Welcome to the January edition of our Keeping In Touch Newsletter *

Introduction

We would firstly like to wish our readers a Happy, Prosperous and Peaceful New Year.

The last few months of 2015 were a busy time in the area of employment law, personal Injury and taxation both generally and for this office in particular.

Richard Grogan of this firm was interviewed as part of the RTE Investigates "Au Pairs In Ireland" which aired in early December 2015. We would like to congratulate Aoife Hegarty for the significant amount of work she did in the investigation of the abuse of Au Pairs in Ireland. This office had the pleasure of working with Aoife from April of 2015 until the airing of the programme in December. We are lucky in this country to have such dedicated investigative journalists such as Aoife Hegarty.

In this issue we deal with;

- National Minimum Wage
- Labour Court fees
- Code of Practice on Victimisation
- The Protected Disclosures Act 2014
- Mandatory Retirement
- Preliminary hearings in employment cases
- Monitoring employees in the workplace with CCTV
- Recent cases in which this office was involved
- Pregnancy is a protected period under Equality legislation
- Injunctions preventing termination of employees
- Home Care Workers
- Workplace Bullying

- The new rates of pay in the Security Industry and the Terms and Conditions of employment which will now apply
- The new rates of pay for the Contract Cleaning Industry and the new Terms and Conditions of employment which will apply
- Mediation in Personal Injury cases
- The Irish Tort Law of "Grooming"
- Incorrect accident dates in claim forms
- Liability when using private investigators
- Bogus self-employment
- Earned Income Tax Credits
- Property Tax
- Company filing deadlines

We hope that those reading this Newsletter will find it useful and relevant.

National Minimum Wage Order 2015 S.I. No. 442 of 2015

This Order which came into operation on the 1st of January 2016 increases the National Minimum Wage to €9.15

Labour Court Fees

The Workplace Relations Act 2015 (fee) Regulations S.I. No. 536 of 2015 specifies that a relevant service for the purposes of Section 71 of the Act means that any service provided by the Labour Court to an Appellant in relation to an appeal under Section 44 of the Act by reason of the Appellants failure or refusal, without reasonable excuse, to attend at the first instance hearing by an Adjudication Officer of the relevant complaint or dispute. The regulations do not set out any specific fee.

The Minister when the Act was being debated indicated that the only area he identified where a fee is merited is where an Appellant of a WRC adjudication Decision did not turn up at the first incidence

hearing. It was indicated that the fee would be in order around €300. If the Appellant could subsequently demonstrate a reasonable excuse for not attending the first incidence hearing the fee would be reimbursed.

What is interesting is that no specific fee has been actually set, as yet.

Code of Practice on Victimisation SI 463 of 2015

This Statutory Instrument is there to deal with complaints of victimisation set out in the Industrial Relations (Miscellaneous) Provisions Act 2004. Section 9 that Act provides that complaint may be presented to WRC.

The Protected Disclosures Act 2014

Statutory Instrument No. 464/2015 was issued on the 28th October 2015 sets out the Draft Code of Practice set out in the Schedule to the Order is a Code of Practice for the purposes of the Industrial Relations Act 1990.

The effect of this is that the model whistle blowing policy set out in the Appendix is the policy which will be applied should a protected disclosure arise.

It is important for employers to have a whistle blowing policy.

There is an advantage for employers in having a whistle blowing policy. By having a whistle blowing policy it does place a higher burden on an employee who would intend to disclose outside the organisation.

The relevant Code of Practice set out in the Statutory Instrument is one which every employer needs to be aware of and also in particular those who advise employers and employees.

The issue of whistle blowing is now becoming an issue where some employees regard it as a way of placing pressure on the employer. In

other cases the employee will have a genuine concern that something has been done which is wrong. The importance of having a whistle blowing policy is to set out the difference between a grievance and a whistle blowing disclosure. Sometimes employees will not appreciate the difference between a grievance and a whistle blowing disclosure. It is important therefore within the organisation that procedures are in place to set this out.

In addition it is very important for employers to have a situation in place where an employee can raise a whistle blowing disclosure and feels confident that they can do so and that they will not be penalised.

For example an employer may have a number of sites. On a particular site a manager or supervisor may not be adhering to health and safety guidelines. It is far more beneficial for the employer the matter is disclosed internally rather than a report being made to the Health and Safety Authority. If matters are raised internally the employer will be in a position to deal with the disclosure properly.

No employer likes receiving a grievance. Certainly a whistle blowing disclosure would be regarded as far more serious. However it is better to have the disclosure made internally than to have procedures for making the disclosure, investigating same, communicating with the employee and dealing with matters internally in a proper and professional way than an employee believing that because there is no internal procedures that they should disclose outside the organisation.

Admittedly the threshold for disclosing outside an organisation is higher than internally.

The difficulty for employers for not having a proper policy is that it is possible that the employee could be penalised, particularly by a manager or someone else within the organisation for having made the

disclosure and as penalisation includes such matters as the imposition of a reprimand, disciplinary action or other penalty, which is extremely wide. It is potentially very easy for an employer to be found guilty of having penalised an employee for having made a disclosure. For this reason it is important that supervisors, managers and those within the management structure have a reporting structure in place and are properly trained to deal with any protected disclosure.

