INTRODUCTION*

Welcome to the May issue of Keeping In Touch

April has been a fantastic month for this firm. However we try to keep things in perspective. We never set out to be a leading law firm simply a specialist law firm. Our goal has always been to make a difference for our clients. It is never about the role or status for us. It is always about the goal of representing our clients to the best of our ability. We work on the basis of continued learning as recognising you always have something new to learn this keeps you humble. Thinking you know everything can make you arrogant and arrogance leads to ignorance.

We regard the Irish Law Awards as extremely important for a firm such as ours. So excuse us if we do take this opportunity of setting out how we did this year in the nominations. We did better than in our wildest dreams. We greatly appreciate that the judging panel felt us worthy of these nominations as finalists and to those who nominated us especially those colleagues who did so. As we said we take the Irish Law Awards very seriously. It's just ourselves we try not to take too seriously.

On 4 April we found out that we have been nominated for;

Employment Lawyer / Employment Law Team of the Year,
Dublin Law Firm of the Year,
Dublin Solicitor of the Year,
Sole Practitioner / Sole Principal of the Year, and,
Excellence in Marketing & Communications

This is the third time where we have been nominated for the Employment Lawyer / Employment Law Team of the Year Award. The other occasions were in 2013 and 2015. For the third year in a row we have received a nomination as a finalist for the Sole Practitioner / Sole Principal of the Year Category of the Irish Law Awards.

The award ceremony for the Irish Law Awards will take place in the Clayton Hotel Burlington Road on the 12th May. As a firm we are

looking forward to this event. We congratulate all our fellow finalists. It will be as usual a great event. We are thrilled to be again attending.

In the Spring 2017 issue of The Parchment published by the Dublin Solicitors' Bar Association we had an article entitled "Bringing Claims to the WRC – Be Wary". This article dealt with the issue of claims being brought to the WRC under the wrong Act. It is a practical short article for colleagues on how to address possible claims.

In the Parchment also there was a short article by us relating to the Civil Liability (Amendment) Bill 2017.

This office successfully made a submission to the Minister for Justice and Equality relating to the Bill. The Bill as originally drafted provided that Periodic Payment Orders would be exempt from Income Tax. This office in our submission pointed out that such payment would still be subject to USC and Social Welfare and possibly any future Levies which might be imposed into the future. Minister Fitzgerald very quickly accepted our proposed amendment to the Legislation. We must thank the Minister and her Department for the speed at which they were prepared to accept our proposal. This is the second piece of legislation this firm has had amended while going through the Oireachtas in the last twelve months. We were also successful in making a submission to Minister Fitzgerald on the Paternity Leave and Benefit Bill (now the Act) to include in the definition of penalisation not just an act of penalisation but the threat of penalisation.

We continue to write for the Irish Legal News on a regular basis.

On 14th April Richard Grogan was quoted in an Article by Fiona Gartland in The Irish Times titled "Employers who discriminate should be identified" A Copy of the article is in the Publication Section of our website.

On 20th April Richard was interviewed as part of a survey undertaken for the WRC on their services. Honest, forthright and positive criticisms made.
We do believe that it is important that law firms do check legislation and make submissions in respect of same. It cannot just be left to the Law Society or to Solicitor's Bar Associations. Of course they do fantastic work and that should be recognised. However, there are

specialist firms operating in this country whether they are small, like us, or large firms where there is potential to make significant submissions to ensure that the legislation meets the criteria set out when a Bill is introduced. Of course firms will be making submissions on issues where they think matters should be amended because of their particular view on a particular piece of legislation. That is of course legitimate however, it is equally legitimate and we believe important that where a Bill is introduced and there is a proposal as to what it is intended to address that Solicitor firms should be to the forefront in pointing out if the legislation does not meet what it was announced it was intended to do. In the case of the Civil Liability (Amendment) Bill 2017 it was clearly an oversight that the issue of USC and Social Welfare was not included. We were just raising it at an early stage as if the Bill had passed without that amendment there could have been considerable extra costs which ultimately would have been born by insurance companies and therefore by the public in funding Periodic Payment Orders. There would also have been the potential loss to any person receiving such an Order of an unforeseen cost.

The continued success of this firm is down to the commitment of both professional and support colleagues in the firm. We have colleagues who work together for the benefit of our clients. There are no staff just colleagues. We do not work on a hierarchical but rather on equality of esteem basis.

In this issue we have reviewed cases from the Labour Court up to 22 March 2017 and the WRC to 19 April 2017. Since finalizing this issue Labour Court cases to 10 April issued on 20 April and we will cover these in the next issue. There are some very interesting decisions of the Labour Court in this latest batch which we do need to consider carefully.

Index

Keeping Up to date with Employment Law changes

In this publication we seek to try to keep colleagues up to date with what we regard as important changes in employment law. We are very pleased with the very kind comments which have been made in respect of our newsletter.

However, we must admit that it is also a facility whereby we keep ourselves up to date with changes in employment law. We have to read the cases to decide which cases we think we should include in this newsletter of course this is a subjective opinion. We cannot cover them all. It is therefore our own in house training also. As a boutique law firm we seek to highlight what we regard as the more important cases.

In reviewing decisions of Adjudication Officers we tend to limit the cases reviewed here to ones where the Adjudication Officer has outlined significant legal precedents of where there is an unusual point. In the case of Labour Court decisions we do tend to cover a

greater percentage of them because of their importance as the Appellate Court. In addition, decisions of the Labour Court are binding on Adjudicators.

We do not tend to review Industrial Relations Claim simply because these cases are not binding on anybody. A lot of them are very interesting but there is limited space in a publication such as this.

In relation to High Court cases relating to employment law because there are so few we will invariably cover them in this publication.

We also seek to cover appropriate statutory instruments and legislation which is passed.

There is a time commitment in undertaking this work but we feel it is something that we can give back to clients, future clients, colleagues and to those interested in employment law.

We must also acknowledge the excellent work done by other firms in producing Guides in relation to employment law. We find them very helpful in keeping us up to date also.

The great thing about employment law work is that those in this area are more than happy to assist each other. Employment law is therefore probably one of the more unique areas of law where Solicitors cooperate in assisting each other in understanding what can be very complex legislation.

Undertaking employment law work for other firms

We are delighted with the number of firms who are referring work to us. We have a reasonably unique system of dealing with clients who are referred to us by other firms. The basis of us acting in these cases is that we will only act in respect of the specific matter which is referred to us. We treat the client who is referred to us as effectively on loan for that particular case. We will not agree to undertake any other work for that client, in the future, on any matter including employment law, unless the Solicitor who referred the work to us initially again refers them to us.

We also provide services at times, to colleagues, by assisting them in putting in place presentations and submissions, which they subsequently present.

We are always extremely pleased when colleagues refer work to us. We are always happy to undertake the work but equally always insist that the client remains for all other work and for any future work a client of the referring Solicitors office. We do regularly get calls from colleagues looking for assistance. We are always pleased to help whether on the basis of the referral or just a quick chat to assist them on a particular point.

Decisions from the WRC

Quite frankly we have not got a clue what is happening with Decisions from the WRC. On 6th April 2017 a decision issued where the case was heard on 7th January 2016. We have a cabinet full of files where cases were heard prior to December where we have neither seen sight nor sound of any decisions issuing, despite the supposed 28 day period for decisions to issue from the WRC.

Adjudication Officers are saying that they will issue decisions within 6-8 weeks. They probably are. It would appear to us that decisions are going into a chasm and then suddenly re-emerge sometime later.

The time limit for getting hearings is all over the place. There are some cases which have been sitting in the WRC for a considerable period of time and we cannot get a hearing date despite sending reminders. There are other cases which we see hearing dates issuing very quickly.

In advising clients when they ask us when their case is going to come on we have to honestly tell them that we haven't got a clue. It might be done quickly. It might not. We just don't know what is happening.

We do see the Annual Reports but the problem with matters is in practice that at the present time we have no idea how long a case is going to be. Admittedly when we had the EAT we were saying it could be two years. At least there was a lime limit. In the Equality Tribunal there was a significant delay also. In the LRC we were normally getting cases listed somewhere between 3 and 4 months after lodging. The Labour Court issues decisions very quickly and cases appear always to be listed in the order they come in to them. Not so it appears in the

WRC where we believe there is some manipulation of cases so as to be able to report a certain percentage are heard quickly. The reviews of WRC decisions appear to indicate this.

Decisions were invariably issuing, most of the time, though there were exceptions within 8 weeks from the LRC. This does not appear to be a problem with the Adjudication Officers not writing decisions. Hopefully this issue can be resolved so that decisions can issue quickly. It is neither beneficial to employers or employees that there is a delay in hearings or that there is a delay particularly in decisions issuing where a case has been heard. The promise of quick resolution was what we were told we were going to get and unfortunately it is not happening in the WRC.

