we contend it makes perfect sense. Both sides should have the submissions in advance. This allows issues which are not in dispute to be agreed. The WRC is holding management meetings. It would be most useful if this was extended somewhat particularly in Unfair Dismissal cases to ensure that submissions are attached and any legal submissions that need to be made or more detailed documentation furnished is furnished well in advance of a hearing.

This enables both sides to read it and an Adjudication Officer to read it and this saves time.

Since our action the WRC is now seeking submissions from both sides.

WRC Procedures

In case ADJ-1998 the Adjudication Officer ruled on the issue of a preliminary application. The employee submitted that when the employer's witnesses were to give evidence the other witnesses should be asked to leave the room. This request was declined. The Adjudication Officer held that hearings held under the Workplace Relations Act in relation to employment and equality statutes are not overly formal. The Adjudication Officer set out that parties are entitled to cross examine the evidence of each witness so it is open to the party to put a witness to close correlation of their evidence to that of other witnesses. Furthermore the Adjudication Officer pointed out that in reality there is nothing stopping witnesses rehearsing their testimony in advance of a hearing. However, the Adjudication Officer pointed out that evidence, however given, by multiple witnesses that appears choreographed is less than persuasive and referred to the case of a Teacher -v- the National School DEC/E2014/097.

It should be noted that Solicitors and Barristers are precluded by law from coaching witnesses.

WRC corresponding with employers

In case MND176 the Labour Court had to deal with an issue of service of documents on the company other than at its registered office.
The Labour Court referred to the provisions of Section 6 of the Workplace Relations Act and specifically noted that the WRC had failed to communicate with a party at its registered address. It appears that the WRC was corresponding with the company at its place of business.

In this case the Labour Court confirmed that there was a lapse of time in the case but held that the Court had to apply the provisions of the legislation. This seems to make absolute sense and it is, in our view, questionable as to why the WRC would ever have communicated with an employer other than at its registered office.

Extension of Time

In Case EDA1713 involving Servier Ireland Industries Limited and Juanita Wilkinson the Court a set out in some detail what reasonable cause is for the purposes of seeking an extension of time under Section 77(5) of the Employment Equality Act 1998-2011. Interestingly the Court has also said that that test would apply to other employment related enactments.

The Court pointed out that the Jurisprudence is conveniently set out in EDA1615.

If a party is seeking an extension of time I think it would be useful that either this decision or EDA1615 was read. The benefit of this decision coming from the Labour Court is that it is one that is fully fought with both Counsel and Solicitors on both sides.

Those involved were all experienced employment lawyers.

We are not saying that a decision has any less weight because of the fact that there would not be employment lawyers involved. What we are saying is that where there are employment lawyers involved it is reasonable to assume that the division of the Court exercising its

jurisdiction will have had the benefit of legal argument from experienced employment lawyers on both sides who would in the normal course open up any relevant authority which was considered relevant and would put argument for and against any particular authority that is raised. In saying this, the Court has effectively has gone with its existing jurisprudence and therefore this is a very useful decision in restating the Law.

Extension of Time

In case ADJ4806 the Adjudication Officer had to deal with a preliminary issue in relation to an extension of time.

This case is extremely useful in that the Adjudication Officer reviewed the Labour Court decision on this issue and also set out in considerable detail the relevant facts. The Adjudication Officer pointed out that even a delay of one day can make a difference.

The Adjudication Officer refused to extend time.

This case is important for practitioners in understanding that the time limits are extremely tight and is important to get proceedings in as soon practicable.

Employment Agencies

Case ADJ6459 is interesting in that the employee brought a claim for Unfair Dismissal against the employment agency. However, under the legislation, being Section 13 of the Unfair Dismissal Acts the claim should have been brought against the company for whom the employee actually worked. This is a strange anomaly of the Unfair Dismissal Legislation. It is effectively that if an individual is employed by an employment agency and is sent to work for a particular company then any Unfair Dismissal claim is against that company and not against the employment agency. This fact is sometimes overlooked by employees.