Mandatory Retirement

The abolition of a mandatory retirement age would force employers to pay extra compensation through voluntary retirements packages according to IBEC.

This claim was made in a submission to the Oireachtas Joint Committee on Justice, Defence and Equality. This issued in relation to a private members Bill being the Employment Equality (Abolition of Mandatory Retirement Age) Bill. This Bill has not been opposed by the Government. A number of significant amendments are being sought because of legal and other difficulties.

With the pension age increasing with a number of employees having lost significant sums in their pension fund during the current economic crisis which we are just getting out of there is significant pressure on employees to be allowed remain in work.

The issues raised by Ibec may well be legitimate but there cannot be an across the board retirement age. The recent Equality (Miscellaneous Provisions) Act does bring the law in Ireland into line with European Case Law. European Case Law allows compulsory retirement if objectively justified.

However there is nothing to stop the legislature, here in Ireland providing for more beneficial provisions in relation to retirement ages.

With a General Election looming it will be interesting to see does this Bill get dealt with before the Dail is dissolved. All Bills before the Dail which are not enacted prior to the Dail being dissolved would have to be resubmitted when the new Dail is elected.

Preliminary Hearings in Employment Cases

The recent Supreme Court Decision Record Number 2011/J1OJR Appeal Number 356/2001 between Bisi Adigun as the Applicant and the Equality Tribunal as the Respondent is a judgement of the Supreme Court of Mr. Justice Charleton delivered on Tuesday 8th December 2015.

The facts of the case itself are interesting but the Decision raises some important principles which would appear to apply to all cases before a Tribunal or quasi-Judicial Tribunal. In relation to issues concerning requesting a statement of the facts the Supreme Court held that such a request is not a prerequisite for a matter to be heard but that even if it had been it is for Tribunals to choose reasonable procedures for the purposes of advancing their work. The Court heard that there could be nothing unreasonable about requesting a statement of what facts would be alleged with a view to a elucidating facts that had previously been flagged only by a tick on a application form.

A second issue which has clearly been now determined that central to the particular case is whether redress in respect of Discrimination could be awarded was whether the individual was employed or not. The Court held that the issue was inexplicably part of, and fundamental, to the admissibility of a claim for redress. The Court held that even, apart from legislative provisions it would make sense that once the issue of whether an individual was an employee or not was raised it should be determined in advance of what was likely to be a substantial hearing. The Court held that the resources of Courts

and Tribunals are limited. The Court held that it is a pointless exercise to engage in a trial of fact over several days when whether or not the resolution of such facts may yield any redress to the claimant is clearly the first hurdle that he or she must cross. The Court held that that can be very isolated and tried in advance.

This is a well thought out and reasoned decision and clarifies the scope and duties of a Tribunal or quasi judicial entity in hearing cases.

The case is important as regards many cases. If a claim has been brought an Adjudication Officer or the Labour Court in the future and the issue arises as to whether a person is an employee or, for example a self employed contractor then it makes sense that an Adjudicator or the Labour Court can determine the matter on the preliminary issue as if the individual is not an employee they may well not be able to sustain a claim for compensation. Equally if a claim arises as to whether the individual was an employee of the entity they have issued proceedings against then equally this a matter which will determine the substantive issue as the substantive issue cannot proceed if the individual is not an employee of the entity they have issue proceedings against.

Monitoring Employees in the Workplace

In the past the EAT, has as regards some divisions allowed CCTV footage to be introduced. In future cases will go before Adjudicators or on appeal to the Labour Court. It will be interesting to see their attitude to CCTV.

In our view employees do not lose their right to personal privacy when they come to the workplace. While employers have a legitimate interest to make sure that the employees are not engaging in misconduct there is a balance to be struck. This balance is between the employees' right to privacy and the employers legitimate business interests.

In our view CCTV monitoring will only permissible when it complies with the requirements of the Data Protection Act 1988 and 2003. This

involves principles of transparency and proportionality. The Data Protection Legislation does require that personal data is obtained fairly. It must be obtained for specified, explicate and legitimate purposes. Employers should expressly alert their employees to any monitoring which is taking place. The employer should clearly communicate the purpose of such monitoring. The fact that an employee maybe aware of the existence of CCTV does not necessarily justify an employer using CCTV footage in the disciplinary process where an employee was never told the footage could be used for that purpose.

In our view an employee is entitled to assume that CCTV would be used for security purposes only unless told otherwise.

It should be noted that in one case study referred to by the Data Protection Commissioner a disciplinary process regarding poor attendance had to be dropped on the instructions of the Director of the Data Protection Commissioner for the very reason that the employee has not been advised as to the reason why the CCTV was being used.

Some employers believe that there can be covert monitoring of employees. This involves hidden cameras. It is rarely acceptable that they would be used unless it is to investigate potential criminal activity. This usually implies the involvement of the Gardai. An employer who engages in covert surveillance of its employees runs a risk that the Data Protection Commissioner may investigate matters and that any disciplinary process initiated could be deemed unfair by an Adjudication Officer or the Labour Court on appeal. Where covert CCTV is being used to investigate potential criminal activity then it is important following case studies that the Gardai are informed that the covert CCTV footage is being put in place and the reason for same.