An Awful waste of paper when you print off a WRC decision

For some reason every time you print off a WRC decision you get two pages of additional blank paper with effectively adds on them for various services and a list of the years and months where you can see cases.

This is an unnecessary cost for anybody producing documentation.

We have of course raised this with the WRC but as usual we get a blinding silence as regards why their computer system cannot provide just the case.

We had a great Labour Court website. It was fantastic. You could search by way of Act, Section, Subsection. You could search on the name of representatives such as Solicitor offices. It was easy to navigate. In addition you never got additional pages. You simply got the decision you needed to print off. Perhaps the WRC is trying to stop people printing off decisions.

It would be helpful if this could be dealt with.

We don't need to be knocking down any more trees than we absolutely have to.

Gender Pay Gap Reporting in the UK

On 5 April 2017 in the UK the first ever snap shot date where their new gender pay gap reporting regime came into operation. For several thousand employers in the UK it was a day in which they had to pull the payroll data from which their first ever public gender pay gap reporting will need to be complied with. In the UK the employer must use the Data to produce six key figures namely;

- The mean pay gap
- The median pay gap
- The mean bonus gap
- The median bonus gap
- The proportion of male and female staff receiving bonuses
- The number of male and female employees in each of the four equally sized pay quartiles.

Those figures must be published on the organisations website. They must be uploaded to a government site. This must be done no later than 4th April 2018.

The definition of "pay" for mean and median pay gap calculations is that overtime is not included. The rationale for this is that the UK Government assumed that male employees would be more likely to be able to perform higher paid overtime than female colleagues yet shift pay premium pay is included. No account is taken of pay forfeited in a salary sacrifice even though some of these benefits for example child care vouchers might be more likely to be taken by female staff.

Hours worked

For many employers actual hours worked may well be in excess of core hours. Unless the employer has a reliable way of tracking, these calculations will be based on what the contract says. This may suggest that employees will earn more per hour than they actually do. There is no pro-rating of bonuses in mean and median pay gap calculations.

Bonus Payment Timing

Employers who pay bonuses including commission and other incentives in April of 2017 will have to include an appropriate part of that bonus in their mean and median pay gap calculations.

Some of the results of this reporting is that many employers are considering voluntarily publishing more meaningful analysis providing details of gender pay gap differentials within relevant comparator groups such as those within the same job grade, level or pay band.

Of course in Ireland nothing has been done as while gender pay gap reporting was a priority of the programme for Government it seems to have fallen completely off the agenda.

Review of Labour Court Decisions

We do try to keep ourselves and colleagues as up to date as possible with decisions from the Labour Court. The Labour Court issues decisions on a regular basis. In the production of this newsletter it is not possible for us always to be that up to date with their decisions. For example the decisions up to 22nd March 2017 are actually covered in this May issue. The reason for same are that for logistical purposes to meet our own deadlines we have to send this publication out to our support colleagues in advance and have to apply our own cut-off date. For those interested in Employment Law of course the decisions of the Adjudication Officers are very helpful. However, everybody does not have the time to read all of them. We would therefore say to those wanting to keep up to date with employment law that if they do not have sufficient time to read everything on the WRC website that they would at least read the Labour Court decisions which deal with employment law. For those who are HR/IR professionals it is important that they would read the cases under the Industrial Relations Acts. For Solicitors and Barristers who may not necessarily appear in those types of cases it is more important if there is only limited time to review those dealing with employment rights.

Really you have to read the Labour Court decisions to keep up to date. Invariably the decisions go into the legal and factual elements in great detail.

Wrong Acts being claimed under

Case ADJ-3795 is another prime example of employees bringing claims under the wrong Act. The claim was brought under the Transfer of Undertaking Regulations S.I. 131 of 2003. The employee in her submission referred to Unfair Dismissal, a Redundancy issue, entitlements to Holiday Pay and other breaches of employment rights. The Adjudication Officer properly held:

"For reasons that would be obvious, an Adjudicator can only decide on matters on the basis of legislation under which the complaint is referred, and complainants would be well advised to ensure that they have selected the legislation most appropriate to their complaint at the time of submitting it. Complaints may arise, of course, under several statutes".

This is most clearly simply stating the obvious but it is useful that the Adjudication Officer has done so.

The difficulty for lay litigants is that there is no comprehensive guide on how to complete the form. The form is a non-statutory form. Despite this the WRC seem intent on insisting on employees specifying a particular Act. There is no reason to do so. The legislation only requires the employees to submit a complaint in writing. The employee can simply write to the Director General with a letter that states:

"Dear Director General,

I was unfairly dismissed. If it was not a dismissal it was a redundancy. I did not receive my holiday pay. I was not paid my last week's wages. I did not get minimum notice payment. I was subjected to sexual harassment in the workplace

Yours sincerely".

That is all an employee needs to do. The Workplace Relations Commission then has to process the claim. There is no obligation

anywhere in the legislation for the employee to use the WRC complaint form. There is only a requirement that it is in writing.

The WRC complaint form is not user friendly to those who are not legally qualified.

There is no help line which employees or employers can go to, to get verifiable advice, which they can rely on. The WRC guides which are produced all have massive big disclaimers (admittedly in small writing and sometimes well hidden) which disclaim any responsibility for misleading anybody in relation to anything that is written down.

We now have the appalling vista constantly of cases being dismissed because claims are being brought under the wrong Act.

The WRC needs to get their act in order and put in place an easy to follow claim form which enables persons without the benefit of legal advice to complete the claim form.

A real problem as is clearly seen in relation to this case is that the complaint was delivered on the 27th May 2016. The case was not heard until the 23rd November 2016 being nearly 6 months later. If claims were processed a lot quicker it would have been very easy for the employee to have amended her claim form.

The sad reality of matters is that more and more of these cases are being dismissed where people are not using legal representatives because of the claim form. This fact of life is not being highlighted by anybody. Clearly no responsibility is being taken by the WRC for the fact that their documentation is not user friendly.
Assuming that they might actually be reviewing their own decisions it should be patently obvious that there is something terribly wrong in the WRC where this is happening. It is a constant problem. We are constantly highlighting it. Absolutely nothing is being done in the WRC to address this important issue.

The whole basis of employment law was that it was supposed to be easy and cheap for employers and employees and that people would not need to use lawyers. Well, congratulations to the WRC. You are making it absolutely crystal clear that people are going to require representation if they are going to bring claims.

The Adjudication Officer in this case had no alternative but to do what the Adjudication Officer did. The criticism by this office is of the WRC. It is a criticism of a management of the WRC.

Perhaps the WRC management will replace the existing claim form with one which can be used by people who are not legally qualified.

(Published in Irish Legal News)

Point of Law Appeals

In the case of Top Security Limited Appellant and Thomas Sadlier and Others 2017 IEHC 134 this was a High Court Point of Law Appeal where Mr. Justice White delivered judgement on 10th March 2017.

It deals with in great detail the practice of Point of Law Appeals.

One of the most important issues is that the appellant in this case contended that the EAT had failed to consider EU Council Directive 2014/18/EC as implemented in Irish Law by SI 329/2006. The respondent employees relied on the Judgement of Laffoy J and Minister for Finance –v- McArdle effectively arguing that where this issue was not raised in the EAT it could not be now raised in this appeal by the employer appellant. Mr. Justice White stated;

"The grounds of the Statutory Appeal on the issue of public procurement cannot be considered by this Court as the issue was not raised before the Tribunal".

This is an important restatement of the law. If an issue is not raised now before the EAT or the Labour Court on appeal it cannot then be raised on a statutory appeal. It is therefore vitally important that if legal arguments are going to be made that they are made before the EAT or now more likely before the Labour Court. It is of course, although it is not specified in this decision sufficient if it is set out in a written submission. The relevance of the case of Minister of Finance –v- McArdle 2007 IHC98 has been highlighted.

The decision is useful in restating the law and the Court restated the decision of Hamilton CJ and Henry Denning & Sons Limited –v- Minister for Social Welfare 1998 1IR34 stating;

"That the Courts should be slow to interfere with the decisions of expect administrative Tribunals. When conclusions are based upon identifiable error of law or an unsustainable finding of fact by the Tribunal such conclusions must be corrected. Otherwise it should be recognised that Tribunals which have been given statutory tasks to perform an exercise or functions, as is now usually the case, with a high degree of expertise provided coherent and balanced judgements on the evidence and arguments heard by them it should not be necessary for the Courts to review their decisions by way of an Appeal or Judicial Review".

This case does confirm that a Point of Law Appeal to the High Court is not a rehearing of the case. It is not a determination by the High Court on the facts unless they are unsustainable finding of facts. An appeal on a Point of Law is to deal with a Point of Law issue. However, it is not an ambushing exercise. If an issue is not raised in a hearing it cannot be raised on a Point of Law. There is an argument that if there was no jurisdiction for a Tribunal or the Labour Court to hear a particular case that in those circumstances a Judicial Review may be allowed even where the jurisdiction of the EAT or the Labour Court was not challenged before them. In this case the employer lost their appeal on a Point of Law.

