Welcome to the July issue of Keeping in Touch.

In this issue we shall deal with such diverse issues as

- The new Advocate Generals opinion on what is working time, to weekend working and its effect on productivity;
- Unfair Dismissal and redundancy;
- Tips on avoiding employment claims;
- Temporary workers; and
- Injury claims.

While previous issues have dealt with Unfair Dismissals at some length this issue is intended to deal with some of the other common employment law issues and cover the effect of the recent Hussein and the Labour Court case. However we still cover Unfair Dismissal and in this issue set out how an employee should be invited to a disciplinary hearing and how to structure same to maximise the argument that fair procedures were applied.

The months of May and June have been exciting times for this firm. In May the Firm was nominated for the Employment Law Team/Employment Lawyer of the Year Award and the Sole Practitioner/Principal Solicitor of the Year Award by the Irish Law Awards. Richard Grogan of this firm was interviewed for an article in the Irish times on 17th June by Erin McGuire "What next in the workplace when you are diagnosed with a major illness". A copy of the article is in the publication section of our website.

We are proud as a small boutique law firm specialising in our specialist areas that the judging panel of the Irish Law Awards would have considered us as finalists in two categories this year. While we did not win in the Employment Law category, we were in the same category as Eversheds, Ronan Daly Jermyn, Beauchamps and the winner of the section ByrneWallace. These are all large commercial firms with large Employment Law Practices. We are very proud that the judges of the Irish Law Awards found it appropriate to put us in with such notable firms as finalists.

Michelle Moran has joined the firm in May of this year. Michelle is working in the Personal Injury Litigation and the Employment Law field. We look forward to working with Michelle going forward and welcome her to the firm.

We are seeing a significant increase in the number of awards for penalisation of workers. In respect of a company KaysRealChefsRealFood Limited an award of €12,500 was made to an employee for penalisation under the Organisation of Working Time Act. In another case against Nurendale T/A Panda Waste, implementation is being sought at the present time for an award of €5000 for victimisation of an employee under the Safety Health and Welfare at Work Act. These are only the cases which go for hearing. There are a significant number of such claims which are settled before any case runs.

In the last two months we have seen a rise in the number of Unfair Dismissal claims. What is surprising is that a significant number of employers still do not apply fair procedures in relation to dismissals to include: notifying the employee of what is involved, allowing the employee to be represented, giving the employee copies of any reports or complaint documentation or investigation documentation, having an independent disciplinary process and allowing the employee a right of appeal. Very often we are finding that disciplinary processes which are set out in the employers own staff handbook are not being complied with. In this issue we have set out some guidance on this matter.

While there have been a number of cases reported in relation to pregnancy related dismissal, what constantly surprises us is the number of such claims which we see. Most of these claims tend to settle. It is not surprising. An employee who is pregnant and/or on Maternity Leave is in a protected category of employees and only in very limited circumstances can their employment be terminated. We are coming across cases where employees who have told their employer that they are pregnant are subjected to inappropriate behaviour in the workplace and particularly inappropriate comments where some employers regard an employee who notifies that she is going to go on Maternity Leave as nearly being disloyal.

We are seeing a significant rise in the number of claims being brought under the Organisation of Working Time Act particularly for more senior employees. We regard this as being caused by an upturn of the economy but with employers not being prepared to take on additional staff to cover the additional work load, which managers and more senior employees are now expected to undertake.

On the 27th of May of this year the Workplace Relations Act was signed by the President. We are awaiting the Act being implemented by the Minster for Jobs Enterprise and Innovation in due course. There are a considerable number of courses and seminars in relation to the new Act. However, what is going to be probably as equally relevant for practitioners in the area of Employment Law is the new rules and procedures which will apply in relation to claims which will be heard by Adjudicators and the Labour Court on appeal. We will be producing our own Guide to the Workplace Relations Act once the new procedural rules have been introduced.

The coming months are going to be interesting times with the new Industrial Relations Bill going before the Dail, the Low Pay Commission due to report in July and the report on the use of Zero Hour Contracts by Limerick University also due to issue soon.

We see that the coming months are going to be both exciting and challenging times for not only Employment Law Solicitors and Barristers but also for HR Professionals and Industrial Relations Professionals.

Our Top Tips to Avoid Employment Claims

Employment Law has an impact on the daily operations of every business. Employment relationships are highly regulated. There are currently more than 40 pieces of employment legislation in force in Ireland. New legislation, whether by way of an Act or by way of a Statutory Instrument, are enacted frequently. It is difficult for employers to keep up to date with changes in Employment Law. However, not knowing the law is not an excuse to an employment claim.