There is a requirement for proportionality. It must be relevant and not excessive for the purpose for which it is collected. This means that an employer must show that the use of CCTV cameras was justified. The onus of proof is therefore on the employer even where the employee has been notified the use and existence of such cameras by way of monitoring must be justifiable and proportionate.

Recording CCTV

It is important for employers to remember that if an employer uses CCTV that this is personal data and an employee can request copies of same and the employer is obliged to furnish same.

Practical Guide for Employers

1. Work out what monitoring in the workplace is needed and the reason for same. Document this.
2. Set out in writing what monitoring is reasonable and justified and again this must be documented in writing.
3. Keep these on a file. It is beneficial to make sure that you get legal advice in relation to the monitoring you are going to put in place.
4. Tell your employees, in writing, of the existence and the purpose that the CCTV cameras will be used for and their location.
5. Set out clear signage in prominent locations to remind employees that CCTV surveillance is in operation.
6. Put in place a clear policy dealing with the use of CCTV and make sure that this is communicated in writing to each employee and that you have a copy of same. Do not retain footage for any longer than is necessary.
7. Make sure that access to such CCTV is treated a data under the Data Protection Act and is only used and accessed for the purposes set out in your policy.
8. Do not keep the footage for any longer than is reasonably necessary.
9. If you get a request from an employee for a copy of the CCTV, which has been retained, make a copy and give it to them. You should record exactly what CCTV was furnished to them. Remember employees are entitled to have information deleted where it is no longer relevant.

The Future

It will be interesting to see how Adjudication Officers and the Labour Court deal with CCTV where clear, precise and reasonable and proportionate policies relating to the use of CCTV have not been put in place and communicated to employees and appropriate protections put in place.

There is a double edged sword in relation to CCTV and recordings within the workplace. If the use of CCTV is permitted outside very clearly defined parameters communicated in advance then the counter argument to such CCTV being introduced is the potential for opening the door to allow employees record conversations within the workplace which they can then use in proceedings against the employer or in defending disciplinary matters or for example bringing an Unfair Dismissal Claim. The reality of matters is that everybody now has a mobile phone. The mobile phones have recording facilities on them. If employers are to be allowed to use CCTV outside the limits communicated to employees then we can see the argument coming from employees that employees equally would be entitled to use recordings.

It will be interesting to see how matters develop.

Recent Cases in Which This Office was Involved

In the case of Kolodziejcyk and Darragh Mulrooney T/A Cabra Dental Clinic, this office represented the employee in the case under Decision DEC/E2015/132

The Complainant is a Polish National who commenced employment with Darragh Mulrooney as a Dental Nurse/Receptionist in July 2013. She submitted that on Friday 23rd May 2014 she had to leave the workplace to attend the hospital as she was feeling unwell connected with her pregnancy. At the hearing she stated that the manager had told her that “if this continues that we will be happy to get someone else”. On the following Monday 26th May 2014 she contacted the

manager by phone to arrange for the purchase of some dental supplies, at this stage she was told during the call that she would not be getting paid for the last week and "thats it" and she would not be getting a P45. There was no letter of dismissal, disciplinary hearing or procedures of any kind. The manager had written to Darragh Mulrooney on the 19th of May advising that the complainant had brought her pregnancy to his notice but without a medical certificate. The equality case confirms that there was a case that was brought to the Labour Relations Commission as a result of which some documentation has been received but documentation which she said she had never seen while in the employment.

The case confirms the European Legislation that the European Directive 92/85 which covers employees' rights does not provide for any exception or derogation from the prohibition on dismissing pregnant workers save in exceptional cases not connected with their condition provided the employer gives substantial grounds for dismissal in writing. In this case the employee had been employed for just under a year when she informed her employer that she was pregnant. The Equality Officer found that the employee was a credible witness and accepted her account of events.

He went on to state in the Decision,

"I consider the manner in which the Complaints employment was ended particularly objectionable in comparison to complaints of a similar nature". The employee was only earning €9 per hour and was awarded €28,000 which was equivalent to approximately 18 months gross wages.

The employee had brought associated claims relating to her conditions of employment in the Labour Relations Commission, now WRC, where the employer was represented by Peninsula Business Services, where she was also successful. In the case under the Equality Legislation the employer neither attended, was not represented and made no submissions in advance of the hearing.

In the case before the Rights Commissioner Service the employee was awarded compensation under the Terms of Employment (Information) Acts 1994, and under the Organisation of Working Time Act for claims under Section 12, 19, 20, 21, 22 and 23 along with Section 17.

In the case of Barry Thompson and Nurendale whose trade name is Panda Waste, the well-known refuse collection company, an award of €5000 was made for victimization under the Safety Health and Welfare at Work Act. The employee was also successful in a case under the Organisation of Working Time Act.

Redundancy Payments – Enhanced Payments

This office was pleased to be in a position to assist the former employee in seeking redundancy in line with payments which had been made to other workers.