Court of Appeal Decision in Culkin –v- Sligo County Council and Irish Human Rights and Equality Commission (Amicus Curiae)

This is a judgement of the Court of Appeal under citation 2017 IECA104 which was delivered by Mr. Justice Gerard Hogan on 29th March last.

The Court of Appeal has overturned the High Court ruling under 2015 IEHC45.

This is quite an unusual case. Mr. Culkin alleged that he was subject to discriminatory treatment on the grounds of age and disability. He brought a claim to the Equality Tribunal. This was brought pursuant

to the Employment Equality Acts 1998-2008. At the same time a claim for personal injuries issued.

In the High Court the argument by the County Council was that the rule in Henderson –v- Henderson and Section 101 of the Employment Equality Acts 1998 as amended precluded both claims under the 1998 Act and for personal injuries. In the High Court that case had been struck out on the basis that the multiplicity of litigation was per se abusive and violated the rule in Henderson and Henderson.

The Court of Appeal spends a considerable amount of time reviewing the issue of the case in Henderson and Henderson. In the Court of Appeal it was pointed out that Section 101 (2) (a) must be read in conjunction with 101 (1) of the Act of 1998 and that section 101 (2) (a) could not be read in isolation. Mr. Justice Hogan in his decision held that the High Court had erred in the application of the rule in Henderson and Henderson. The Court of Appeal held that the rule in Henderson and Henderson is to prevent successive suits where one would do. Mr. Justice Hogan very helpfully pointed out that even if the plaintiff in the case wanted to he could not have combined the common law claim for personal injuries along with the statutory claim for discrimination in one set of proceedings. Mr. Justice Hogan pointed out that just as the Equality Tribunal had no jurisdiction to entertain the common law claim, the High Court had no first instance jurisdiction to adjudicate on the statutory claim for discrimination or harassment under the Employment Equality Acts 1998 as amended. Mr. Justice Hogan held that to bring a claim under the Employment Equality Acts and a personal injury claim does not breach the rule in Henderson and Henderson.

This is an important clarification of the law. It does mean for example that an employee could bring a claim under a piece of employment law and at the same time bring a personal injury action. Even if the issue in dispute arises from the same facts but that the reliefs available are separate. For example an employee could bring a claim that he/she was required to work excessive hours under the Organisation of Working Time Act and at the same time bring a claim that being required to work excessive hours the employee suffered a personal injury in that it affected his/her health.

It should however be noted that the decision does not alter the position under Section 101 (4) (a) of the Act of 1998 which requires claimants to elect to pursue an Unfair Dismissal claim under the Unfair Dismissal legislation or a discrimination claim relating to a dismissal under the Employment Equality Acts.

While the issue was not dealt with and didn't arise in this particular case issues have arisen in relation to individuals bringing an Equality claim and a dismissal claim at the same time before the Adjudication service.

It is actually possible to bring an Unfair Dismissal claim and a claim under the Equality legislation provided that the claim under the Equality claim does not relate to dismissal.

This decision of the High Court is to be very welcomed in clarifying the law in Henderson & Henderson.

Employment Injunctions

In the case of Fiona Duffy and Liffey Meats (Cavan) 2017 IEHC103 Mr. Justice Twomey delivered his judgement on 22nd February. This is an interesting case as to when an injunction should or should not be taken. In this case prior to her departure on maternity leave in November 2015 the Plaintiff was the sole credit controller of the company. The employee returned on 9th January 2017 and claims that she was not returning to the post of Credit controller.

There was a factual dispute as to whether the employee was employed as a sole credit controller or as accounts receivable clerk. There was also an issue relating to a purported contract as to whether the employer could assign the employee to other duties. The employer claimed that it was entitled in accordance with sections 26 and 27 of the Maternity Act 1994 to offer the plaintiff a different position than held prior to her maternity leave where it was not reasonably practicable to offer her the same position provided the alternative position was a suitable alternative.

In this case the Court held that damages would be an adequate remedy for any loss suffered. What is interesting about this case is that the Court also pointed out that the more appropriate forum for the resolution of this matter was the WRC. The Court pointed out that the cost for both parties of the WRC were considerably less than High Court litigation and also pointed out that Section 30 of the WRC meant that mediation may be offered to the parties.

The Injunction in this case was refused.

Injunctions in Disciplinary Matters

In the case of Thomas Rowland and An Post being a judgement of Mr. Justice Clarke delivered on 27th March 2017 under reference 2017 IESC 20, He pointed out that in the High Court reliance had been put on the decision of Mr. Justice Clarke himself in the case of Becker –v- The Board of Management of St. Dominic's School and Others 2006 IEHC130.

In this Appeal to the Supreme Court he stated;

"There may well be additional reasons why it may not make sense for the Court to consider injunction, at an interlocutory stage, in ongoing disciplinary process. In the ordinary way a plaintiff seeking an interlocutory injunction only has to establish an arguable case before the Court goes on to consider the balance of convenience and other similar matters. If at every stage of a disciplinary process, a party could secure an interlocutory injunction if there was even an argument about whether the procedures adopted were permissible, the practical consequences for any effective disciplinary process would be obvious".

That statement makes absolute perfect sense. It is one that we would fully agree with. It may well be subsequently in a case of Unfair Dismissal that issues will arise as regards an unfair disciplinary process but certainly this decision makes it clear that the Courts will be slow to grant an injunction in relation to a disciplinary process.

He went on in paragraph 2.5 to say;

"Precisely because procedural problems can be corrected and because there may well be a significant margin of appreciation as to the precise procedures to be followed it will, in a great many cases, be premature for a Court to reach any conclusion on the process until it has concluded".

In the judgement he went on to state that an injunction could be granted where the Court was satisfied that it was clear the process had gone wrong and there was nothing that could be done to rectify it and that it follows that it is more or less inevitable that any adverse conclusion reached at the end of the process would be bound to be unsustainable in law.

In relation to disciplinary matters His Honour did state that there is no reason in principle why procedures cannot be put in place which seek to refine issues in order to determine the precise extent of the material which requires to be disclosed at the precise requirements for cross examination which may be needed in order that the process as a whole be considered procedurally fair. He pointed out that unless the entitlement to obtain information or test evidence is afforded at a stage which is so late that it can be said that the person whose interests are in potential jeopardy has suffered irremediable detriment then it would be hard to see how the timing of when information is given or cross examination allowed could, in and of itself, be regarded as creating a process which breached the rules of constitutional justice.

This decision is extremely helpful in determining when an injunction in disciplinary matters might be given. It is also highly relevant in relation to the running of disciplinary hearings.

The case highlights that even if there is a procedural flaw during the process that that procedural flaw can be rectified at a later stage in the process provided the employee effectively suffers no detriment.

Who is the employer?

In the case of Minister for Education and Skills and Anne Boyle and the Labour Court as a Notice Party judgment was given by the Court of Appeal under reference 2017IECA39 on the 24th February 2017.

The issue in relation to this is that the question is who is the employer. The Court helpfully pointed out that the definition of the employer in the 1991 Payment of Wages Act effectively is that where A agrees to be employed by B but C has agreed to pay for the services supplied by A then C is deemed to be the employer for the purposes of the Act. Effectively this means in a lot of schools that the Department of Education will be the employer. The Court pointed out that the definition of employer in the Protection of Employees (Part Time Work) Act 2001 is not the same as in the Payment of Wages Act. The Court held that the purpose of the EU Directive which was transposed in the Act was to protect a group of vulnerable employees in relation to pay related matters and that the substance of the employment relationship should be what should count.

The Court correctly pointed out that for some 185 years it is unclear as to who the employer of a national school teacher actually is.

Taxation of Awards under the Unfair Dismissal Acts

In Case ADJ456 the Adjudication Officer in this case awarded compensation in the sum of €52,416 and stated;

"This award is compensation and is not taxable".

We are not dealing in this section with this particular case but simply with the taxation element.

Section 7 of the Finance Act 2004 which inserted a Section 192A TCA1997 provided with effect from 4th February 2004 that compensation awards paid following a formal hearing by a relevant authority which would include an Adjudication Officer in respect of infringement of employer's rights and entitlements under the law are exempt from Income Tax. However, the exemptions specifically do not apply to payments which are in respect of earnings, changing function, or, procedures of an employment, or, a termination of an employment (except redundancy payments which are specifically exempted from Income Tax).

We would be of the view that under the legislation the sum awarded is the net loss as per the Unfair Dismissal Acts but the tax treatment of same is for tax purposes treated as a gross sum. It may sound illogical

but tax and logic do not necessarily always apply. There is a difference under the Unfair Dismissal Acts and the tax law on how figures are arrived at and how they are taxed.

