
## Welcome to the Summer edition of Keeping In Touch – May 2014

In this most recent issue we will be looking at some significant employment cases. While these include cases which this office was involved in it also includes other important decisions which have issued from the High Court, Employment Appeals Tribunal, Labour Court, Equality Tribunal and the European Court of Justice.

There are also articles dealing with various aspects of the law which affect both employers and employees.

In the last two months we have made written submissions to the Minister for Jobs, Enterprise and Innovation including:-

1. Employment Permits (Amendment) Bill, 2014,
2. Holiday Pay for periods of Sick Leave. We cover the legal issues on this in the newsletter separately: and
3. The Annual Leave Year under the Organisation of Working Time Act.

At the time of publishing this newsletter the long awaited Workplace Relations Bill, has not issued. Hopefully the Bill will also address some anomalies such as the Annual Leave Year, and holiday pay while out sick, but also such matters as Section 7 (2) (b) Payment of Wages Act which requires a notice of appeal to be served on the other side by the party appealing and Section 23 National Minimum Wage Act which requires a request to be made before issuing a claim. These two are issues we have written to the Minister about in the past.

Employment law is becoming ever more complex due to a large extent the effect of EU case law. We have tried to set out some of the more relevant cases as we see them.

We have in the newsletter set out some of the changes in tax legislation in last year's Finance Act which impact on employers and employees. We have also set out our arguments as to why the tax bands at the higher levels should be increased for employees who reach the highest tax band at far too low a figure compared with our competitors. In this publication we do express personal views on various cases and on the law. They are personal comments and views on certain aspects and should be treated as such.

Before acting or refraining from acting on anything contained in this publication legal advice from a Solicitor regulated by the Law Society of Ireland should be obtained. On taxation issues specialist advice from a Registered Tax Consultant should be obtained.

Finally, we hope those reading this Newsletter find its content useful and interesting.

**Depression is a disability under the Equality Legislation**

In a case of Stobart (Ireland) Limited and Richard Beashel being a decision of the Labour Court under reference EDA 1411 the Labour Court set out a detailed overview of the legislation and in particular Section 2 of the Equality Act. The Court stated that it is well set in law that depression comes within the definition of a disability. The Labour Court referred to a number of decisions in relation to matters.

What is important from this case is that the employee was medically diagnosed with depression. The employee notified the company of the disability. The case is important for both employers and employees. Where an employee is suffering from depression it would appear important that the employee notifies the employer of same.

Where an employer is notified of an employee suffering from depression then it would appear that an employer must make medical enquiries as to the nature of the employees depression or as to the extent to which it might impair his or her capacity to work. It may be necessary to determine what reasonable accommodation the employee might require when suffering from depression.

Where an employer seeks to dismiss and employee where the employee has notified the employer of the employee suffering from depression or any other disability then it would appear necessary for an employer to avoid having a claim of discriminatory dismissal to:

a. Ascertain what long term condition, if any, the employee may be suffering from;
b. Ascertain how same may impair his / her capacity to work;
c. Engage with the employee to determine the reasonable accommodation the employee might require; and
d. Establish the nature of the disability the employee is suffering from.

As we said this is an extremely important case for both employers and employees. For employers it is imperative that they have procedures in place for employees to notify them of any disability they may have. The employer must have their own procedures in place thereafter to deal with the employee and the disability that the employee is suffering from in accordance with the requirements of the Equality legislation. Failure to do so can result in claims under the Employment Equality legislation. This can be expensive for employers.

**Submissions to the Minister for Jobs Enterprise and Innovation**

Since the last issue of Keeping In Touch we have made a number of submissions to the Minister for Jobs Enterprise and Innovation.

Holiday Pay for employees who are out sick

The European Court of Justice has held, as a legal right, that an employee who is absent due to illness will accrue holidays for a maximum period of 18 months while out sick. The entitlements to do with holidays and holiday pay then arise when either the employee leaves the employment or the employee returns to work.

When we wrote to the Minister there were issues as to whether Irish Legislation being the Organisation of Working Time Act included such a right.

If the right is in the legislation to such an entitlement then the employer is liable. If no such right exists then the reality of matters is that employees will not be able to recover against their employer. In those circumstances the employee will have a claim against the State. This will result in significant legal claims, against the State, resulting in substantial legal fees which could be avoided by the State, by amending the legislation.

We accept that this is a double edged sword for the Minister. Clarify the law in Ireland and run the risk of the ire of employers. Do nothing and run the risk of very substantial risks against the State.

It would be our view that it is better to clarify the law as otherwise it will simply be clarified after very expensive litigation.

In Denmark in December 2013 their highest Court held Danish law was not compliant with the EU obligation.

Holiday year.

There is an anomaly in our Working Time Legislation.

The holiday year is for a period from 1 April to the following 31 March. Because of this unless an employee gets their minimum of four weeks annual leave in that period the employee has a claim against the employer. Most employers operate on the calendar year. Our legislation is very specific. The legislation in the UK allows for an employer to specify a leave year, for that entity which is agreed by contract. No such right exists in Irish Law. We have written to the Minister to consider amending the legislation to allow such a right for employers. This would accord with the reality with life in many companies. While it is an anomaly it is the law. Until the law is changed the law has to be applied.

The Workings of the LRC / EAT / Equality Tribunal

The Minister for Jobs Enterprise and Innovation set up the Workplace Relations Customer Service which is based in Carlow. We wrote to the Minister in March highlighting areas of improvement. We believe these areas of improvement will result in significant financial savings to the State. They will result in significant reduction in legal and representative costs for employers and employees. They will help reduce the backlog of cases. It would also ensure that cases going forward would be dealt with quicker and more efficiently. While some might regard these as criticisms of the system we regard them as proposals to improve the system which will benefit employers, employees, representative of employers / employees, whether they are Solicitors, HR Professionals or IR consultants and result in cost savings for the State.

We do not know if a lot of these proposals are feasible as we are not involved in the management of Workplace Relations Customer Service but we were delighted with the positive response we received from both the Ministers office and the Workplace Relations Customer Service.

**National Minimum Wage**

This is a case where this firm was involved representing the employee. The case that we are going to discuss being a case of O' Leary International Limited and Viktors Gurkovs
http://www.workplacerelations.ie/EN/Cases/2014/March/MWD146.html is interesting in many ways.