In the case of A Worker and M&J Gleeson and Company Limited which is part of the C&C Group where there has been a certain amount of controversy recently the worker in this case brought a case for enhanced redundancy. The worker was a member of management and had been paid redundancy on the basis of statutory redundancy to cover his employment from 1978 until March 2015. It was paid at the statutory rate.

The Labour Court in their recommendation held that the Court found merit with the workers claim and recommended that the company in line with arrangements that it applied elsewhere in the operation pay the claimant severance of 3.5 weeks per year of service inclusive of the statutory redundancy to which he was entitled.

The employee in this case was in a management position and was not in a Union. Union employees had in the same plant received severances of 3.5 weeks per year of service. While it was not part of the case this case does demonstrate the importance and the power of Unions in being able to negotiate severance packages where employers when dealing with members of management who are not in a Union can deal with those managers on a separate basis.

This is one of those cases which highlights the important role of Unions in the State.

The case also highlights the significant role of The Labour Court has in applying equitable levels of redundancy to workers.

It is our view that it is irrelevant whether the workers are in management or in a non-managerial position.

Pregnancy is a "Protected Period"

The recent case of Indre Strakisiene v. LVG Foodstore Ltd T/A Simply Market Dec/E2015/092 is an important case in restating that the entire period of pregnancy is a "protected period" during which dismissal on the grounds of pregnancy is prohibited.

In this case the employee was dismissed. She told her line manager that she was ill. She was then told that her job was gone or words to that effect. The Tribunal concluded that the employer was aware or ought to have been aware within a few weeks of the Claimant reporting sick that her absence from work might be pregnancy related which in fact it was. The Tribunal held that in its view the Respondent failed to provide any evidence to suggest it handled the matter in a responsible or reasonable manner.

The case highlights the importance for employers that if an employee is reporting sick or ill that the employer ascertains from the employee what the illness is that they are reporting ill or sick about if it is not specified on a medical certificate. If it relates to a pregnancy related medical complaint then the employer should be fully aware that this is a protected period and that this is not a ground to dismiss an employee on because they are absent from work.

The case also highlights that there will be other areas such as where the individual is suffering from a disability that it is important for employers before dismissing to find out what the illness is and to ascertain is it one of the areas protected under the Equality Legislation.

This firm is coming across a significant number of pregnancy related dismissal cases themselves. A lot of these cases do not go for full hearing and settle. The cases which go for hearing are simply the tip of the iceberg of cases which are going through the system.

Injunction Obtained Preventing Termination

In a recent case a senior executive of Irish Pride Bakeries obtained an Injunction restraining his dismissal by reason of redundancy. At first sight this may appear to have reignited the issue relating to interlocutory injunctions.

However, this is a case where there are limited protections.

On the 6th of August the Plaintiff met with the Receiver. The Plaintiff was advised his position was being made redundant with his employment being terminated two weeks later on 21 August. On 7 August there was a press release announcing the sale of Irish Pride to Pat the Baker by way of an asset sale which would be covered in the European Communities (Protection of Employees and Transfer of Undertaking) Regulations 2003.

The Receiver was of the view there was no requirement for the Plaintiffs position and it was a case of clear redundancy. The case involved not the validity of the redundancy but rather the Plaintiff's entitlement to three months' notice under his contract of employment. Due to the circumstances of the case if the employee had his employment continued he would have transferred under TUPE. The Receiver would have been entitled to terminate his employment giving three months' notice being his contractual entitlements. The High Court applied the Campus Oil principals, the Court acknowledged that the Receiver could if he had wished to do so terminate the Plaintiffs employment by providing three months' notice in accordance with the contract of employment. In accordance with the Campus Oil case the High Court concluded that the Plaintiff had made it a strong

case for relief as damages where not an adequate remedy and the balance of convenience favoured the Plaintiff. This is not a case where there was a challenge to the redundancy. What there was, was a challenge centered on the Plaintiffs contractual entitlement to notice.

It should be noted that the Courts are not appropriate to challenge a redundancy. That is by way of an Unfair Dismissal Claim.

Home Care Workers are Vulnerable to Exploitation.

New research has found that exploitation, poor working conditions and discrimination are widespread in the home care sector. There was a nationwide consultation with those working in this sector. Homecare workers working for private agencies or employed directly by families are increasingly vulnerable. This includes low pay, temporary contracts and irregular hours.

The Migrant Rights Centre Ireland, the Carers Association and SIPTU have come together to launch a set of proposed guidelines for the sector. The stated aim of the guidelines is to assist in tackling the exploitation and to build a sector which is sustainable and deliver quality care alongside decent jobs.

The current position is that there are no enforceable standards for non-HSE homecare sector workers. This means that there are different pay rates, training, standards of care, duties and terms and conditions of employment depending on the service provider.

In the area of the care of individuals in their home the survey discovered that insufficient time with clients is a significant factor.