We have raised this issue with the WRC in the past. This office actually presented a lecture note to Adjudication Officers as part of their training before their appointment and that lecture is on our website. This was recently updated in a presentation to the Wicklow Solicitors Bar Association. Copies can be obtained on our website in the publications section, www.grogansolicitors.ie under the heading Lecture Notes. In case ADJ557 being a case under the employment Equality Acts the award in that case was exempt from taxation even though it was marked equivalent to nine months' pay because of the specific provisions in relation to claims for discrimination.

Unfair Dismissal – Constructive Dismissals

In ADJ3442 the Adjudication Officer gave a very detailed overview on the facts and relevant law in relation to the Unfair Dismissal. The Adjudication Officer held that he was awarding a sum of €40,000 but reducing this by 75% namely to a sum of €10,000 gross as compensation for the constructive dismissal as the employees hasty resignation did not assist their case and were almost completely fatal to it. This is a very valid comment in relation to constructive dismissal cases that many employees resign far too quickly.

The Adjudication Officer has rightly stated that the payments are subject to relevant revenue and income tax guidelines.

We have no criticism in relation to the decision except for the fact that the compensation was awarded gross. Our understanding of the Unfair Dismissal legislation is that the compensation is the net loss. However, for tax purposes it is treated as a gross loss. This may sound contradictory. Of course it is. But then we are dealing with tax law and tax law and Social Security law have nothing to do with equity or logic. The Unfair Dismissal legislation specifies that the loss is the net loss to the employee. On our website in the publications section you will find a lecture note which was given to the Wicklow Solicitors Bar Association in March 2017 dealing with the taxation of employment law awards. But let us try to explain matters.

If you take two employees both of who were earning €50,000 per annum. One employee simply receives their salary every month. The other employee pays into a pension scheme and has permanent health care insurance. They are both dismissed without reason. The first employee will have a lower net salary than the second employee as in the case of the second employee all the additional payments which he or she made will have to be added back in which actually increases the net pay.

An Adjudication Officer making an award could not award €100,000 to both. The Adjudication Officer could only actually award two years of their net wages / salary.

The net wages or salary is then subject to tax as if they were gross wages under the terms of the Tax Legislation.

The relevant legislation under Section 192A Taxes Consolidation Act which was introduced by Section 7 of the Finance Act 1984.

Of course there is an anomaly. Of course it is unfair. But as it is said in tax law there is no fairness in tax law. However, the Unfair Dismissal legislation is very clear in that it must be the net loss which must be awarded.

Unfair Dismissal

The case of ADJ2243 is an interesting one in that the Adjudication Officer directed re-engagement. What is interesting in the case is that the Adjudication Officer clearly canvassed the views of the parties as to the appropriate remedy and pointed out that the Adjudication Officer did so in accordance with the case of the State (Pharmaceutical Union) –v- EAT 1987 ILRM36. What is also interesting about this case is that the Adjudication Officer set out three issues namely that;

1. All work related documents should be translated into a language understood by an employee and referred to the case of complainants –v- Goode Concrete Limited DEC-E2008-020. (We are the Solicitors in the Goode Concrete case for the employees. We do not however believe the requirement to translate all

documents is now the law. We may be wrong. This is just our opinion).

2. All meetings and discussions with staff should be documented, placed in a personnel file and retrievable in accordance with optimal Human Resource and Data Protection Practices.
3. That the employer as a respondent should undertake workshops on the grievance procedures.

In this case the employer had raised the issue that the employee had not utilised the employer grievance procedures.

The Adjudication Officer also pointed out that Adjudication Officer would have preferred that the Grievance Procedures were used.

Cleary in cases, and these are our comments, where there is a constructive dismissal, the employee must utilise the internal grievance procedures except in very limited circumstances. In an Unfair Dismissal case it is our view that the employee should normally utilise the appeal procedure. It would be our view that even if the employee appeals late they should still be allowed appeal. In other cases such as the Organisation of Working Time Act, as just one example, there is no requirement that an internal grievance procedure would be used by an employee before issuing a claim.

The Employment Relationship and Constructive Dismissal

In the case of Barry O Callaghan Wilcock Test Centre and Edilia Patricia Valaz Lopez UDD178 the Labour Court has again confirmed that in a constructive dismissal case it is a matter for the employee to demonstrate that the conduct of the employer was of such a nature as to mean that it was not reasonable for the employee to continue in the employment. The Court pointed out in the alternative the employee must establish that the conduct of the employer was such as to undermine the fundamentals of the employment relationship. In this case the Labour Court helpfully pointed out that the employment relationship contained few of the characterises of a normal employment relationship in that there was no contract of employment or statement of terms and conditions of employment, no record of payment in the form of payslips was ever created or supplied, no grievance procedure of a formal or informal nature existed and finally

there were no records of hours worked by the employee ever having been created. In addition the Court pointed out that the P45 was accepted by both parties to be incorrect.

In this case the Court awarded a sum of €2,750. The case is again and interesting decision of the Labour Court in determining what one would expect to find in a normal employment relationship.

Unfair Dismissal

In Case ADJ3427 this is a case we would refer colleagues to. It is an extremely useful case in that it sets out a considerable amount of the case law relating to unfair dismissal. The decision sets out the importance of an investigation quoting case law from the Labour Court. The decision also sets out definitions of gross misconduct.

This is just one of those decisions that we would advise those interested in employment law to read.

The Adjudication Officer in this case has taken a considerable length of time in reviewing the law.

It is one of those decisions which makes it very clear why it was held to be an Unfair Dismissal and why the compensation was set at the level it was and that both the employer and the employee would know why the decision as what it is.

Dismissal by Receivers

The case of Brennan and Irish Pride Bakeries (In Receivership) is a decision of the Court of Appeal given by Ms. Justice Finlay Geoghegan delivered on 29th March 2017 under reference 2017 IECA107.

The contract which the employee had was very specific as to the grounds on which the employee could be dismissed.

The receiver sought bids and received a bid from Pat the Baker which it was deposed as having submitting the most attractive bid. It was agreed with the purchaser that the TUPE Regulations of 2003 would apply to the transfer of the business. A purchaser was not found for

the business and assets of the Ballinrobe facility where Mr. Brennan worked. The provisions of Section 437 (2) and (3) (M) of the Companies Act 2014 was referred to which confers a power on a receiver to engage and discharge employees on behalf of the company. It was determined in the decision that it does not confer a power on a receiver to do anything which the company itself could not do. It was held that the employee was entitled to continue in the employment unless terminated in accordance with the terms of his contract.

The employee was dismissed on one weeks' notice. The employee pointed out that his contract provided for three months' notice. It was pointed out that the Trial Judge in the case had said there was a potential practical benefit to the employee in restraining a purported termination of employment which was not permissible under the contract. If the employee had remained in employment with the Appellant at the time, it was contended he might have been able to benefit from the TUPE Regulations. Regulation 5 provides that the Transfer of an Undertaking of a business shall not in itself constitute a ground of dismissal. There is an exemption in paragraph (2). The Court pointed out that nevertheless the employee if he continued in employment would have been entitled to certain consultation and information under those Regulations and would have had the opportunity of engaging with the purchaser. This case is important in that it confirms that a receiver is not automatically entitled to terminate an employment in breach of an employment contract and there is no automatic right for a receiver to terminate employments.

Organisation of Working Time Act – Sunday Premium

In case ADJ -2353 the Adjudication Officer found that providing a full days off at full pay in lieu of a Sunday Premium was sufficient compensation for the purposes of Section 14(1) of the Organisation of Working Time Act

This is a very useful Decision for practitioners.

Employees who are Breastfeeding

In Case C-531/15 Elda Otero Ramos and Servicio Galego De Saude and Another the ECJ concluded that following Article 4 (1) of Council Directive 92/85/EEC of 19 October 1992 on measures to

improvement in the health and safety at work of pregnant workers and workers who have recently given birth or are breastfeeding that where an assessment is carried out there must be an examination of the individual situation of the worker who is breastfeeding to establish whether her safety and health or the safety and health or her child is at risk.

These must be carried out in accordance with Annex 1 and the guidelines laid down in Article 3 (1) of the Directive. The ECJ held that a failure to carry out such an assessment correctly is less favourable treatment of the worker concerned and constitutes discrimination for the purposes of Article 2 (2) (c) of Directive 2006/54EC of 5 July 2006. They held that such treatment is also discrimination based on sex within the meaning of Article 19(4) (A) of the same directive. The ECJ held that it is for the referring Court to verify whether the facts of the case before it demonstrate discriminatory treatment.

The ECJ stated it is for the referring Court to examine a line managers' report relating to the job of the worker concerned and it is for that Court to establish whether such a report provides information about the individual circumstance of the worker which should be taken into account in its assessment. They also pointed out that where rules of national law make it difficult for a person who considers herself to be wronged by a breach of the principle of equal treatment to challenge that position, such rules are incompatible with Article 19 of Directive 2006/54 and in such case it is a matter for the National Court to verify. The further confirms that the burden of proof under Article 19 (1) remains on the respondent employer.

This case is an important restatement of the law and is an important decision for female workers who are breastfeeding.