The Act sets out the law relating to the National Minimum Wage Legislation. The Labour Court has set out in detail the basis of determining the law concerning the calculation of the hours an individual worked in line with Section 8 of the Act.

The Labour Court held that in line with section 8 (1) (a) of the Act that for the purposes of determining if the Act had been complied with it is necessary to look at the hours which an employee is contractually obliged to be available to his or her employer. The Court pointed out that the effect of Section (8)(1)(a) and (b) is that where an employee's hours of work are determined in accordance with (1)(a) and they work additional hours during the reference period the applicable hours should be calculated in accordance with (1)(b) which is effectively the time they actually worked. Conversely where an employee works less hours in a reference period than those determined his or her working hours will effectively be their contractual hours. In this case the contract provided:

"Your normal hours of work will be in accordance with the European Committee Driving Hours Regulations, Friday to Thursday. You will be expected to stay overnight on a regular basis in your vehicle. You will receive breaks that are in line with the European Committee Driving Hours Regulations".

The Labour Court held that in regard to working hours the contractual obligation on the employee was to be available to the employer for such hours as are permitted by the European Committee Driving Hour Regulations. The Court held that on the basis of the employer's submission that this referred to Regulation EC 561/2006 commonly referred to as the EU rules on driving hours. It followed that the employee was contractually required to be available to drive for the maximum number of hours permitted by the Regulations which in this case would be 48.

The Court therefore determined that the rate of pay under the National Minimum Wage Act which the employee was entitled to receive was effectively €8.65 per hour multiplied by the number of weeks that the employee worked multiplied by 48. From this figure then was deducted the amount actually received.

The employee in this case was paid a day rate. The Decision is extremely interesting in that effectively it has held that where an employee is contractually required to work a certain number of hours then the employers are obliged to pay the employee for those hours at least at €8.65 per hour in accordance with the National Minimum Wage Act. This is regardless as to the number of hours the employee actually worked where they are less than the contractual hours.

What does this mean?

Possibly an example would clarify matters.

Let us assume an employee has a contract which provides that they will work for up to 40 hours per week available to work for that number of hours and the contract specifies that the rate of pay will be €10 per hour. Let us assume the employee actually only works 30 hours a week and is paid for those 30 hours. The employee may well still have a claim under the National Minimum Wage Act on the following basis.

40 hours x €8.65 = €346.

Paid = €300

Underpayment = €46 per week.

Conclusion

This case highlights the importance of properly drafted contracts of employment.

Where an employer requires an employee to be available for a minimum number of hours per week but actually pays them or engages them for a lesser number of hours then depending on the rate of pay that is paid to the employee the employee may well have a claim. Effectively for an employee who is required to work 40 hours a week the minimum that an employee can receive is €346 per week from the employer without running the risk of a National Minimum Wage claim. The case highlights the importance of properly drafted contracts of employment, particularly where an employer may require an employee to be available but may not provide that number of hours.

This is a very important decision from the Labour Court. It follows on from the Circus Gerbola Limited and El Mostafa Chitabbou MWD1211 http://www.workplacerelations.ie/EN/Cases/2012/december/MWD1211.html which was heard in 2012 which squarely placed the onus of proof on an employer to show compliance with the Act. Both of these decisions are available on Workplace Relations Customer Service website.

**Date of Dismissal in Unfair Dismissal claims is vitally important when issuing a claim**

It may, at first sight, appear self-evident that the date of dismissal determines the six month notice period for bringing a claim. That is correct. However, that date may not necessarily be the date that the employee believed the employee was dismissed on.

For the purposes of the Unfair Dismissal legislation the “date of dismissal” means that where prior notice of the termination of a contract of employment is given and it complies with provisions of that contract and of the Minimum Notice and Terms of Employment Act 1973-2005 it is the date on which the notice expires. Therefore if an employee is dismissed on a Monday, and they have worked for the employer for over one year then the notice would mean that the contract would terminate one week later.

Where prior notice is not given or it does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act 1973-2005 it is the date on which the notice would have expired or the date specified in the contract of employment. What however is important is that where prior notice is not given it is the earlier date. Therefore the contract provides for one months' notice, but the employee has only worked one year and is only entitled to one weeks' notice and the employee is not given notice of termination in accordance with the legislation and is simply just dismissed the date of dismissal is not one month after the notice but one week after the notice. This issue came up in a case of Michael Gabbor –v- NWD Limited UD2436-2011. In that case the EAT was asked to decide what the date of dismissal was. A claim as lodged on 23rd December 2011. The employee was informed on 21st May of a decision to dismiss him after a disciplinary hearing. It was confirmed that he was entitled to two weeks basic pay to be paid in lieu of notice and therefore his contract would cease on 7th June 2011. The employee was also told he could appeal the decision within 5 days. An appeal hearing was heard on 20th June and on 24th June the employee received a letter dated 20th June stating that the decision to dismiss was upheld.

The EAT in that case held that the date of dismissal is the date the statutory notice expires not the date of notification of the appealed decision. The EAT in that case considered Section 8 (2) of the Act and noted that the claim for redress must be made within six months of the date of dismissal. The EAT referred to a number of cases. The EAT referred to a case of West Midland Co-Op Society Limited –v- Tipton [1986] IRLR12 where Lord Bridge of Harwich agreed that:

"In the absence of an express contractual provision to the contrary" that "the effective date of dismissal is the date of the initial notification of dismissal to the employee".

If a contract sets out that an employee has a right to appeal the time limit for bringing an Unfair Dismissal case does not stop simply because there is an appeal process. If however the contract provides that if an employee appeals, the dismissal will not take effect until after the appeal process is finished then the date of dismissal is not the original notification but the date after the disciplinary hearing takes place.

To avoid difficulties where there can be issues relating to the interpretation of what is in a contract of employment or staff handbook there is nothing to stop an employee lodging an unfair dismissal claim after the earlier of the notice period in the contract or the notice period the employee would be entitled to under the legislation relating to Minimum Notice and then lodging a further claim after the disciplinary appeal is heard. It is simply a matter of having matters associated together in the EAT. There is no difficulty always in requesting same. The EAT is very helpful in doing so.