As Solicitors who practice in this area we are finding that there are certainly unfair terms applied. We have systems put in place by some employers, where care workers moving from one location to another location as part of their job are not paid for the time in transit. They

are often told that this is rest time. However the reality of matters is that because of the limited amount of time that they are given to move from one location to the other they do not get an opportunity to take a rest. Sitting on a bus when you have to be sitting on that bus is not a rest interval when the employee is moving from one location to another working location. Under the National Minimum Wage Act travelling for a business purpose by which we would mean travelling from one location where care is undertaken to another location where care is to be undertaken is treated as working hours for the National Minimum Wage Act even though it would not be working time for the Organisation of Working Time Act. We are also finding that some employers are attempting to categorise such workers as self-employed. Unfortunately there is little regulation and fewer standards in this working environment.

It is our experience that the exploitation of such workers is mainly directed towards migrant workers.

A worrying trend appears to us to be developing whereby certain entities in the care sector are targeting undocumented migrants who are non EU nationals as a form of cheap labour.

The entire work permit system along with recent changes in Employment Law in relation to migrant workers has effectively created an environment which supports the exploitation of migrant workers because of the fact that their rights to compensation are effectively limited to unpaid wages. This creates an environment whereby these workers can been seen as a form of bonded labour or at best a disposable labour force.

The area of homecare workers needs to be properly regulated. This is not just to protect the workers. It is also to protect those who are being cared for. Often these individuals who are being cared for are vulnerable. Where there is an unregulated body of workers where there are no standards applied and no regulations this creates an environment which fosters the potential for abuse of those who are supposed to be cared for. We have the awful vista of both those being cared for and the workers both being vulnerable and with little or nothing being done to regulate same.

Unfortunately our employment legislation in Ireland has actually created an environment where a not insignificant number of workers are completely devoid of employment law rights.

Workplace Bullying

The case of Una Ruffley and the Board of Management of St. Agnes School being a Decision of the Court of Appeal on the 8th December 2015 is interesting in itself but possibly for some of the Principles which have been set out. Where an employee is considering bringing a claim for bullying it is necessary for the employee to show repeated inappropriate behaviour. A single inappropriate behaviour will not amount to bullying.

The fact that an employee is put through a disciplinary is not in itself an issue of bullying.

The Court of Appeal did point out that in this particular case what should have been a declaratory action brought to challenge the validity of the decisions and sanctions imposed by the Defendant employer into a claim for damages for civil wrong that was unsustainable. The case does highlight the issue that in appropriate cases it may be appropriate for an employee to bring a declaratory action to challenge the validity of decisions and sanctions imposed. The decision has been highlighted, by some on the basis it is a decision overturning an award of €255,000. However the comments made in relation to how the disciplinary processes was operating does highlight that if a disciplinary process is not appropriately run and where it can be subject to severe criticism that in those cases an employee may well be able to see declaratory orders overturning sanctions.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Rates of Pay in the Security Industry

The Employment Regulation Order (Security Industry Joint Labour Committee) 2015 SI No.417/2005 applies from the 1st of October 2015 in relation to those in the security industry. The rate of pay is specified to be €10.75 per hour. Where composite rates are pay higher than the rates provided for in this section are paid to workers it is necessary for the employer to keep such records as are necessary to show that the rates of remuneration as defined are being complied with. There are provisions for those entering employment for the first time and those under the age of 18.

Overtime rates provide that hours worked in excess of 48 hours per week in the roster cycle will be paid at the rate of time and a half. A roster cycle will be a predetermined working pattern which can be up to a maximum of six weeks which is issued to the employee in writing prior to the commencement of the roster cycle.

In calculating annual leave regular rostered overtime is to be included for the purposes of holiday pay and will be averaged over the previous 13 weeks prior to the taking of the annual leave. Many employers up to now have not provided that regular rostered overtime would be taken into account in calculating annual leave but this will increase the cost of taking annual leave. Workers covered by the agreement are excluded from the provisions of Sections 11, 12 and 13 of the Organisation of Working Time Act relating to the 11 hour break, rest intervals at work and Sunday working. However, the employer must ensure that the employee is provided with the equivalent rest intervals and breaks. Up to now it has been compensatory rest intervals. This new statutory instrument refers to equivalent and this would appear to be a higher test.

Rosters must, except in exceptional circumstances be provided to an employee three days in advance of the commencement of a roster cycle. Where security firms are providing services to their clients they must provide or make arrangements with that client to provide appropriate facilities and protection to ensure the safety health and welfare of their employees. These facilities/protections shall include protective clothing, shelter, toilets, heat, light and access to canteens or means to heat/cook food, communications equipment and first aid. The employer must also ensure adequate monitoring procedures to

ensure the safety and security of workers. A copy of the Health and Safety Risk Assessment must be available at each site.

There is a requirement to provide a non-contributory death in service benefit equal to 1 years basic pay payable after six months service and up to the age that the State Pension becomes payable to the employee. The death in service benefit will apply whether the employee was on duty or not at the time of death. There is also a requirement to provide personal attack benefits which rises from 10 weeks basic pay less social welfare after six months services to 26 weeks basic pay less social welfare after 42 months service. In addition an employer must ensure that appropriate physical and psychological support is available on request to any employee who was subject to violence as a result of carrying out his or her duties. There must also be a sick pay scheme. The employee must have in place a grievance and disciplinary hearings that will be carried out in accordance with the Code of Practice on Grievance and Disciplinary procedures being SI146/2000.