Transfer of Undertaking Regulations

The issue of rights when there is a transfer under the Transfer of Undertaking Regulations commonly called TUPE is one that regularly arises. In case ADJ2255 the Adjudication Officer in this case held that where annual leave is not paid that this is the responsibility of the transferor and that the transferee only has a liability in respect of the

annual leave accrued in the year of the transfer but not for annual leave accrued for any annual leave prior to the year of the transfer. This is a view that we disagreed with. In a recent case before the Labour Court involving Kilsaran Concrete the Labour Court clearly indicated to the parties though admittedly it is not in the decision that all obligations from an employer, being the transferor, transfer to the transferee as do all rights. The Adjudication officer in this case has set out that the reasoning is in line with case law. Unfortunately the relevant case law is not set out.

Admittedly TUPE is one of the most controversial and difficult pieces of legislation to work through. It is imprecise. There have been numerous ECJ Decisions. It is a case where there are constant arguments as to what case law applies. Some of the case law is in fact contradictory.

We are not saying that we disagree with the decision of the Adjudication Officer in this case but simply that it might have been useful if the case law had been set out so that we would understand the case law being relied upon.

Alcohol Dependency and Equality Law

In a case of Irish Aviation Authority and Christopher Reddin UDD1710 being a decision of the Labour Court the Court dismissed the appeal and held that the dismissal was not unfair. In this case the Court stated;

"The Court is of the view that generally speaking when dealing with an employee who has an alcohol dependency problem, employers should give such employees an opportunity to seek professional treatment before considering dismissal. However, each case must be judged on its merits. Factors such as risk to safety, the level of responsibility the employee has and contact with the public are taken into account when deciding whether or not the penalty of dismissal was within the range of reasonable responses an employer might take.

The respondent had on a number of occasions referred the complainant to occupational health to establish the nature of his dependency and to update itself on his state of health".

In this case the Court pointed out there was a clear policy in place for all employees agreed with the staff unions on managing workplace intoxicants, supported by a protocol on random resting. The Court pointed out that there were clear policies. This is a very important decision of the Court. It does act as a Guide to what actions employers should take where there is an issue of an employee with alcohol dependency problems or drug problems and the steps which an employer should take. This is a most helpful decision in acting as a Guide to employers on this issue.

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Reasonable Accommodation

In Case ADJ557 the employee in this case contended that reasonable accommodation was not provided to her where she was not put on day shift work only. It was common case between the parties that it was accepted that the complainant suffered from depression and that the depression was a disability within the meaning of the Act and that working night shifts at times was causing difficulties.

The Adjudication Officer helpfully pointed out that where the employer repeatedly sent the employee to their occupational health specialist and meeting with the complainant the respondent fully met their obligations as set out by the Labour Court in a Health and Fitness Club –v- A Worker EED037. The Adjudication Officer held that the Respondent company had learned both from their own specialists and from the Complainants GP that the Complainant needed to be accommodated with day only shifts for a period of time. However, this did not happen. The Adjudication Officer held that the employer treated this as a normal transfer request in line with its Union agreement rather than a statutory obligation. It was held that it was wrong for the Respondent company to treat a medically identified need to be accommodated with day time work for a time as being on a par with its normal transfer policy and therefore the provisions of Sections 16 were not complied with. The Adjudication Officer in this case invited additional observations in regards to the case of Reilly –v- United Parcel Services DEC/E/2013/077 as regards whether the Respondent could contend that such a measure would have imposed a disproportionate burden on it. The employer argued that the agreement with the Union and the relevant Labour Court

recommendation under the Industrial Relations Act were cited as reason why the agreement had precedence over the complainant's rights.

The Adjudication Officer helpfully dealt with the Court of Appeal decision in Mullaly and Others –v- The Labour Court and Waterford County Council 2016 IECA291 where Hogan J unequivocally stated in his conclusions that;

"All of this is to say that if the decision of the Labour Court was not simply a recommendation, but had binding legal consequences then of course the result of this case so far as the jurisdictional issue of justiciability is concerned would be quite different."

"As this, is however, not the case, I entirely agree with the conclusion of Noonan J that the recommendation of the Labour Court pursuant to section 20 (1) of the 1969 Act "has no strictly legal effect but rather relies upon the moral authority of the expert statutory body from which it emanates". Nor can it be said that "such a recommendation creates any form of Res Judicata or any other form of binding resolution".

The Adjudication Officer was satisfied that the agreement in question did not take precedence over the Respondent's statutory obligations towards the employee. The Adjudication Officer pointed out that the Respondent has a worldwide turnover of between 3 and 4 Billion US$ and that the pay of the complainant on day shifts for the time she was out sick after her sick pay ran out would have been around €10,000. The Adjudication Officer held that while the replacement on the swing shift could have earned a shift allowance and training costs might also have improved the Adjudication Officer was unable to accept that the burden on the Respondent would have been disproportionate. The Adjudication Officer awarded a sum of €20,000 being equivalent to just under 9 months' pay. As this was compensation for discrimination it was exempt under Section 192A of the Taxes Consolidation Act which the Adjudication Officer properly set out in the decision. This is a very useful decision for colleagues to read on the issue of reasonable accommodation.

Harassment in the Workplace

In the case of Catlan Trading Limited trading as Marco Moreo and Kellie Ann McGuinness EDA175 the Labour Court had to deal with a case where the employee appealed dismissal of her claim before an Adjudication Officer where she alleged gender discrimination, harassment and sexual harassment.

The Labour Court overturned the decision and awarded €5,000 for the distress and the effects of sexual harassment which constitutes discrimination.

An extremely interesting aspect of this case was the argument relating to Section 14 A (2) of the Employment Equality Act 1998.

The Court noted that the employer did not have an anti-harassment or dignity at work policy in place at the relevant time. The employer contended they were a small employer and that it was not incumbent on it to have such policies and that it took reasonable steps to deal with the issue when it became aware of the harassment. The Court pointed out when the Code of Practice S.I. 208/2012 does not impose any legal obligation in itself. It is the employer's responsibility to ensure compliance with the Act. The Court helpfully pointed out that it is an employer's responsibility to have in place effective measures to ensure that sexual harassment does not occur and if it does occur to ensure that adequate procedures are readily available to deal with the problem and prevent its reoccurrence. The Court pointed out that there are some groups which are specifically vulnerable to such harassment.

The Court helpfully pointed out that the Code encourages employers to follow its recommendations in a way which is appropriate to their size and structure. The Court pointed out that it does not exempt small or medium sized enterprises from its recommendations. Such enterprises are encouraged to adopt some of the practical steps to their specific needs while keeping to the general intention of the Code. The Court pointed out that an employer who has taken such steps to prevent harassment, to reverse the effects of it and to prevent its reoccurrence may avoid liability for such acts in any legal proceedings brought against them. The Court however pointed out that in the instant case while the employer did not have in place a policy or

procedure at the relevant time but now had there was no policy in place at the relevant time and there was no policy in place to prevent such harassment or to inform employees of its intolerance of such inappropriate behaviour.

The Court has importantly pointed out that the defence contemplated by Section 14 A (2) of the Act cannot be availed of where an employer subsequent to harassment introduces a policy on harassment.

The Court stated;

"In order to avoid liability it is essential for the respondent to establish that it had in place, at the time at which the harassment occurred, arrangements intended to prevent and deal with the occurrence of such content. It is clear that no such arrangements were in place at the material time. Accordingly, the defence provided by Section 14 (A) (2) of the Act cannot avail the respondent and it is therefore liable for the discrimination suffered by the complainant".

This is a very helpful determination by the Court in setting out the law on the defence under Section 14 (A) (2).

This is a case which was fully fought with extremely competent Solicitors and Counsel being Mr. David Martin of Gore Grimes Solicitors and Mr. Des Ryan BL instructed by Killeen Solicitors. The Court has very helpfully set out the arguments on both sides and the submissions made. For anybody interested in Equality Legislation and the steps employers should put in place this is a decision which is important to read.

Compulsory Retirement Age

In ADJ4227 the Adjudication Officer in this case held in line with the current legislation that a retirement age was justified. The Adjudication Officer would refer to case E/411/05 and C/250/09 and C/269.09, C/159/10 and C/160/10 all being decisions of the ECJ.

The Adjudication Officer found that the defence put forward objectively justified a normal retirement age of 65 in that it was included in a collective agreement which the complainant was a party

to and which provided for the replacement of the particular posts on the retirement age with a credit of counsellors was an objective reason. One of the issues which is going to start arising in these Equality Cases is when were these objective criteria set and how these are recorded within the organisation.

The reality of matters is that in these cases, although it is not clear in this case, whether that is the position or not as it was a collective agreement which tends to lead the view that this was something which was in the paperwork within the organisation. Normally there will be no paperwork. It will simply be a defence raised. The issue is going to become more prevalent as to when these criteria were set and how they were recorded and in the absence of documentary evidence as to when this was done and how it was recorded we would be of the view that these compulsory retirement cases are open to legitimate challenge.