This office is coming across a practice which is being used by some employer representatives whereby the employee is dismissed. Their contract may provide they receive notice under the terms of the Minimum Notice Legislation but a lengthier notice period is provided. This is done in the hope that the employee will issue a complaint immediately and therefore an argument can be made that the employee issued a complaint prior to the employee being entitled to by which we mean before the contract was actually terminated. This is usually done under this trick that is put in place, by providing that the employee does not have to work the notice period given to the employee.

In light of the provisions of the Unfair Dismissal legislation there is a strong argument that the date of dismissal will actually be the date as determined by the contract or their entitlement under the Minimum Notice Legislation, whichever is the earlier, and not the date specified in the notice to the employee. Saying this, it is always beneficial to hold issuing the proceedings until after the notice period expires even if this is a payment in lieu in working the notice period.

It is however important to make sure that if this notice period would bring the employee outside the six month period from the date of the notification of the dismissal the claim should issue within the six months period and then immediately after the notice period would have expired and again requesting the EAT to amalgamate the two claims together.

**Unfair Dismissal - Workplace Investigations – Keeping Them Fair**

In Unfair Dismissal cases it is not a matter for a Tribunal to decide whether the employee was, for example, incompetent or incapable or was guilty of misconduct.

It is sufficient that the employer honestly believes on reasonable grounds, that the employee was incompetent, incapable or guilty of misconduct.

The requirements were clearly set out by Mr. Justice Lardner in a case of Bolger –v- Showering (Ireland) Ltd [1990] ELR184 where he stated;

"In this case it was the ill health of the plaintiff which the company claims rendered him incapable of performing his duties as a forklift driver. For the employer to show that the dismissal was fair, he must show that;

1. It was the ill health for the reason for the dismissal,
2. That this was the substantial reason,
3. That the employee received fair notice that the question of his dismissal for incapacity was being considered, and,
4. That the employee was offered an opportunity of being heard".

This means that a workplace investigation must take place. If you are having a workplace investigated then this is a fact finding exercise. The person investigating matters is required to be an impartial fact gatherer. That person must observe the rules of natural justice before coming to any conclusions. Failure to conduct a complete investigation and to show that it was impartial and objective can lead to costly litigation. This was well shown in the case Michael Morales –v- Carton Brothers (UD835/2011) where the employer was criticised by the Employment Appeals Tribunal for its failure to conduct an open-minded and full investigation. The employee was awarded €65,000.

When considering any disciplinary matter an employer, before dismissal should first tell the employee of the matters to be investigated. Where possible the employee should be warned of the possibility of dismissal, if there is not an improvement, where it relates to poor performance an employee in such circumstances should be given an opportunity of improving performance. Where an employee has been given an opportunity to improve then there is an obligation on the employer to keep the employee informed and to what extent there is improvement or failure to improve.

The approach of Tribunals ion cases of dismissal for conduct was set out in the case of Hennessy –v- Read & Write Shop Limited UD192/1978 where it was stated;

"In deciding whether or not the dismissal of the complainant was unfair we applied a test of reasonableness to;

1. The nature and extent of the enquiry carried out by the respondent prior to the decision to dismiss the claimant.
2. The conclusions arrived at by the respondent that, on the basis of the information resulting from such enquiry, the claimant should be dismissed".

Before any decision to dismiss is made

1. There must be a bona fide complaint which is unrelated to any other agenda.

2. The complaint should be stated factually, clearly and fairly without any innuendo or hidden inference or conclusion.

3. The employee should be interviewed as to his or her version. This should be noted and furnished at the deciding authority against without comment.

4. The decision of the deciding authority should be based on the balance of probability from the factual evidence.

5. The actual decision as to whether dismissal should be a decision proportionate to the gravity of the complaint and to the gravity and effect of dismissal on the employee.

6. The employee should be given a right of appeal.

7. At all stages the person or persons conducting any investigation, disciplinary process or appeal should be independent.

Where an employer fails to follow these basic principles the employer may well be found to have unfairly dismissed the employee. The fact that the employer if they had properly investigated matters in accordance with fair procedure would not have been held to have unfairly dismissed the employee is unfortunately not a relevant issue. It may have an impact on the level of compensation.

What is clearly evident and comes out in a considerable number of Unfair Dismissal claims, reported in the Employment Appeals Tribunal, is that it is the lack of fair procedures which results in an Unfair Dismissal award being made against an employer rather than the facts surrounding the dismissal. It is equally important for employers to make sure that their policies and procedures clearly comply with the Code of Practice on Grievance and Disciplinary Procedures. Employers must follow such procedures. In addition, employers must always be advised of such procedures and it is important that they are advised of them before any disciplinary procedure commences. It is advisable that even if a copy of the Staff Handbook was furnished to an employee at some time in the past that the Disciplinary Policy is again furnished to an employee at the start of any disciplinary investigation.

**Lodging Appeals to the Employment Appeals Tribunal**

Following case UD640/2012 extreme care must be taken in lodging an appeal to the EAT and by extension to the Labour Court or the Equality Tribunal. In the case before the EAT the employee had lodged the appeal not by sending it to the EAT but by sending it to Workplace Relations.

Workplace Relations then sent it to the EAT. The EAT received the appeal within the six week period after the date of the Rights Commissioner Decision. Subsequently a further copy of the appeal was delivered to the EAT directly. This was delivered outside the six week period. The EAT in that case held that as the appeal had not been delivered directly to the EAT, by the employee, within the six week period of time (even though it had been sent by Workplace Relations Customer Service) that this was not a valid appeal as the appeal had not been served directly by the person appealing, in this case the employee, or on their behalf.

While there may be various views as to whether the EAT, in their decision was correct, the fact of matters is that this is the first time this issue arose because of the provisions of the Workplace Relations Customer Service, which service is not set up on a statutory basis.

It is therefore important until such time as this decision is overturned by the Circuit Court or by the High Court on appeal that parties wishing to appeal make sure that the documentation is served directly on the EAT.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

**ECJ have held that excluding a person from a training course because of maternity leave constitutes unfavourable treatment.**

On March 6th of this year the ECJ decided that the exclusion of an employee from a training course automatically because she had taken compulsory maternity leave did constitute unfavourable treatment contrary to EU law. This is because the employee can then not benefit from an improvement in the working conditions in the same way her colleagues could. This was held in Case C-595/12.