A security firm means an employer who employs one or more security operatives. A security operative means a person employed by a security firm to provide a security service for contract clients of that firm and perform one or more primary functions as set out. It should be noted that managers, assistant managers and trainee managers are excluded from the Regulation and therefore the normal Organisation of Working Time Act rules and Minimum Wage legislation would apply to them.

Because of the way the legislation is drafted it should be noted that where an employer has an associated service company which provides services by way of the employees to the main company having being employed through the service company that service company may well become a security firm for the purposes of the legislation requiring the employer to comply with this Statutory Instrument.

Rates of Pay for the Contract Cleaning Industry

The Employment Regulation Order (Contract Cleaning Joint Labour Committee) 2015 SI No.418/2015 sets out the rates of pay in relation to contract cleaners.

This Order relating to the new rates of pay only applies to workers employed by an undertaking engaged in whole or in part in the provision of cleaning and janitorial services in or on the exterior of, establishments including hospitals, offices, shops, stores, factories, apartment buildings, hotels, airports and similar establishments.

These rates of pay do not apply to direct employees. By this is meant an employee who is engaged directly by an organisation to do cleaning for that organisation. However, because of the way many business are now structured many such workers are now in what can be called employment companies who provide services to the main company. By this I mean "Company A" sets up its only "Company B". Company B employs all staff to provide the services to Company A. This could include everything from general operatives working on the factory floor to cleaners. Where such structures are put in place, and they are common then instead of the National Minimum Wage applying this particular Order will apply.

The rate of remuneration is €9.75 per hour which is more than the National Minimum Wage. There are provisions for a worker who is under the age of 18 years or a worker who enters employment for the first time after reaching 18 years of age or is undergoing a course of study or training authorised by the employer, for a lower rate of pay.

In calculating holiday pay where Sunday working is part of the normal weeks work or regularly part of a roster it must be included in calculating holiday pay and the relevant holiday pay will be calculated on the average of Sundays worked in the 13 weeks prior to the date of the employees holidays.

Overtime rates will be paid after 44 hours worked Monday to Sunday. The rates are time and a half for the first 4 hours and double time thereafter. Sunday overtime to paid at the rate of double time for all hours worked.

There is a requirement to provide a death in service benefit of €5,000. The eligibility for an employee is two years continuous service in the cleaning industry.

Where an employee is dismissed the internal company procedures and appeals are to be exhausted in the first incidence in line with the Code of Practice SI 146/2000. The procedure must state that an employee may be represented at any stage of the disciplinary procedure by a colleague, trade union official of his or her choice.

Every employment contact shall include the name of the recognised Trade Union with representation or negotiation rights in the company where appropriate.

All employers will on request or within two months of the commencement of employment provide a statement of the terms of employment in line with the relevant statutory instrument which includes such things as the hours of which overtime would be paid, the rate during weekends, Sundays and bank holidays. The reference to bank holiday should of course be in accordance with the Organisation of Working Time Act which calls them public holidays and it is advisable that the employer would use the word public holidays rather than bank holidays. It should be noted that workers employed prior to 2 August 2012 should be paid on Good Friday which is a bank holiday but not a public holiday as if it was a public holiday but employees engaged after that date would be paid on Good Friday as it if was a normal working day. It is also necessary to set out shift hours and the rate. There is also a requirement to set out particulars of the duration of rest periods and breaks. This would appear to be in addition to the matters set out in Section 3 of the Terms of Employment (Information) Act as amended.

It would be our view that many employers who because of the way the structure the business having the employees in a service company or an employment company may well find that they now have to comply with this Statutory Instrument. This may come as a shock to some employers

Mediation in Personal Injury Cases

The case of Keith Ryan v. Walls Construction Limited [2015] IECA214 is case concerning the issue of mediation.

In this case there had been an extensive process of Discovery. This had been completed. A Notice of Trial had been served. The Action was ready for hearing. Mr. Justice Cooke directed that the parties engage in a process of mediation within a specified time period. The Defendant in the case appealed that Decision to the Court of Appeal. In the Court of Appeal Mr. Justice Kelly held that the parties should not be forced to engage in mediation if they did not wish to do so. Mr. Justice Kelly added that the Court should ensure that when making an order for mediation it is not simply adding costs and delay. It is note worthy that Mr. Justice Kelly noted that the experience in the Commercial Court had been that mediation has the greatest prospect of success if it is sought immediately after the Pleadings have been closed and prior to the commencement of an expensive and time consuming Discovery process.

This case may very well have been decided on its own merits.

The use of mediation is becoming common. It is firmly established in the Commercial Court Division of the High Court. However mediation is not high on the agenda of many personal injury litigators. Under the Rules of the Superior Courts the High Court is permitted to adjourn proceedings to allow the parties an opportunity to engage in alternative dispute resolution. However, the High Court does not have the power to direct the parties to submit to ADR. The Court can simply adjourn the proceedings to allow the parties time to consider whether ADR is appropriate or not. This is in reality the recognition that ADR is a voluntary process. In personal injury cases the Civil Liability and Courts Act 2004 does give the High Court the power to direct a mediation conference regardless of whether the parties consent or not. If a party is interested in mediation it would appear that it would be appropriate that once the proceedings are closed and before Discovery commences that an application is made for mediation.