Supreme Court Ruling on absolute ban on asylum individuals working

The Supreme Court has held that an absolute ban on asylum seekers working is unconstitutional. The matter is being put back for six months. This is to give the Government time to react.

The decision of the Supreme Court is not a carte blanche for asylum seekers to work. All the Supreme Court has said is that an absolute ban on such individuals working is unconstitutional.

There would be nothing to stop the Government bringing in provisions relating to maximum hours of work such as applying to students here studying, as just one example.

This is a complex issue. Because of EU Rules relating to the free movement of workers there could be difficulties if asylum seekers were automatically entitled to work full time as once they become workers they are entitled to move freely within the EU.

The other issue which will appear to come out of the decision of the Supreme Court is that the delay in processing claims is an issue. It would appear, to us, that if the processing period was limited and was a reasonable period of time that in those circumstances an absolute bar on working may be constitutional. Of course there are difficulties.

It is one thing to have a time limit for somebody who arrives who has all documentation such as passports and other identification documentation which can be checked. A different time limit may be more reasonable for somebody who does not have any identification documentation or inappropriate documentation.

There would also then be the issue of times for appeals and again these would have to be reasonable.

It is interesting that the Supreme Court has put matters back for six months. The Supreme Court has recognised that this is a complex area. We are not simply dealing with the Constitution. We are also

dealing with the EU rights for workers to freely move within the EU. This case arose effectively because of the significant length of time it takes the State bodies currently to process asylum applications.

We will await with interest to see what the government proposals are and whether those proposals will be acceptable to the Supreme Court.

Personal Injury claims arising out of bullying

Questions regarding Personal Injury claims arising out of bullying in the workplace have significantly increased in recent times. However, while an employee may have been treated very badly in the workplace, this does not necessarily give rise to a Personal Injury claim.

In order to be successful with a claim for bullying in the workplace, an employee needs to prove that he/she suffered an injury to his/her health which was caused by an actionable wrong in the workplace and that the injury which was suffered was foreseeable. The Supreme Court stated in the Quigley case that "*Where the personal injury is not of a direct physical kind, it must amount to an identifiable psychiatric injury*". This, of course, will be a matter for a specialist medical practitioner.

However, it should be noted that the injury must be an injury to health as oppose to ordinary workplace stress.

The Health and Safety Authorities Code of Practice on bullying in the workplace and the Industrial Relations Act Code of Practice define bullying as follows:-

"*Repeated inappropriate behaviour, direct or indirect, whether verbal or physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individuals' right to dignity at work*".

This definition has been endorsed by the Supreme Court in the case of Quigley -v- Complex Tooling and Moulding Limited [2009] 1IR349. The test for the actionable wrong was set out in the case of Berber -v- Dunnes Stores [2009] 20ELR61 and the test is an objective test which

will consider the conduct of all parties involved as a whole and its cumulative effect.

The case of Ruffley -v- The Board of Management of St. Anne's School [2017] IESC 33 is a recent Personal Injuries claim for bullying arising from a disciplinary process which has attracted much attention. Damages in excess of €250,000 were awarded to the Plaintiff in the High Court and it was found that the defective disciplinary process amounted to bullying. This decision was overturned in the Court of Appeal. The matter subsequently went to the Supreme Court where the case was dismissed and it was held that a defective disciplinary process did not amount to bullying. A partial stay was placed on the High Court award and it was orde5red that the employer pay the sum of €100,000. The Court placed significant emphasis on how the repeated and inappropriate behaviour must undermine a person's dignity at work. As set out above, this judgment indicates that the conduct complained of must be severe.

Duty of care for visitors in Personal Injury accident cases – DIY "Specialists" Beware

The recent judgment of the Court of Appeal in the case of Elaine Newman vs. Patrick Cogan and Marie Cogan [2017] IECA176 is an interesting judgment delivered by Ms Justice Irvine on the 16th June 2017.

The judgment examines the duty of care owed by an occupier, in this case a home owner, to a visitor where the occupier has personally taken on the task of carrying out DIY repairs within his/her home.
The facts of the case involve Ms Elaine Newman who was a visitor at the home of Mr. Patrick Cogan and Mrs. Marie Cogan. Mr. and Mrs. Cogan were the parents of her partner. Ms Newman unfortunately lost the vision of her eye and now has an artificial eye as the result of an accident with a glass door which caused pieces of glass to hit her eye.