The case involved a lady who was placed, in accordance with national Italian legislation, on compulsory maternity leave for three months. The Italian Court asked the ECJ whether the Directive on Equal Treatment of men and women which precludes a rule which excludes a woman on maternity leave from training which is part of her employment and is a pre-condition to be permanently appointed to a post, thus, enjoying improved employment conditions but at the same time guaranteeing the right to participate in the next training scheduled was discriminatory. The Court pointed out that under EU law a less favourable treatment of a woman relating to pregnancy on maternity leave constitutes discrimination on the grounds of gender. The Court held that a woman on maternity leave must have the same right to return to her previous job or an equivalent job and benefit from any improvement of working conditions which she would have benefited during her absence. In this present case the Court held that the maternity leave had not influenced the employee's position. However, importantly the Court held that being excluded from vocational training as a result of having taken maternity leave had a negative effect on her working conditions as she was not able to obtain a higher salary corresponding to the promotion. The Court held that automatically excluding a person from a course must be regarded as unfavourable treatment in these circumstances. The Court held that the automatic exclusion takes into account neither the absence for maternity nor the requirement for the additional training course organised at a later but uncertain date. As a result the Court held that it did not comply with the principle of proportionality particularly because the competent authorities are under no obligation to organise such a course at specific intervals.


**Tel:** 6177856 | **Fax:** 6177857 | **Email:** info@grogansolicitors.ie | **www.grogansolicitors.ie**

The Court importantly concluded that the provisions of the Directive are sufficient, clear, precise and unconditional to have direct effect. The important aspect of this case is that not only can an employee bring a case against a State entity but that they could also bring a case against a private employer.

This case has significant potential negative impact for employers in the private sector where ongoing training or completing of courses is necessary for promotion within an organisation.

It would appear; although the matter is open to discussion, that if an employer provided that training courses would be held at regular intervals and that those regular intervals were reasonable then it may well be that an employer could exclude an employee from such training courses during maternity leave.

The better option for employers is to consider offering attendance at a particular course to an employee even though they are on maternity leave. In particular this would be important where an employee may need to attend or complete such a course to obtain a promotion or an increased salary.

**Redundancy by reason of a business relocating**

UD 893/2012 and RP703/2012 being a decision of the EAT which involved an employee who worked in Carlow. The Carlow premises were closing. The employer proposed to move the employee to an alternative position in an alternative location, this was in Waterford.

The contract provided:

"The company reserves the right to relocate or establish operations in Ireland and the UK and you may be required to transfer to another department and/or place of work. Before implementing any change we will consult you and consider any reasonable objections that you may have to the proposed changes".

The particular contract was silent as regards a place of work. The Tribunal was however satisfied that the employee was the area manager for Carlow and that Carlow was her place of employment.

In seeking to avail of a mobility clause the Tribunal was of the view that the company did not discharge the onus where it thought to relocate the claimant without consultation provided for in the contract. The division of the EAT importantly referred to Section 7 (2) (a) of the Redundancy Act 1967 (as amended by Section 4 of the Redundancy Payment Act 1971). This Section provides that an employee shall be taken to be dismissed by reason of redundancy where the dismissal is attributable to:

"The fact that his employment has ceased or intends to cease, to carry on business for the purpose of which the employee was employed by him or has ceased or intends to cease to carry on that business in the place where the employee was so employed".

The Tribunal held that by virtue of the company's conduct to terminate the employee that persuant to Section (9) (1) ( c) of the Redundancy Payment Acts 1967 that this was a redundancy situation and that the employee was entitled to a redundancy lump sum based on her service.

This case is interesting in that it highlights the issue that merely having a clause in a contract which provides for mobility, may, because of the provisions of the Redundancy payment Acts in itself not be sufficient to defend a claim for redundancy where an employer seeks to relocate.

Where an employer seeks to relocate between two different towns that are a significant distance apart then a mobility clause may not be sufficient to defend a claim for redundancy.

**Deduction from wages**

A case involving a number of employees under reference PW11/2012 was heard in July and November 2013.

There had been a reduction in wages which the employees had agreed to in 2006.

In April 2011 a meeting took place between the workforce and Management. During the course of that meeting the staff where informed that their current salaries were to be reduced by 10%. The reason put forward was to attempt to address a serious financial difficulty facing the employer. The employees were

asked to give their written consent. Approximately one month later despite only a minority confirming their agreement to pay cuts the employer began implementing it from May 2011.

The Employers' Handbook stated;

"The company reserves the right to deduct from your pay any monies due to the company including such items as canteen charges, overpayment or loan or any agreed deduction as may apply".

A further clause stated:

"From time to time these terms and conditions of employment may need to be revised to take account of new circumstances. Such provisions may be brought about by way of legislation, employee requests or management requirements and will be discussed with employees as necessary".

The employer contended that there was serious compelling reasons for the cuts to be imposed. The company admitted that there were requests for sight of the company's accounts but the company felt unable to disclose them to shareholders and staff for various reasons.

The Tribunal held that the net issue in the appeal related to Section 5 of the Payment of Wages Act 1991 and a particular clause of the contract. The Tribunal held that they did not accept that the employer could unilaterally deduct the wages of its employees. The Tribunal held that such a deduction would be contrary to the wording of Section 5 (1) (b) of the Act. The Tribunal held that the employer in this case did not advance its own cause for a deduction as it opted not to fully engage with the reported financial situation it was facing at the relevant time. The Tribunal held that by virtue of Section 5 (1) of the Act and Section 5 (1) (c) of the Act that these clearly meant that an employer must receive the written explicit permission from its workforce before wages can be reduced.

This case is very important for confirming the effect of the legislation as regards the rules to be applied as regards reduction in wages.

The employees consent must be provided.

While it was not argued in this particular case there is a potential saving provision which employers can rely on which is that in all the circumstances it

was reasonable for a deduction to be made. It would however appear that before an employer can rely upon such a provision it is necessary for the employer to show how it was reasonable and necessary for a deduction to take place. This would mean disclosing financial information. This may not only be the accounts of the company, it may be particulars as to the breakdown to include drawings for Directors, shareholders, expenses paid to Directors and shareholders or family members of Directors or shareholders. There is a trend developing at the present time of employers seeking to impose salary deductions and reducing wages on the pretext that it is necessary for the survival of the business. This is however being done without disclosing the relevant financial information.