However this particular decision is an excellent decision which has gone into the law in some detail and usefully for practitioners in setting out the relevant law practitioners may want to look at when bringing or defending these cases.

EU Directive 2000-43-VEC

Case C-668-15

This case involved a credit institution requiring a person applying for a loan to purchase a car who had produced a driving licence showing a country of birth other than a member state of the European Union or the European Free Trade Association in the form of identification to provide additional proof of identity in the form of a copy of a passport or residence permit.

The EC J held that it was legitimate to seek such documentation.

Deduction of Wages

In Case ADJ3978 the employee complained that from July 2016 there had been a deduction in her wages which she objected to. The Adjudication Officer was of the view this issue may well have arisen in

August 2015. The Adjudication Officer quoted with approval the case of Dunnes Cornelscourt –v- Margaret Lacey 2007 1IR478 and referred to the provisions of Section 5 (6). The Adjudication Officer held that notwithstanding the merits of the case that the Adjudication Officer was bound to apply Section 41 (6) of the Workplace Relations Act 2015 which provides that an Adjudication Officer shall not entertain a complaint referred to him or her under this Section if it has been presented to the Director General after the expiration of a period of six months beginning on the date of contravention to which the complaint relates.

We believe that the Adjudication Officer in this case may not have had the case of HSE and McDermot 2013 334MCA quoted to them. This case was dealt with by us in the November issue of our newsletter Keeping In Touch which is available in the publication section of our website www.grogansolicitors.ie. In that case Mr. Justice Hogan effectively said that where an employee limits their claim to the six months prior to the date of the claim then in the case of a continuing breach they are entitled to pursue a claim. In this particular case we are not aware as to what the claim form said. If the claim covered the entire period back to 2015 then following the rationale of the judgement of Mr. Justice Hogan which is quite specific in this matter the claim could not proceed as it would be for a period in excess of six months. If however, as Mr. Justice Hogan pointed out, the claim was limited to a six month period of time, i.e. 26 weeks then the employee is entitled to pursue the claim even if the breach had occurred years previously provided it is a continuing breach.

ERO Rates of Pay

In Case ADJ2408 the case involved a security officer in a security company. In this case the employer contended there was an agreement relating to rates between it and a named union. The Adjudication Officer referred to the plain wordings of the ERO. The Adjudication Officer found that the appropriate rates had not been paid. He also found interestingly that the respondent could not point to an actual agreement reduced in writing and signed by the parties or otherwise sufficiently evidenced relating to remuneration or conditions of employment.

The Adjudication Officer found in favour of the employee. What is interesting in this case is that the Adjudication Officer has clearly applied common sense to the decision. Unions when they enter into agreement by way of collective agreement will invariably insist that they are in writing. In fact we do not understand how you could have a collective agreement otherwise than in writing.

Payment of Wages

In case ADJ-5906 the Adjudication Officer had to deal with a situation where an employee who had worked for an estate agent had a contract provided that he would be paid expenses for properties closed and when other properties closed he would be paid for those also. The employee was not paid for these in a redundancy situation. The Adjudication Officer awarded over €12,000 in unpaid commission. The Adjudication Officer helpfully pointed out that the definition of wages includes a fee, bonus or commission.

The Decision is useful for setting out the definition of wages in the Act.

Payment of Wages Collective Agreements

In case ADJ5696 the Adjudication Officer has held that following the case of O'Cearbhaill –v- Board Telecom Eireann 1994 ELR54 being a decision of Mr. Justice McCarthy that it is sufficient that a Trade Union had negotiated changes in accordance with the Post and Telecommunications Act, 1983 an individual consent was not a pre requisite to the change.

The Adjudication Officer has helpfully set out Section 6 of the Industrial Relations (Amendment) Act 2015 which provides that an agreement relating to the remuneration or conditions of employment of workers of any class, type or group made between a Trade Union or Trade Unions of workers and one or more than one employer or a Trade Union of employers that is binding only on the parties to the agreement in respect of the working of that class type or group.

This is a helpful restatement of the law.

In this case the Adjudication Officer directed that the respondent was in breach of Section 3 of the Terms of Employment (Information) Act and ordered the respondent to give the complainant the required statement within four weeks of the decision.

There is a difficulty with such decisions. They are not enforceable. There is no method to enforce obtaining the appropriate statement.

There is an alternative basis. An Adjudication Officer may under Section 7 of the Act of 1994 rewrite the contract. In such circumstances the re-written contract or statement as required under Section 3 becomes binding on all parties. There is an issue in such situations if the amended contract is not furnished whether there is a claim against the State for failing to provide an effective remedy.

Payment of Wages – Weekly Wage

In ADJ3680 the Adjudication Officer had to deal with an issue where salary was set on a yearly basis but was paid weekly. The Adjudication Officer held that it was customary to divide an annual salary by 52 weeks. In this case it was divided by 52.18 resulting in a loss of €3.11 per week. The Adjudication Officer held that the formula of 52.18 was rarely used. The employer had argued that they were bound by CIB instructions.

This case is a timely reminder to employers in setting wages which are to be paid weekly that the weekly amount is inserted rather than the annual amount. Of course when wages are paid monthly it is very simple in that the annual salary is divided by 12.

Criminal Prosecutions over the Cleary's Redundancies

The upcoming criminal prosecutions are clearly going to be one of the more interesting cases about the powers of the WRC and the effect of non-compliance with employment law.

This is a case which those involved in employment law whether they are Solicitors, Barristers, HR/IR professionals or business owners will need to take significant notice of.

In the past there have been very few criminal prosecutions for breach of employment legislation.

This is a high profile case. The interesting aspect will be to look to see do other prosecutions arise in less high profile cases.

This case will probably take some time to be dealt with and it is one that there may be many commentaries on as the case develops.

At this stage to be fair to all parties we would regard it as inappropriate for us to make any comment on the merits or otherwise of the case. We are simply highlighting the fact that criminal prosecutions have commenced.

Redundancy

In Case ADJ5103 the employee in this case sought redundancy.

The claim was unsuccessful.

This is a decision which we would recommend anybody interested in employment law reads. The Adjudication Officer in this case has set out in bullet points all of the reasons why the Adjudication Officer felt that this was not a redundancy situation. It is an easy to read transparent decision which it is very easy to understand why, from what has been set out, how the employees claim was misconceived.

This is an excellent decision. It can be seen by anybody reading the decision why the employee lost. What however is probably more important is that no employer or employee who is in this case could be under any misunderstanding as to how the decision was reached and the reason why it was reached. This is important for both those involved in cases but also for those of us reviewing cases.

It helps to understand why a particular decision was arrived at in a particular case.

TUPE Transfers and Redundancy

The European Court of Justice in Case C-336-15 confirmed that Article 3 of Council Directive 2001-23-EC of 12 March 2001 known as the TUPE Regulations must be interpreted as meaning that a transferee must when dismissing an employee with more than one year after the Transfer of the Undertaking, include in the calculation of that employees length of service which is relevant for determining the period of notice to which the employee is entitled the length of service which the employee acquired with the transferor.

Redundancy Decisions in the WRC

We are seeing no standard basis of reporting redundancy decisions. Some Decisions are in line with the old EAT procedures. Some Decisions such as ADJ-4427 are setting out what the amount of the award is. Other Decisions are giving effectively a detailed decision but including in the body of the decision all the relevant information which would previously have been in the old EAT Decisions such as ADJ5304.

This is not in any way a criticism of any Adjudication Officer. However, it would appear that it would be more beneficial if there was a standard format of setting out redundancy Decisions. We would be of the old method used by the Employment Appeals Tribunal was a better system and easier to operation. That however is just our opinion.

However it would be beneficial if there was at least a standard format of Decisions. While cases go to the Department of Social Protection we are constantly finding that there are difficulties getting payment and where there is not going to be a standard format we can see it causing problems.

Redundancy Decisions

In ADJ4871 the Adjudication Officer has set out the decision in some detail. The decision which runs to a little over two pages does set out the rate of pay. It does set out the start date. It does set out a finishing date. It does set out that there were no breaks in service.

What it does not set out is the complainant's date of birth. This is actually an extremely important piece of information for an employee to bring a claim to the Department of Social Protection. The reason for this is that the Department of Social Protection can check the PPS number off the date of birth. It also facilitates them in checking their own records. It is also necessary for determining if the employee is within the required age criteria for claiming this an in redundancy.

We have raised this issue of redundancy decisions in previous issues and hopefully all the relevant information could be put into decisions going forward as it will make it easier to claim redundancy monies.

If this is not done unfortunately we are going to be in a situation where claims will be rejected and they will then have to come back down to the WRC which is simply a waste of time for Adjudication Officers and is also a waste of valuable State resources from the Department of Social Protection.

The do not have all the relevant information they cannot make the payment without a follow up decision from either the WRC or the Labour Court on appeal.