Our top tips are here to hopefully assist you avoid claims.

1. Use Probation Periods

It is important your contracts of employment set out a probationary period. Up to six months is normal. Try not to extend probationary periods. If any employee is not suitable it is better for you, as an employer that they leave early. Your probationary clauses should reserve the right to use a shortened disciplinary procedure or no disciplinary procedure during probation. Our advice is that you would use a shortened disciplinary procedure.

As employees do not acquire rights under the Unfair Dismissal Legislation except in limited circumstances; dismissing an employee within 12 months, if they are not suitable, will mean that they will not have, normally, an Unfair Dismissal claim but you do have to be careful of the Equality Legislation, to make sure that a person is not dismissed on any of these protected grounds.

2. Working Time Records

It is surprising the number of employers who lose cases under the Organisation of Working Time Act because of failure to have records. You should consider a digital clock-in system. If you have a digital clock-in system then this should be checked regularly to make sure that you are in compliance. All employers must keep records of: start and finishing times, hours worked each day and each week and leave granted to employees. These records must be kept for three years. Some employees are automatically entitled to these records such as mobile workers. Other workers can easily obtain these records by putting in a request under the Data Protection Act. In a working time case in the absence of records, the burden of proof will be on the employer. Working time records, properly kept, will identify to you if there are any breaches so that you can rectify them. They will also make sure that in any proceedings you are in a position to defend same with the best evidence.

3. Hiring Employees

If you are hiring an employee you should check whether there are any restrictive covenants or non compete covenants existing relating to their most recent employer. This will make sure potential legal actions from competitors are reduced. This confirmation could be included in the offer letter or the contract of employment. It is best practice to have the employee confirm in writing that there are no restrictive covenants or non compete clauses applying to their former employment.

It is also useful to get employees to confirm, in writing, that information provided in their CV or as part of the application process is completely true and accurate. We advise that you include a clause stating that failure to provide true and accurate details may lead to dismissal or withdrawal of the offer.

4. Sick Leave

Your contracts and policies should be clear on how your employees communicate absences to you. It would be our view that you include a provision that a text message is not sufficient communication. You should set out clearly when a medical certificate is required. You should reserve the right to send employees for medical assessment with your medical advisor or with a medical practitioner nominated by you. Regular contact should be maintained with employees during sick leave to facilitate an early return to work.

To avoid claims you should be aware that while on sick leave employees will be entitled, at least, to be paid public holidays for the first three months of the absence. This can be extended up to twelve months where an accident occurred in the workplace. Even if the employee is absent due to an accident outside the workplace you are still liable to pay public holidays for the first six months.

New legislation is being introduced which will provide that you must provide for holidays during sick leave to cover a period of up to fifteen months absence. In effect this means that the employee will retain those rights to holidays, on their return to work for up to five weeks holidays. The entitlement only applies to the statutory entitlements being 20 days per annum. This is a cost to employers but failure to provide for is may result in a claim under the Organisation of Working Time Act where compensation in addition to any monetary loss can be awarded. There is no reason why you should fall foul of this test.

5. Do You Have Employees from Different Countries?

If you have employees who do not have English as their first language then you may be vulnerable to a personal injury or accident at work claim. To minimise potential claims appropriate training should take place for every system of work. These training and documentation should be in a language capable of being understood by the employee. It is useful to have employees complete a test after training to ensure the employee fully understands the procedure. This is just good health and safety prevention. Accidents in the workplace are a considerable cost to the employer in lost productivity, disruption to your business and the cost of increased insurance premiums.

To ensure the employees understand important provisions in your policies and procedures it is useful, where you have a multinational workforce, to ensure that appropriate documentation in a language likely to be understood by the employee is available to them. Certainly health and safety documentation should be in a language likely to be understood by them. Disciplinary and Grievance procedures also should be translated. It is very useful to have the contract of employment translated. There then can be no issue but that the employee would have understood the terms and conditions of their employment. It is beneficial to make sure that it is stated in any documentation that the English version will always take precedence if there is any ambiguity or difference because of the translation.

6. Do you have Employees who require a Work Permit.

This is can be subject to reviews by NERA and the Garda National Immigration Bureau.

You should make sure that you have up to date copies of all work permits on file for all employees requiring a work permit. New rules were introduced in October 2014. Make sure that senior managers know the rules relating to work permits.