Where an employer proposes to make reductions in wages it is reasonable to expect the employer to show that they are equally taking the pain.

For an employer to seek to reduce wages by 10% it would be reasonable to expect that the employer would be in a position to show what drawings and income the employer took from the business and to show how their drawings and income taken from the business have at least reduced by a similar amount.

It is fully understandable that employers may not wish to disclose financial information, particularly as regards drawings and income being taken from a business by shareholders who are also Directors or who are Directors, but in a nominal capacity, such as a spouse. There can be a considerable amount of resistance as any employer would know, if an employer is to disclose that they are taking between direct income, expenses paid on their behalf by a company or payments made to its spouse where the total value may be €200k per annum even if being reduced by 10% to 180k per annum can still seem an excessive sum of money to an individual who is on €30k per annum and is expected to take a €3k reduction in their wages.

There is another issue which can affect employers where wages are unilaterally reduced without consent. Where wages are unilaterally reduced without consent an employee can deem that to be a termination of their employment and seek to bring an Unfair Dismissal claim. There are legitimate ways in which an employer can correctly reduce wages. This does however involve a degree of planning and organisation in advance of it being done.

It does often require input from specialist employment lawyers as to how it can be done properly, and in accordance with the law so that it is not subject to a claim by employees'. Do it wrong and the specialist employment lawyer may well be acting for a number of the employees.

**Part Time Workers and Pension Rights**

An interesting case arose in the UK recently, it related to a part time judge. The ruling has placed an important limitation on the scope of the EU rule designed to protect part time workers from less favourable treatment.

The case involved a Barrister who sat as a Recorder Judge between 1978 and 2005 in the UK. The case was sent to the European Court of Justice. In the UK there had been a decision that he was entitled to a pension by operation of the Part-Time Workers Directive. The issue arose relating to the amount of pension payable to the individual. The UK Employment Tribunal ruled that his entitlement should be calculated by reference to the date of his appointment. In practice this meant he would receive a pension of approximately £10,000 per year. The matter was appealed. The UK EAT found that the judicial earnings prior to 7th April 2000, being the date on which the Directive had to be brought into force, could not count towards his entitlement.

The UK EAT noted that it was only on that date that discrimination against part time workers in terms of their pension rights had become unlawful in the UK. The UK EAT found that the legal position was clear and declined to refer the issue for further consideration to the ECJ.

The reasoning in the UK case is clear and appears correct. While there is no similar decision in Ireland it does indicate that part – time workers can only go back against the State to the date on which the Directive should have been implemented and in respect of private employers to the date that the legislation in Ireland was brought into effect.


**Parental Leave**

The case of Lyreco Belgium NV –v- Sophie Rogiers C-588/12 before the European Court of Justice ("ECJ") is a case dealing with the correct method of calculating compensation for breach of Directive 96-34-EC being the Directive dealing with Parental Leave.

The case dealt with the issue of an individual who was on parental leave and was therefore working reduced hours and was earning a reduced salary. The question was should compensation be calculated on the reduced salary or on the full time salary. The ECJ held that where an employer unilaterally and without compelling or sufficient reasons terminates a workers full time contract of indefinite duration the compensation is determined on the basis of the full –time salary rather than the reduced salary earned by the worker at the date of dismissal.

One wonders why such a case would ever have been brought to the ECJ but saying this it does bring clarity to the issue.

**French non-compete clauses in share purchase agreements.**

A buyer of a French company which keeps the seller on as an employee should know that the fact of a non –compete clause included in the Share Purchase Agreement and not in the employment contract does not exclude the application of French Employment Law. Accordingly under French Employment Law the non –compete clause must be limited in both time and space and importantly must provide for post termination compensation.
The French Supreme Court on 8th October 2013 made it clear that the post – termination compensation is compulsory only when the employee / seller has an employment contract in force when the Share Purchase Agreement is signed.

**Holiday entitlements / Annual Leave entitlements of workers' on Sick Leave**

The European Court of Justice ("ECJ") has ruled on a workers' entitlement to be paid for annual leave / holidays while on sick leave.

There are two important European Court decisions on this being case C-350/06 and C-520/06 both which are commonly called the Stringer case. These decisions of the ECJ have huge significance for employers and employees throughout Europe.

The Findings of the Court

The ECJ held that a workers annual leave / holiday entitlement continued during periods of sick leave.

- A workers' entitlement to have worked during the leave year in question is not necessary to obtain such rights.
- A workers annual leave / holiday entitlement in a given year may not lapse at the end of the leave year or any carry over period due to the workers' inability to work.
- The maximum period of leave which a worker on sick leave can obtain is limited to 18 months. Therefore the maximum leave which can accrue is 6 weeks being four weeks for each Annual Leave year and two weeks for the six month period.
- Where a workers does not return to work prior to his / her employment being terminated (whether by the employer or by the employee) the worker is entitled to payment in lieu of the outstanding Annual Leave / Holiday Leave entitlement not taken during the period of his or her sick leave.

There is an argument that Irish law currently does not comply with the rulings of the ECJ. The Organisation of Working Time Act 1997 requires the worker to actually have worked in order to obtain the Annual Leave / Holiday Leave entitlements.

If the Irish law is not compliant with the ECJ ruling then employers will have no liability. This does not mean that the worker will lose their rights. The worker will be entitled to sue the Irish State for the loss. It would appear that any worker, whether or not they have brought a claim before the Rights Commission Service / Labour Court and whether or not they have complained to their employer will be entitled to bring a claim if it has arisen in the last six years and possibly back to when the Act came into force. This could be a substantial cost to the Irish State.

If the Irish legislation is in compliance with the ECJ ruling, which is questionable to say the least, then employers will have a liability. Even if employers at the present time do not have a liability employers need to deal with workers who are on long term sick leave rather than allowing them to remain on the books indefinitely as such workers will become entitled to Annual Leave / Holiday entitlements in respect of the entire period that he or she was out sick. Immediately the Organisation of Working Time Act is amended.

Questions will arise as to what the effect of the ECJ ruling is. The ECJ ruling only applies to the four week mandatory Annual Leave / Holiday entitlement which workers are entitled to obtain. Additional annual leave over and above the Statutory Minimum will not be affected by the ECJ ruling.