Redundancy

In Case ADJ3040 is an interesting decision. In that case the Adjudication Officer awarded compensation for Unfair Dismissal. The basis for doing so was that the employee was dismissed as part of what was claimed to be a redundancy. However the Adjudication Office found that the whole redundancy process was confusing and that the employer did not comply with their own redundancy procedures. An award of €13,000 was made. This case is a timely reminder for employers that when redundancies are being considered that proper procedures are applied and in particular where the employer has a redundancy process that it is strictly complied with.

Safety Health and Welfare at Work Act

In ADJ4397 the Adjudication Officer had to deal with the complaint under Section 28 of the Safety Health and Welfare at Work Act 2005.

In this case the employee earned approximately €35,000 per annum and was awarded €25,000.

The case is an interesting case in that the employee submitted various complaints. The issue which had to be determined is whether the complaints constituted complaints regarding health safety and welfare at work. None of the complaints actually used the word health, safety or welfare and none of them referred to the Act.

The Adjudication Officer reviewed the law in this area. The Adjudication Officer referred to the case of Toni & Guy Blackrock –v- Paul O Neill 2010 ELR page 1 which established that the burden of proof is on the complainant to establish that on the balance of probabilities she committed a protected act and that having regard to the circumstances it is apt to infer from subsequent events that the protected act was the operative consideration leading to the detriment imposed. The Adjudication Officer pointed out that the Labour Court had confirmed that if both are satisfied the burden shifts to the employer to show on credible evidence on the balance of probabilities that the protected act did not influence the detriment imposed.

The Adjudication Officer held that the scope of what can be a protected act is broad. The mere request for a copy of a bullying and harassment policy was sufficient in the Labour Court case in Board of Management of St. David's CPS Secondary School Artane –v- McVeigh HSD118 to find a protected act. It is also well established the Adjudication Officer held that an employee does not have to use the respondent's grievance procedures for their act to amount to a protected act as in Stobart Ireland Drivers Services –v- Caroll 2013 IEHC581. The Adjudication Officer also pointed out that it is clear that the subject matter of a protected complaint or representation is not relevant to determination of claims pursuant to Section 20 as held in the case of St. Johns National School –v- Akduman 2010 21ELR30. In that case the Labour Court held it was making no finding in relation to the veracity of the complaint of bullying in making its determination pursuant to Section 27.

Complaints under the Safety Health and Welfare at Work Act are unusual. This is a very useful decision for practitioners to read not

only on the facts but equally importantly in relation to an outline of the law.

(Published in Irish Legal News 21 April)

Industrial Relations Acts claims

There are a considerable number of Industrial relations Acts claims which go before the WRC. We have not been reviewing these. There is a very simple reason for this. The High Court and the Court of Appeal in Mullally & Others and the Labour Court 2016 IECA291 is a Judgement of the Court of Appeal where they have held that recommendations under Section 20 (1) of the Industrial Relations Act 1969 are not legally binding. Of course they have a moral persuasive element where they relate to Government Departments or Semi State bodies they will more usually than not be followed. However, in relation to private employers whether the recommendation is from the Labour Court or from the WRC there is no legal mechanism whatsoever to enforce them. It has been confirmed that such recommendations are not justiciable. They do not constitute a determination of any rights or obligations. There is no legally enforceable element to such recommendations. Effectively unless employees are going up against a State or Semi-State body or one which is likely to follow the recommendation there is little point in bringing these cases. One wonders whether the legislation needs to be changes to in some way make the recommendations a determination which is binding.

The counter argument is also there that this is a voluntary process. However, the reason we don't report Industrial Relations recommendations is that they have no binding effect, saying this, they are extremely useful in dealing with State and Semi State Bodies.

Security Industry Sectoral Wage Order

The proposed ERO was published on January 6th. Representations were requested on the proposal up to 7th February last. The proposal is still under consideration by the Labour Court.

A new group of 30 Security firms have come together as the Security Employers Association (SEA) with the intention of challenging the proposal sectoral wage orders in the Courts if necessary.

The first ERO was proposed in 2015 which provides for an increase in the minimum hourly rate from €10.10 to €10.75 and allows up to 48 hours per week to be worked without overtime premia. The new ERO will bring the rate to €11.65 per hour from April 1 2019. It also provides for minimum hours of employment with a minimum of 24 hours per week after six months service. This is qualified in that it does not apply to existing contracts below that level of hours.

The issue of EROs was brought in to replace Registered Employment Agreements which were deemed unconstitutional. There has been a reluctance by some groups to re-engage with sectoral wage bargaining. This is particularly so for hotels and restaurants. If we are going to get involved in a further set of legal challenges to ERO's then possibly we need to have a situation similar to the Low Pay Commission for the National Minimum Wage Act but where the Labour Court is appointed.

The Sectoral Wage Bargaining particularly for some industries such as the hotel, restaurant, security industry and others where there is the potential for low paid work, including the construction industry, requires immediate attention. The Labour Court is the best place to provide guidance as to what the appropriate rates of pay should be. If there is to be further challenges to the Legislation and the Legislation needs to be changed and appropriate action taken to ensure that these matters can be dealt with. There is nothing that would stop the Minister amending the legislation in relation to ERO's to be similar to the Low Pay Commission. It would then be a matter for the Labour Court to invite submissions. There is no reason why these could not be in writing and that the Labour Court would then make a recommendation to the Minister.

Employment Permits Revised

SI 95/2017 now consolidates secondary legislation for employment permits which is underpinned by the Employment Permits Acts 2003-2014.

The revised "highly skilled" and "ineligible" list of permits is set out in Schedule 3 and 4 of the 2017 Regulations. The new Regulations have amended the list of ineligible list of employments. HGV drivers had been on the list. They have been temporarily removed. This is subject to a maximum quota of 120 work permits issuing per annum.

This is subject to review with the Department of Transport.

In the case of Non EEA deboners this has been expanded up to 360 permits.

Level 10 PhD academics have been added to the highly skilled list so that Universities and Institutes of Technology can recruit very specific skillsets.

The employment permit system is reviewed twice annually. This is done by an expert group on future skill needs. The total number of permits issued in 2016 was €9383. In 2015 the figure was €7265. This is a 29% increase. The demand for permits in 2016 was €13,371 up from 11,783 in 2015, which in itself was a 13% increase.

National Minimum Wage (Protection of Employee Tips) Bill 2017

This Bill was introduced on 21st March.

Quite frankly we cannot understand why it has been brought under the heading of the National Minimum Wage Act.

This is more an issue under the Payment of Wages Act. The National Minimum Wage Act deals with the payment of the National Minimum Wage. The Schedules to the Act set out certain payments which can be taken into account and certain payments which cannot be taken into account. Currently as it stands certain tips can be taken into account and certain tips cannot be taken into account. A service

charge distributed to employees through the payroll is a reckonable component of the National Minimum Wage. However, an amount distributed to employees of tip or gratuities paid into a central fund managed by the employer and paid through the payroll are not reckonable components. What this means in practice is that a payment which is charged on the bill as a service charge and is then distributed to the payroll system is part of reckonable pay. However, if tips are collected and put into a pool and then distributed by the employer even through the payroll system they are not reckonable components.

We would be of the opinion that the promotors of this Bill had got it wrong. This should be a Payment of Wages Act Bill not a National Minimum Wage Bill.

One can understand the rationale. You go to a restaurant. You get good service. You pay a tip. The last thing you really want to hear has happened is that that tip has been taken and kept by the employer. The draft should have looked at a more simple solution.

When you go to a restaurant and there is a service charge put on the Bill you will think that that will go as a tip and will not be used to effectively reduce the hourly rate of pay that the employer pays the employee. The reality on it is that by paying a tip by way of a service charge you are not giving extra money to the service staff and the kitchen staff but rather you are subsidising the wages. It would be far better if the legislation provided that service charge which is charged and paid to the employees on an agreed basis but where those with a proprietary interest in the business receive nothing, that would include their relatives, and that such sums would not be deemed to be wages for the purposes of the National Minimum Wage Act. In relation to tips again a similar system would apply and again they should not be reckonable.

It would be a simple matter of amending the National Minimum Wage Act for same and at the same time providing that failure to pay these sums is a breach of the Payment of Wages Act that can be sued for and enforced under Section 5 of the Payment of Wages Act as an illegal deduction.

The idea behind the Bill is to be commended as most of us who go to a restaurant and are charged a service charge or pay a tip will actually think that goes to the staff. In reality often it does not. What is worse is when you are charged a service charge to think that that is actually used to pay the wages of the hourly rate agreed is not what people think a service charge actually is.

Statute of Limitations (Amendment) Bill 2017

This Bill was introduced by Deputy Wallace. The Bill proposes to reduce the lifetime of High Court or Circuit Court Judge from 12 years to 2 years and reduce the statute of limitations from 6 years to 2 years.