7. Have a Social Media Policy.

Nearly everybody nowadays is on social media. Your good name and the good name of your business can be destroyed over night because of inappropriate postings on social media. You should have a very clear precise and well-communicated policy for employees which makes it clear that any failure to comply with your policy can result in dismissals. Where you have any social media sites operated by your business it is important that passwords to these sites are retained by management to avoid a disgruntled employee from posting inappropriate material on a social media site where you may not know then who posted it.

8. Bullying and Harassment

Bullying and harassment claims are now arising quite frequently. It is important to have a bullying and harassment policy in place. If you receive a complaint it is important that the complaint is investigated. You should ensure that you have a "dignity in the workplace policy" posted where the employees will have access to same. You might want to consider mediation. Mediation can have a high success rate and can often stop litigation claims starting.

9. Make Sure your Managers Know What the Law is.

The individuals most likely to land you in an employment claim are senior managers right down to supervisors. It is important to have an annual meeting with managers and supervisors to highlight employment law trends and updates. It is important that managers and supervisors are advised on the law. Managers and supervisors should know the maximum hours which an employee can work. If you have proper time keeping records this should alert the company to any potential breaches which might arise. Managers and supervisors should be given a role to ensure compliance. Rest and break periods and notifications of requirements to work overtime often result in claims under the Organisation of Working Time Act. Managers and supervisors have a role in applying the Dignity in the Workplace Charter to minimise the risk to the company from an Equality Claim. Making sure that managers and supervisors understand their role and their obligation to apply the law reduces the risk of claims against you as an employer.

We are a boutique law firm. We specialise in three areas of law. Employment Law is one of those. We are well-known as employment solicitors. It is our job to know more than just the law. We know how to deliver relevant legal knowledge to you in business: quickly, efficiently and in a cost-effective way. We understand business.

We help employers manage people-risks. We know how to, and, are well used to, dealing with sensitive issues. We advise businesses on how to reduce employment claim risks and disputes. We can provide Employment Law training to HR managers and those who are managing your employees.

The question we ask our commercial clients is which will be cheaper for you? Is it avoiding a claim or having to defend a claim. Defending a claim is always more costly in time and expenses than the cost of avoiding a claim.

Holiday Pay and Overtime

In Ireland the Labour Court has consistently held that overtime is not to be taken into account in calculating Holiday Pay. The issue is whether this is consistent with the EU Directive.

The Directive in Ireland was implemented by the Organisation of Working Time Act. There is ongoing conflict as to how Holiday Pay should be calculated. The Directive states that workers have a right to at least 4 weeks paid Annual Leave but does not state how Holiday Pay should be assessed. However, the ECJ has ruled that the Directive requires Holiday Pay to be based on "normal remuneration". This includes payments linked intrinsically to the performance of the workers tasks. This was held in the case of Williams –v- British Airways [2011] IRLR948.

In the UK the EAT have decided that non-guaranteed overtime payments were intrinsically linked to the performance of the tasks required under the workers' contracts of employment. Therefore the Overtime Pay must be taken into account in calculating EU Holiday Pay. This applies only to the minimum of 4 weeks and not to any other Annual Leave entitlement.

In the UK they have accepted that certain allowances relating to travel were intrinsically linked to the performance of tasks under the contract and therefore amounted to normal remuneration.

In the UK their EAT have had to consider whether the UK Law could be read in line with the EU Law or whether they were simply inconsistent. If that was the position then there would be a claim against the State. In the UK case involving British Gas being Lock –v- British Gas Trading Limited the ECJ held that commission payments must be taken into account.

In the UK case of BA –v- Williams and Bear Scotland it was decided that a worker must be paid for holidays at a rate comparable to normal remuneration received for periods worked and non-guaranteed overtime should be included in calculating Holiday Pay. In the Lock case they took the view that there was no difference in principle so far as Annual Leave pay is concerned between non-guaranteed overtime and commission.

Here in Ireland the Legislation is being changed to provide for Holiday Pay during periods of Sick Leave. However, there is no proposal at the present time to deal with the issue of overtime. Either the Irish Legislation is in compliance with the EU Legislation, in which case the existing decisions by the Labour Court are wrong, or the Legislation is not in compliance with the Directive, in which case the decisions of the Labour Court are correct under Irish Law but leave the State open to a claim. Unfortunately, neither of these situations are acceptable. If the Labour Court has not been applying the Law correctly then it is a simple matter for it to be applied correctly. Saying this, there is a very strong argument that the Labour Court is properly applying the law as it applies here in Ireland. If that position is correct then there is a significant claim against the State which is going to have to be dealt with. The alternative is whether the Labour Court can perform a linguistic acrobatic exercise to read our Legislation in line with the Directive. The Labour Court can only go so far in reading legislation in line with the Directive and cannot and do not write something which is not there.