The office of Richard Grogan & Associates has made a written submission to the Minister of Jobs Enterprise and Innovation on 27th March 2014. Where there is a clear and definitive ECJ ruling the State is obliged to bring in the legislation to implement same. Failure to do so is simply going to mean expensive claims against the State.

For employees who believe that they may have a claim it is important that that the claim issues as soon as practicable as it is likely that the State may attempt to minimise exposure by limiting claim periods.

**Zero Hour Working Practices – Not Zero Hour Contracts – The Real Test**

The case of Ticketline Trading as Ticket Master and Sarah Mullen DWT1434 http.//www.workplacerelations.ie/en/Cases/2014/April/DWT1434.html which issued on 10th April is an important decision clarifying the issues in relation to what are commonly called zero hour contracts.

The Court in this case set out a detailed overview of the legislation.

The Court held that the employee, in this case, had a contract which was operated as though she was required to be available for work at all times. This is in line with Section 18 of the Act which refers to contracts where there is a certain number of hours, or, as and when the employer requires him or her to

be available for work, or, both a certain number of hours and when the employer requires him or her to be available for work.

The Court found that where the employer requires an employee to keep themselves available for work the employee comes within the scope of Section 18 of the Act.

This case has significant implications for both employers and employees. It goes further than the normal "zero hour contracts" situations.

If a contract of employment requires an employee to work say 40 hours per week and the employer does not provide work then the employee may bring a claim under the Payment of Wages Act but may also bring a claim under the Organisation of Working Time Act.

Under the Organisation of Working Time Act the employee would be entitled to claim 10 hours pay for each week. However, in addition, the Organisation of Working Time Act provides for compensation of up to 2 years wages.

A number of employers will have what are commonly called "zero hour contracts". However, the actual wording of same, and, the way they operate in practice will now be subject to review as to whether the employee does have rights under the Organisation of Working Time Act. In our view, clearly if the employer requires the employee to be available, or if the contract provides for a set number of hours or a combination of either of these two situations the employee will have a claim against the employer.

The case is also important in that it confirms that the Labour Court will not look just at the written terms of any contract but will also look at what the relationship between the employer and the employee was. The Court will consider what representations and statements were made by or on behalf of the employer. In this case the Labour Court accepted that the statements were made on behalf of the employer which required the employee to be available for work. As a result of this the Labour Court awarded compensation of €3000. The experience in Ireland is different than that in the United Kingdom. In the UK, there is no obligation on an employer even if they require an employee to make themselves available, to pay the employee or to suffer the potential of a claim under the equivalent of Section 18 OWTA if work is not provided. The Irish legislation is different. There is some advice issuing from certain entities that the alternative is to provide a contract for a "casual worker". Merely calling a contract "casual employment" is not in itself sufficient.

A court in Ireland will look behind the title of any contract to find out what it actually says. The most recent decision of the Labour Court enables the Court to look at what the actual relationship between the employer and employee was. In addition the Court will look to see what was said to the employee by way of statements or representations. Employers who are considering either zero hour contracts or casual contracts of employment need to carefully look at all documentation to make sure that there is no requirement whatsoever for the employee to be available to work.

In addition, employers must make sure that managers or supervisors do not say anything to such employees which could be deemed to be a requirement for the employee to be available or required to be available to work.

**Excessive Hours of Work - Working Time Claims – What Is The Reference Period**

The case of Swords Risk Services Ltd and Damien Sheahan being a decision of the Labour Court under reference DWT435 http:/www.workplacerelations.ie/en/Cases/2014/April/DWT1435.html is important for clarifying the law of what the reference period is for a claim of working excessive hours.

The legislation is clearly set out in Section 15 Organisation of Working Time Act.

How this applies in practice is often open to discussion. In this case a complaint was made in February 2013. The employee had left work in October 2012.

The Court found;

"The Act does not prohibit the Court from calculating the average working week over a period of 6 months provided the effect of that calculation crystallises into an infringement of Section 15 of the Act within 6 months of the date on which the complaint was made by the complainant to the Rights Commissioner. In this case the complaint was made in February 2013. The complainant left work in October 2012. The complainant and the Respondent

are entitled to calculate the average working week in the six months up to and including the date on which he ceased working for the company".

What does this mean in practice?

An argument is sometimes put forward, before Rights Commissioners that the reference period will be the period to February 2013 from a date in September 2012 in a similar case scenario. The effect of this Court ruling is that the averaging period would actually go back to April 2012.

This Court decision confirms that for claims of working excessive hours, which must be averaged over a four or six month period of time, provided the claim is made within six months of the employment ceasing the employee can go back six months prior to the date of leaving provided the claim is made within 6 months of leaving the job. This decision has important consequences for anybody bringing or defending claims.

**What Notice is an Employer Obliged to Give and Employee Entitled to Receive to be Obliged to Work Overtime?**

This question regularly comes up in cases before Rights Commissioners and the Labour Court. In the recent case of Lucey Transport Limited and Marius Serenas DTW13141 http://www.workplacerelations.ie/en/Cases/2013/October/DWT13141.html the Labour Court gave a very considered decision on this point.

The Court stated in relation to the legislation;

"It seems to the Court that the underlying rationale of the provision is perfectly clear. It is directed at making a sensible distinction between situations in which an employee has a fixed start and finishing time around which he or she can have private or family life and those who cannot do so due to the unpredictability of their work commitments. Where an employee has a contractual entitlement to a fixed starting and finishing time he or she cannot be obliged to start or finish work at any other time as any variation from the contractual terms can only be by mutual agreement. Where, however, an employee's starting and finishing time is determined solely by the employer the law requires that in order to maintain some degree of work/life balance reasonable notice of starting and finishing times must be furnished by the employer".

The Court held that 24 hours' notice must be given and that failure to do so contravenes Section 17 of the Organisation of Working Time Act.

What does this mean in practice?

If an employee has a fixed starting and finishing time with no provision in the contract which requires the employee to undertake overtime then the employer cannot insist upon the employee doing overtime. Where a contract has a fixed starting and finishing time but there is provision allowing the employer to require the employee to undertake overtime then the employer must give 24 hours' notice of the requirement to work overtime.

There is an exception to this. Section 17 (4) of the Act confirms that where some unforeseen event intervenes then 24 hours is not required. The Labour Court has consistently held that unforeseen means that "cogent evidence" must be furnished if an employer is to rely on this.