The Bill is intended to cover situations of civil debts by banks and vulture funds. The Bill however could have significant impact on employment cases. Currently under the National Minimum Wage Act an employee can bring a claim back six years. These are particularly vulnerable individuals. Because of some of the schemes which are operated by some employers it might only be when they get advice that the recognise they have been underpaid the National Minimum Wage for many years. This would be an unforeseen detrimental impact.

In employment law cases it can take a considerable amount of time to seek to recover monies. This can range from everything from unfair dismissal to holiday pay claims.

While we understand the thrust of the Bill we would caution against the Bill impacting on employment law rights. Employees seeking to enforce breaches of employment law really should not have their limitation period reduced.

Parental Leave (Amendment) Bill 2017

This Bill proposes to increase parental Leave from 18 weeks to 26 weeks. The Bill was introduced by Deputy Roisin Shortall and Deputy Catherine Murphy on 4th April.

The thrust of the Bill seems reasonable.

Non-attendance in the WRC

In reviewing cases it is becoming evident that there are quite a lot of cases where there is no attendance by the complainants in the WRC.

Of course this is a complete waste of time for the WRC.

We think it might be useful if there were some particulars furnished as to why people didn't attend. I think one of the issues which might be quite interesting is how many of these are cases which are submitted late at night. The new system makes it very easy for somebody to simply lodge a claim in anger by simply filling the form out on line and hitting the send button.

There are very simple methods that can be used by the WRC to see if a case is really going to proceed especially when a party is not represented. It would be quite simple for the WRC to write to a party and ask them to set out if they will be attending and advising that the case will not be listed until they have advised that they will attend. At the same time they can also request particulars when the employee might be absent for example being on holidays. An alternative is there are call-over days when people are asked to attend before an Adjudication Officer, who will not be hearing the case, where parties will be asked to exchange submissions and dates could then be set.

Cyclists

The ASTI issued a call recently for cyclists to wear helmets and reflective jackets. This is simply common sense. In fact in our opinion it should be a legal requirement for a cyclist on the road to have to wear both. There is a very good reason for this. If there is an accident then in those circumstances a helmet can help avoid serious head injuries.

A reflective jacket may help avoid an accident in the first place. Whether a cyclist is cycling during the day time, at night or particularly at dusk the benefit of a reflective jacket is that it more readily identifies the cyclist to a driver of a vehicle. Cyclists have rights as road users. However they also have duties. There are many times that cyclists will be seen going through a red light. Cyclists are

no different really than motorcyclists. The both, if they are involved in an accident, can sustain very serious injuries. Drivers of motor vehicles, whether cars or larger vehicles need to take special care to avoid accidents with pedestrians and cyclists. Equally cyclists must comply with the rules of the road. Currently there is no requirement for a cyclist to have a licence. There is an argument that anybody using the roads should be required to have a licence. They should be required to pass a test to ensure that they understand the rules of the road. There is even an issue that the bicycles should be subject to some form of test to ensure that they are road worthy and have such items as working lights and brakes. Everybody who uses the roads needs to understand their rights but also their duties and to comply with these. Safety on our roadways is important. This office does undertake a considerable amount of personal injury work. We see significant injuries coming to us. Many accidents could have been avoided particularly on the roadways if those using them had taken more care towards others. In some cases it is a question of them having taken more care for themselves.

The proposal by the ASTI is simple sound common sense.

We note the outcry from some cyclists at the thought of having to wear a helmet. Those on motorcycles have to wear helmets. Those in cars must wear seatbelts. This proposal for helmets for cyclists is just injury prevention. It is common sense.

I HAVE BEEN INJURED IN AN ACCIDENT ……. WHAT DO I DO?

Being involved in accident, whether a road traffic accident, a slip and fall or an accident while at work, is distressing. A claim for personal injuries is not the first thing that comes to mind and trying to think logically in relation to what steps to take can be difficult. This is what you should do: -

1. Get medical attention straight away.

Go to see a doctor, whether your G.P. or, depending on your injury, an Accident & Emergency Department, get medical treatment and follow your medical attendant's advices.

2. Report the accident.

Reporting the accident is important. If in a road traffic accident, report it to An Garda Síochána and your insurance company. If a slip and fall, inform the owner of the property where you fell, e.g. if in a shop, notify the manager of that shop, if in a public place, inform the relevant local authority. If in an accident at work, inform your supervisor or manager. Ensure that the accident details are recorded.

3. Witnesses – Who was there?

Make a note of who was with you when the accident happened. For example, if in a car accident, the names, addresses and telephone numbers of the passengers in the vehicle with you as well as the details of the driver of any other vehicles involved. If you were involved in an accident at work, take note of who you were working with at the time who may have witnessed the accident.

4. Seek the advice of a solicitor

If you have suffered an injury because of somebody else's negligence or fault, you may be entitled to compensation. You should seek the advice of a solicitor so that you do not lose your claim because of naming the incorrect legal name of the person at fault for your injury or because of being too late in submitting the claim to the Injuries Board. You should also seek the advice of a solicitor to ensure that you are getting the maximum value of your claim, including compensation for the injury, your out of pocket expenses such as medical and travel expenses and loss of earnings or loss of employment opportunity because of your injury.

PERSONAL INJURIES AWARDS AND THE COMPENSATION CULTURE

High cost motor insurance premiums and high value compensation for personal injuries claims have been the subject of much debate in our media during the past year. Blame has been laid at the door of the legal profession and compensation that is being branded as being

"too high". Below is some food for thought when considering the ongoing debate.

There have been comments in relation to some of the values for injuries compensation being considerably higher than other European countries and there have been proposals that values should be benchmarked against international systems. However, it is not within the statutory power of the Injuries Board to benchmark internationally and, even if this were allowed, other countries are not comparators for the Irish system for reasons being, for example, the different social welfare systems and different legal systems. However, our own Court of Appeal have set out a very fair benchmark for assessing general damages in personal injuries cases which appears to have been ignored.

In the case of Payne –v- Nugent [2015] IECA 268, the Court of Appeal outlined a new way of assessing personal injuries cases. This case highlighted that "modest injuries should attract moderate damages" and saw the Court of Appeal reduce a High Court award of general damages by 46% from €65,000.00 to €35,000.00. This judgement highlighted that in assessing the award of compensation, the trial judge should have regard to where the injury falls on the scale or spectrum of damages which ends at €400,000.00 for the catastrophically injured. The judgement also highlighted that the damages must be reasonable and proportionate. The Court of Appeal did highlight that this was not a formula to be adopted but that it was more of a benchmark by which the appropriateness of an award could be evaluated. The approach in this case is essentially start at the top and work your way down having regard to the injury. This is a more fair and proportionate approach than having regard to a label for an injury like in the Book of Quantum. This approach to awarding general damages was followed by the Court of Appeal in the cases of Nolan –v- Wirenski [2016] IECA 56 and Anthony and Rita Shannon –v- O'Sullivan [2016] IECA 93 where the Court of Appeal significantly reduced the awards of general damages made by the High Court.

A new Injuries Board Book of Quantum was published in 2016. Commentators appear to be very taken up with it's content and not so much with it's compilation and calculation. The data analysed would appear to be primarily based on out of court settlements, which is compensation paid out by the insurance industry themselves. Given

that the insurance industry have been criticised for their disinterest in challenging cases and being only concerned with their pricing, this is worrying. What is also worrying is that the data which was analysed to compile the new Book of Quantum is data concerning the awards made by the courts in 2013 and 2014 which is flawed given that the Court of Appeal went on to reduce the general damages awards in 2015 and 2016.

Legal costs can be unnecessarily increased as a result of certain actions or inactions by both the legal representatives for the claimant and legal representatives for the insurance company. In circumstances where items such as an Appearance, Replies to Particulars, a Defence or furnishing discovery documentation is not done in accordance with the court rules, it will be necessary to issue a motion and seek an Order for these items. This is costly. There are many cases where it would appear that liability is not or should not be an issue but a full Defence is filed putting the claimant on full proof of the claim. In these circumstances, a liability expert has to be engaged. This is also costly. In addition, discovery can sometimes be sought as a matter of course and this is also an additional cost. On many occasions, an offer of settlement will not be made until the morning of a court hearing. At this stage, a full legal team has been engaged for both sides, a case has been prepared for a full fight in court and all experts are on standby to give evidence. These are all items which contribute to the legal costs. Legal costs can be reduced if both solicitors for the claimant and the insurance company comply with the court rules, agree as much information as is possible and come to a resolution as early as possible in relation to cases which can be finalised.

There is always a risk with litigation in that there is no such thing as a guaranteed win. The newspapers report on court cases daily. Some cases are won. Other cases are lost. The point is that when a claimant brings a personal injury claim and receives an award of damages, that person is getting compensation which he/she is entitled to by law. That person has been injured because of the negligence of another party and has brought a claim in accordance with the law and has been awarded damages in accordance with the law. If a claimant is not entitled to compensation by law, he/she will not receive it.

***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.**