Early settlement of cases is always preferable. Mediation is a process which we encourage and support and we would see as one which will be used, to a far greater extent in years to come.

This is a developing area of law. We are likely to see significant development of law over the coming years.

While mediation is an option in employment cases before the Workplace Relations Commission there is no power for an Adjudicator in the WRC or the Labour Court to adjourn cases for the parties to consider mediation. This is a possible defect in the new system. When cases come on particularly as employment cases invariably have a personal element for both parties it may be only then that mediation is truly grasped by the parties. Hopefully through setting their procedures the WRC and the Labour Court may consider inviting the parties to attend mediation especially if cases simply involve quantum.

We currently have the absolutely crazy situation that should an employee in the claim form state they will attend mediation but indicate they wish it to be face to face mediation the WRC will write to the employee stating the employee has declined mediation. This is of course completely incorrect and is probably due to the fact that the WRC have not the staff to undertake face to face mediation. However you would think the WRC would be at least honest about this rather than contending mediation was declined and can only be classified as a "lie" by the WRC.

Irish Tort Law now covers acts of "Grooming"

In the case of Cormac Walsh v. Michael Byrne [2015] IEHC414 the Plaintiff sued the Defendant for sexual assault, battery and trespass to the person. The Plaintiff also sought a declaration from the Court that the entire relationship created by the Defendant with the Plaintiff was a continuum of oppression of the Plaintiff involving manipulation, psychological domination and acts of assault and battery and this was tortuous.

The Court was satisfied that the Defendant has committed the Tort of battery and assault. The Court considered that it should develop the law by recognising the practice of grooming for the purposes of sexual abuse either as a new tort or the development of existing tort law. A tort is defined in Salmon & Heuston on the Law of Torts (20th Ed) at page 15,

"Some Act done by the Defendant whereby he has without just cause or excuse caused some form of harm to the Plaintiff"

The High Court accepted that the specific harm that is caused where there is an abuse of trust and held that in this case the mental trauma suffered by the Plaintiff is not just confined to the act of assault and battery but arises also as a result of the consequences of the breach of trust of the Defendant who played such an important role in the Plaintiffs life.

1. The law has been developed to include grooming as a recognised aspect of the tort of trespass to the person. The law expressly recognises the impact of a breach of trust can have on a victim of sexual abuse.
2. Where there is a history of grooming it should be expressly pleaded in the Statement of Claim as should the facts of same.
3. Practitioners should also include an expressed claim for aggravated damages in the case of sexual abuse.
4. It should be noted that following the Supreme Court Decision in Clarke v. O'Gorman, a PIAB Authorisation is required for the Tort of Trespass to the Person.

Incorrect Accident Date

An issue which can arise in personal injury cases is that the date of the accident is incorrectly set out.

In the case of Peter Bowell v. Dunnes Stores Limited [2015] IEHC613 the High Court has held that getting the date of your accident wrong is not fatal to a claim for personal injuries. In this case the Plaintiff worked part time for Dunnes Stores. The Plaintiff alleged that he tripped and fell over a container of bottles in the stock room of the

Portlaoise branch. Dunnes Stores contended that the Plaintiff was mistaken about both the date and circumstances of the accident and that he was not at work on the date alleged.

Mr. Justice Barton held that a genuine mistake as to the date of the occurrence of an event or circumstances given rise to proceedings was not fatal in law to the claim itself. In this case his Honour allowed the case to proceed and found in favour of the Plaintiff. There was held to be an element of contributory negligence.

This case is important for confirming that getting the date of the accident wrong is not fatal.

Saying this it is important that Plaintiffs are asked to check the date that an accident occurred on.

Potential Liability when using Private Investigators

If you are thinking of using a Private Investigator, you need to be careful. The new Private Security Services Act 2014 has been brought into force since the 1st November 2015. It now is an offence for a Private Investigator to offer investigation services without a license. The definition of a Private Investigator is very broad.

It includes,

"A person who in the course of business, trade or profession, conducts investigations into matters on behalf of a client and includes a person who, (a) obtains or furnishes information in relation to the personal character, actions or occupation of a person or the character or kind of business in which the person is engaged or (b) searches for missing persons".

A corporate entity who employs an unlicensed Private Investigator can on summary conviction be liable for a maximum fine of €3000 or imprisonment for term not exceeding 12 months or both.

The Private Security Authority maintains a register of both contractor and individual license holders on its website which will assist a business in making sure that the security service is being provided by a licensed company or individual.

For many companies and individual employers the issue of using a private investigator will be to ascertain whether an employee is for example moonlighting while claiming to be ill and is absent from work or some other associated work related issue. It is important that employers make sure that they only use a licensed operator.

While the Act has been in place since 2004 the relevant Statutory Instruments bringing in these relevant provisions only became effective on the 1st of November.