What an unforeseen circumstance is will depend on the particular circumstances. What however is clear is that an unforeseen circumstance cannot be regularly occurring. It cannot occur, for example, every week.

Where an employee has no set starting and finishing times then again the employer must notify the employee at least 24 hours in advance of the start and finishing times.

In some businesses individuals will work on different shifts. These shifts may change from week to work. The law on this provides that the notice to employees of the requirement to work a particular shift for example a shift starting on a Monday must be notified the previous Friday. This is an exception to the 24 hour rule. If an employee comes to work on Monday at 9am and the employer wants to change the start time on Tuesday to 8am it is not sufficient to give notice at 9am on Monday as that will not be 24 hours. If however the employer wanted to change the finishing time on Tuesday to 6pm rather than 5pm it would be sufficient if the notice was given any time before 6pm on Monday.

The Lucey Transport case is important for restating the law on this issue. What is relevant however to both employers and employees is that failure to comply with this provision can result in significant awards.

In this particular case failure to notify the employee of finishing times was sufficient to result in an award, to the employee, of €2500.

**Minimum Notice**

We are regularly asked about the right to Minimum Notice.

The Basic Position

Where an employer wishes to terminate the Contract of Employment of an employee (by which we mean in plain English dismiss the employee) the Minimum Notice and Terms of Employment Act 1973 sets out the minimum requirements.

1. 13 weeks employment but less than 2 years employment – 1 weeks' notice
2. 2 years' service but less than 5 years' – 2 weeks' notice
3. 5 years' service but less than 10 years' service – 4 weeks
4. 10 years' service but less than 15 years' – 6 weeks
5. 15 years' or more – 8 weeks

Notice payments do not have to be paid in the case of gross misconduct but even then we advise employers to pay the Minimum Notice "without admission".

What happens if the contract has a greater notice period

If the Contract of Employment has a greater notice period then the employee is entitled to the greater of the Minimum Notice under the legislation or under the Contract.

A common question that arises from employees where their contract is terminated but they have received the Minimum Notice entitlements under the 1973 Act but not the notice under their Contract as to whether they can bring a claim for Minimum Notice?. There are different opinions on this. There are even different Employment Appeals Tribunal Decisions ("EAT"). Some divisions of the EAT hold that the employee may bring a claim under the Act for the notice set out in their contract. Other divisions of the EAT take a different view. What is clear is that if an employee does not receive their full notice as set out in their contract of employment they may bring a claim under the Payment of Wages Act.

What is the position where the employee is given notice but still has outstanding holidays?

There is no clear view in relation to this as to whether the employer may require the employee to take their holidays as part of their notice period.

In the case of Kelly –v- Michael Amber Limited M409/1979 the EAT held that the employer is entitled to require the employee to take their holidays as part of the Notice Period. The opposite position was taken in the case of Maher –v- Ashton Tinbox Ireland Limited M4720/1986.

The difficulty is that the EAT deal with claims under the Minimum Notice and Terms of Employment Act 1973. The issue of holidays is dealt with by the Rights Commissioners / Labour Court under the Organisation of Working Time Act. An employer who seeks to require an employee to take holidays as part of their period of notice may have difficulties and may end up being sued by the employee.

Is an employer entitled to require an employee not to work during the period of their notice?

The answer to this question depends on whether the Contract of Employment provides that the employer may require the employee not to work during their notice period. Unless the Contract of Employment specifically provides that an employer does not require the employee to work during the period of their notice then the employee is entitled to work during that period of time except where the employee is dismissed "for cause". We would refer you to our Guide to contracts of employment for more information on this matter.

What can an employee do if they do not receive their Minimum Notice?

If an employee does not receive their Minimum Notice then the employee may bring a claim under the Minimum Notice and Terms of Employment Act 1973. If the employee has a contract which provides for notice periods then the employee may also bring a claim under the Payment of Wages Act.


**Income Tax – A Bar to Competitiveness**

On 9th April the Minister for Jobs, Enterprise and Innovation Richard Bruton writing in the Irish Times stated that the Government must work towards a medium term goal of reducing the threshold at which people pay the higher rate of tax as well as the rate itself.

The Minister pointed out that the 52% marginal rate of Income Tax is much higher and kicks in at a much lower level of income than in our competitor countries.

The Minister pointed out that at €32,800 the marginal rate of 52% applies.

In the UK by comparison, and while there are other factors to consider, workers pay 20% on incomes up to the equivalent of €38,000 and 40% on incomes above that up to €180,000.

This difference does create the potential for harming competitiveness and job creation in Ireland. It is great to see a Minister who is direct and straight talking on this topic. The Minister has the advantage of having previously being a spokesperson on Finance while in opposition.

A Government policy which would seek to reduce the marginal rate and to increase the threshold at which the marginal rate applies can only help business. By helping business it will help create jobs.

The Minister must be applauded for his constructive comments on this important issue for this country.

**Extension of Pay and File Deadline for ROS Customers 2014**

On 24th April the Revenue announced an extension of the ROS return filing and tax payment date for self-assessment income tax customers and for customers liable to Capital Acquisitions Tax.

For customers who file their 2013 Form 11 return and make the appropriate payment through ROS for preliminary tax for 2014 and the income tax balance for 2013 the due date is extended to Thursday 13th November 2014.

The beneficiaries who receive gifts or inheritances with valuation dates at the year ended 31 August 2013 will make CAP returns and the appropriate payment through ROS the due date is also extended to Thursday 13th November 2014.

Where pay and file is not through the ROS system the due date is 31st October 2014. The above was set out in Revenue e-Brief no. 30/14

**Changes in Tax Legislation in the Finance Act**

This short article is intended to give a summary of some of the main income tax relief that will impact on employees, employers and individual tax payers.

**Top - Slicing Relief**

At one stage top - slicing relief ensured that the taxable amount of ex gratia lump sum received on retirement or redundancy was not taxed at a rate that was higher than the individual's average rate of tax in the three years before retirement or redundancy.

The Finance Act 2013 abolished the relief on payments of €200,000 or more. The Finance (2) Act 2013 provided that the relief is entirely abolished from 1st January 2014.

This relief was of significant benefit to higher paid individuals for example if the average rate of tax had been 30% then even on retirement if the ex gratia sum was due to be taxed at 41% the maximum would be 30%. That important relief is now gone.