Ms Newman brought a Personal Injuries claim in the High Court and claimed that her partner's parents were liable for her injuries as a result of the duty of care imposed on them pursuant to the Occupiers Liability Act 1995. The claim was dismissed by order of the High Court.

The case was appealed and was successful on appeal with the Court of Appeal awarding €200,000. It was outlined in the judgment of the Court of Appeal that Mr. Cogan's duty of care as an occupier of his home when he changed the glass in the door in or around 2000/2001 was to carry out that task with the level of care and skill of that of a reasonably competent tradesman. The Court of Appeal further outlined that when a householder is performing repairs that they would assume a duty to all who might subsequently be affected by those repairs must carry out these repairs with the care and skill that is required to complete such repairs in a safe manner. If a visitor were to suffer injuries as a result of any dangerous repair work carried out by the occupier, the occupier would be judged against the standard of care that would have been expected of a reasonably competent tradesman asked to carry out the same repairs. The engineering evidence in the case was such that if any reasonably competent tradesman were asked to replace the glass in the door in question, he or she would have used safety glass and not the type of glass used by Mr. Cogan to repair the door. In those circumstances the Court of Appeal found that Mr. and Mrs. Cogan were in breach of their obligations under Section 3 (2) of the Occupiers Liability Act 1995 and were inturn responsible for Ms Newman's injury.

As highlighted by this case, there is a significant responsibility placed on a home owner to carry out DIY repairs in a safe and competent manner as any such repairs will be judged against the standard of a competent tradesman in the event of a visitor suffering injury.

Unsatisfied claims against Setanta Insurance - what you need to know?

1. On the 25th May 2017, the Supreme Court ruled 5-2 in favour of the Motor Insurers Bureau of Ireland the result being that the MIBI will not be liable for the approximate 2,000 outstanding claims against Setanta Insurance.

2. Under the Rules governing the Insurance Compensation Fund, claimants will only be recovering 65% of their claims up to a limit of €830,000.

3. The Government have announced that they are moving on the reform of the Insurance Compensation Fund to ensure that all future third party claims arising from Insolvent Insurers are 100% covered.

Payment of Reasonable Sums on account of costs

The Provisions of Order 99 Rule 5 (1) of the Rules of the Superior Courts as amended allow the payment to the successful party of a reasonable sum on account of costs within such period as may be specified by the Court.

In the case of Josie Monteriro de Silva and Others and Rosas Construtoresa and Others Mr. Justice David Keane delivered the judgement on 1st June. In that case his honour confirmed that he made final orders directing costs to be taxed in default of agreement. No application was sought for liberty to apply and it was the final order. An application was made looking for a reasonable sum on account of costs. This is in line with Practice Direction HC71.

The Court held that the application could not be entertained as no such application has been made at the time the original order was made and therefore the matter was functus officio. This issue appears to have arisen because of the fact that after the final order was made an appeal was lodged.

It would therefore appear important in cases where a final order is being made that liberty should be sought to apply for costs under practice direction HC71 pending taxation to cover a situation should matters be delayed as regards taxation.

Circuit Court Rules (Personal Injuries Assessment Board Act 2013) 2017 S.I. No. 201/2017

In the June issue of our Newsletter we covered the S.I. No.186/2007 relating to the Superior Court rules for Personal Injuries. The new Statutory Instrument now deals with claims going to the Circuit Court.

These rules amend the Circuit Court Rules by the substitution for Rule 5A of Order 5 of a new rule including a requirement, in the case of proceedings which require to be authorised in accordance with section 14, 17, 32, 36 and 49 or Rules under Section 46(3) of the Personal Injuries Assessment Board Act 2003 that the endorsement of claim in relevant proceedings shall contain a statement confirming whether or not the proceedings have been authorised by the PIAB.

We would expect to see an appropriate District Court Rule in due course.

***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.**