It should be remembered that there are now quite serious and complex rules that must be applied so as not to be in breach of Data Protection Legislation and not to be in breach of the legislation. An appropriate engagement letter with the Private Investigator is useful and should be obtained.

Bogus Self-Employment

The Irish Congress of Trade Unions has recently produced a report on bogus self-employment in the construction industry. Bogus is used because the workers are actually employees but recorded as self-employed for various reasons.

ICTU notes that there are about 27,600 recorded as self-employed which if they are self-employed (which is entirely possible) constitutes a loss of €80 million in PRSI payments every year.

There are significant difficulties where employees are categorised by their employer as self -employed.

The employees can of course go the Department of Social Protection but it can take time the Department of Social Protection to investigate

matters fully and make a ruling. The alternative is to bring a claim to the Workplace Relations Commission.

One issue which has yet to be determined will be what kind of claims could be brought. In addition to the usual claims for example for not receiving a document that complies with Section 3 of the Terms of Employment (Information) Act such individuals may well have claims under the OWTA for not having received holiday pay and public holiday pay.

However one issue which may sharply bring these cases into focus is that these individuals may well be able to bring a claim under the National Minimum Wage Act. It may be said that these people are earning more than €9.15 per hour. If they are not being paid through the tax system then there is an argument which can put forward is that under the National Minimum Wage Act they received nothing. The reason for this that the word "pay" means that all amounts of payments and any benefit in kind specified in Part 1 of Schedule 1 of the Act made or allowed by an "employer" to an "employee" in respect of the "employees employment". If the employer is contending that the employee is not an employee then there was no pay to the person as an employee and therefore the employee will have a claim for just over an additional €356 per week or a little over €18,000 per annum. For the employer to put forward the Defence that the individual was an employer the employer will then be in the situation of having to admit that they were in involved in Tax Evasion and Social Welfare fraud. If they do raise or make an admission that they misclassified on purpose the employee then in those circumstances the employee may raise the Defence against their Defence of ex-turpi causa namely that the employer cannot benefit from their own illegality by looking to have an offset.

When an employer is met with one of these cases to rectify matters the employer will have to pay the Tax and the Social Welfare on the monies that were incorrectly paid as the employer is obliged to pay wages net under the Payment of Wages Act. The employer will not be able to seek recovery from the employee as this would be a Tax Evasion and Social Welfare fraud put in place by the employer themselves.

There seems to be a trend emerging, not only in the construction industry but also in some other industries to attempt to categorise individuals as self-employed contractors.

This creates huge problems. The first is the loss of income to the State. The second is the individuals who are subjected to this effectively lose their Social Welfare entitlements. Employers who undertake these bargain basement tax evasion schemes are undermining legitimate business in the State who seek to be compliant. It will be interesting to see how cases develop but from the cases coming to our attention we anticipate that this issue will arise more often. A considerable number of these cases do appear however to settle.

Earned Income Tax Credits

Revenue eBrief No. 116/15 has confirmed that the Finance Act 2005 introduced a new Earned Income Tax Credit. It provides for a maximum tax credit of €550 (computed by reference to the standard rate of Income Tax) In respect of an individual's income. This applies for 2016 and the following years.

Property Tax

There has been a recent call that Property Tax should be based on the size of the property and not its value. In a submission to the Department of Finance contributors have also called for a credit for those who have paid stamp duty on the property in the previous 10 years prior to the introduction of the tax as well as a reduction in tax for apartment owners who have paid their management fees in full. It will be interesting to see how this debate develops.

Companies Filing Deadlines

The Companies Act 2014 has introduced a new procedure for companies that have missed the filing deadline for filing the annual return and financial statements on time. This eliminates the need to pay a late filing penalty. More importantly, for most companies it retains the audit exemption.

The company may make an application to their local District Court (or High Court) seeking an Order extending the time for filing the annual return and the financial statements. If granted by the Court the company must file the documentation with the CRO within 28 days and then file the annual return and the financial statement with the CRO within the extended time granted by the Court. Only one application can be made per Order.

The company cannot represent itself. It must seek the services of a Solicitor or Barrister to make the application to the Court.

The application is made at the District Court where the registered office is situated.

There are costs of paying the late filing penalty in addition to the costs of an audit to be carried out for the current financial statements in the next financial year against the cost of making an application to the District Court. For group companies that now can avail of the audit exemption the District Court application will be the cheaper option.

What are the Advantages?

i) No loss of audit exemption or audit for two years.
ii) No late filing penalties.

What are the Disadvantages?

i) Cost of making the application.

The CRO has issued an information booklet on the process. It is information leaflet no. 39.

The process is as follows,

- Make an application for a Court date
- Serve the notice and Affidavit on the CRO putting the CRO on notice of the application.
- File the Affidavit and Declaration of Service 4 days before the Court date.

- When the Order is granted showing the new filing date the Order should be filed with the CRO and the company must file the annual return within 28 days of the new date.

***This publication does not purport to provide legal advice. Before acting or refraining from acting on anything in this publication legal advice from a Solicitor regulated by Law Society of Ireland should be obtained. In contentious cases a Solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.**