**Tax and Medical Insurance Premiums**

The Finance (No. 2) Act 2013 confirmed the tax relief for medical insurance premiums has been restricted for contracts renewed or entered into on or after 16th October 2013. Before that date tax relief was available at the rate of 20% for the full amount of the premium. The new change means that tax relief would be available only on the first €1,000 of an adult's premium and the first €500 on a child's premium.

We have concerns about this. With the rising cost of health insurance policies if this figure is not increased then many tax payers will receive less and less tax relief on their premiums. It is an old trick by the Government to bring in a limit

at a particular level and then to leave it there so that with the benefit of inflation it becomes worthless.

Medical Insurance Premiums are important for individuals and whether a person is employed, self-employed or an owner of a business which employs individuals the importance of proper medical insurance is important.

**PRSI for employees**

While not covered in the Finance Legislation the Social Welfare and Pensions Act 2013 implements measures announced in the Budget 2013 to extend PRSI from 1 January 2014 to unearned income of employment contributions and individuals in receipt of a taxable pension under 66 years of age. A person who is not chargeable for income tax purposes is not obliged to submit a tax return. If they are they must submit tax returns.

**Tax Relief on Saving Products.**

The rate of tax on saving products has increased. For deposit accounts, life insurance policies, investments funds and special term accounts the rate increased from 33/36% to 41% from 1 January 2014.

If you go back to 2008 the majority of saving products had a tax rate of 20%. We now have a position where the rate is 41% and in addition PRSI at 4% for many employees on such income significantly increases the marginal rate of tax.

**Start your own Business**

The 2013 Finance (No.2) Act introduced a new measure to encourage the long term unemployed to start their own business. There is an exemption from income tax up to €40,000 per annum for a period of 2 years for individuals who set up an unincorporated business. The new business must be established after 25th October 2013. It must be established before 31 December 2016. The business cannot have been previously carried on by any other person or have previously been part of a larger business. The person starting the business must have been unemployed and in receipt of Social Welfare payments for at least 12 months before starting the business.

USC and PRSI are not affected by the relief and continue to be payable.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

**Capital Gains Tax**

CGT remains at 33%.

It now appears now beneficial for an individual to invest in Capital Appreciation rather than income producing assets because of the lower tax rate on capital gains.

**Issues for small and medium enterprises (SME's)**

We thought it would be useful in our newsletter to start a discussion on some of the issues which are affecting SME's.

1. The lack of any safety net. If an employee becomes ill or loses their employment they are entitled to Social Welfare. An employer who sets up a small or medium enterprise has no such safety net. If such an employer becomes ill there is no method of getting illness benefit or disability benefit. If the business does not prosper and survive there is no potential for Social Welfare payments.

   SME's are responsible for the majority of job creation in the country. Like you we are a SME. We take the risk. We, like you, spend our time and our money and often work long hours to create and maintain employment. We, like you, pay our taxes. We are, like you, also unpaid Revenue Collectors in that we have to deal with the payment of PRSI, PAYE, and VAT.

   There is no safety net for the owners of SME's. There is a strong argument that something needs to be done to assist SME's.

2. The Tax Burden on SME Employees.

   Many SME's will have Managers. Currently the level of income at which those Managers will become liable to the top rate of income tax is way below that of, for example the United Kingdom and many other countries. There is therefore an excessive burden on SME's as a payroll cost in trying to compete with other jurisdictions. In the next Budget it is not a question of raising the threshold at which individuals get into the tax net. It is a question of raising the level at which individual employees become liable to the higher rate of tax.

There are also benefits of course for the owners of SME's. That is that those owners, like you, do not have to pay the higher rate of tax until a higher level of income is earned. Wage demands are increased. There are specialist skilled shortages in some areas in this country. The Income Tax Code should be amended to encourage SME's to engage more employees and also of course to make it advantageous for such employees to want to work. The effective rate of tax for an employee who is on the top rate of tax is that for every additional €1 that is paid to that individual 48% goes in tax. With the threshold being reached at approximately €32,800 the cost for an SME, like you, to put a real tangible benefit to an employee is restricted because of the excessive tax taken.

**Supports for SME's.**

The SME sector creates the majority of new jobs in this country. They are local jobs. They are in local businesses. They are situated in local communities. There is very little being done by the State to assist an SME to set up in business. Take the situation of a small SME which is taking on employees for the first time. They have the cost of putting in place contracts and staff handbooks. There is little in the way of definitive easy to access employer guides written in simple English an individual owner of an SME can have readily to hand. While there are booklets on various aspects of the law, produced by the State, there is no one definitive booklet. The legislation that an SME has to deal with in dealing with employees is diverse and is not consolidated. Different rules apply in different situations. Some of the definitions are actually contradictory. It would be beneficial if the State provided a service for such entities by way of courses which would guide SME owners through the myriad of legislation that they have to deal with and give practical up to date precedent documentation which could be used. This office is constantly surprised at the fact that many contracts which are prepared do not comply with basic legislation.

In other jurisdictions such contractual documents are readily available to SME owners. There is no reason why it should not happen here. Equally in the area of complying with Revenue laws and Social Welfare matters there is little support and training for SME owners.

To grow the SME sector far more in the way of support is required by the State.

KEEPING IN TOUCH

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**Sick Leave in the Public Service**

The Public Service Management (Sick Leave) Regulations 2014 SI No. 124 of 2014 have issued. The Regulation set out in detail the terms of the new sick leave scheme which will apply across the public service. The Regulations specify the sick leave remuneration limits in respect of illness or injury and critical illness or injury.

In cases of illness or injury it provides for a maximum of 92 days on full pay in a one year period followed by 91 days on half pay subject to an overall maximum of 183 days paid sick leave in a four year period.

In the case of critical illness or injury it provides for a maximum of 183 days on full pay in a one year period followed by 182 days on half pay subject to an overall maximum of 365 days paid sick leave in a four year period.

When access to paid sick leave has been exhausted there are provisions for temporary rehabilitation remuneration.

These Regulations will significantly impact on individuals in the public service by reducing their entitlements.


**Tel:** 6177856 | **Fax:** 6177857 | **Email:** info@grogansolicitors.ie | **www.grogansolicitors.ie**