These issues have been around for some time now. They have not been addressed by the Department of Jobs, Enterprise and Innovation.

Failure to deal with these issues is simply going to open up a bonanza for lawyers bringing High Court actions against the State where the State is going to have to pay considerable legal fees to Senior Counsel, Junior Counsel and to Solicitors. Should that happen, then there is going to be the usual outcry that lawyers have been jumping on the compensation bandwagon. Never let it be said that we do not alert potential claims against the State which can be simply avoided by the appropriate Legislation being amended. If the claims do start to run, against the State, nobody will be able to say that we did not alert the State to the problem.

It will be interesting to see how matters develop.

The New Sick Pay Rules

The Workplace Relations Act has changed the law relating to the payment of Sick Pay during periods of illness.

The Organisation of Working Time Act (OWTA) does state that a sick day is not to be regarded as a day of Annual Leave. The Act, as it has operated since 1997, is silent on the issue of how time spent on Sick Leave should be regarded for the purposes of calculating Annual Leave entitlements.

The European Court of Justice in the Schultz – Hoff and the Stinger in 2009 ruled that employees could accrue Annual Leave while on Sick Leave. Subsequently in 2011 the Court ruled that National Laws could put a cap on the unlimited accrual of Annual Leave during successive years of absence on Sick Leave.

In July of 2014 the European Commission advised the Government that the 1997 Act was not compatible with Article 7 of the Working Time Directive.

The Workplace Relations Act provides that for the purposes of Annual Leave, where the Employee was absent from work due to a Certified Illness, the Employee is deemed on that day to be working and performing his duties for the purposes of calculating his or her entitlement to Annual Leave. The Act now provides that where an employee is unable to take all or any of their Annual Leave during a Leave Year due to a Certified Illness the leave may be taken within a period of 15 months after the end of that year.

The effect of the new rules is that an employee will be able to accrue up to 5 weeks paid leave entitlements while out on Sick Leave.

Where an employer terminates an employee while they are absent on long term Sick Leave then the entitlement to the Annual Leave will have to be discharged at that stage by the Employer.

It is going to be important for employers to put in place policies on Sickness and Annual Leave to ensure that there are proper employee-reporting procedures in place to cover Certified Sick Leave. It may also be that employers will look more quickly at terminating due to long term illnesses.

Organisation of Working Time Act – Opinion of the Advocate General

In Case C-266-14 the Advocate General issued an important decision relating to peripatetic workers. That is to say workers who are not assigned to a fixed or habitual place of work. The Advocate General has held in the opinion that time spent travelling by an employee from home to the first customer designated by their employer and from the last customer designated by their employer to their home constitutes "working time" for the purposes of the EU Directive being Directive 2003/88/EC.

In the particular case technicians were employed by two undertakings to install and maintain security equipment in homes and in industrial and commercial premises located within an area assigned to them. These workers use a company vehicle in which they travel every day from their homes to the place where they are to carry out the installation or maintenance of security systems so as that they use the same vehicle to return home at the end of the day. The technicians are also required to travel at least once a week to the offices of a transport logistics company near where they live to pick up equipment, parts and material needed for their work.

The Advocate General has stated at paragraph 31;

"The definition of "Working Time" for the purposes of point (1) of Article 2 of Directive 2003/88 is based on three criteria which in light of the case law of the Court it appears necessary to regard as cumulative

(i) a spatial criterion (to be at the workplace);
(ii) an authority criteria (to be at the disposal of the employer); and
(iii) A professional criterion (to be carrying out his activity of duties)."

The Advocate General has stated

"To my mind, the failure to take into account as "Working Time", within the meaning of point 1(1) of Article 2 of Directive 2003/88, the time which peripatetic workers spend travelling from home to the first customer designated by their employer and from the last customer designated by their employer to their home is contrary to that Directive, in so far as, in the case of that category of worker the three criteria referred to in the definition laid down in that provision are met".

[The Advocate General stated at paragraph 41

"Being at the disposal of one's employer is to be in a legal situation characterised by the fact that the worker is subject to the instruction and organisational power of the employer, irrespective of where the worker is. In other words it is a question of the time during which the worker is legally obliged to obey the instructions of his employer and carry out his activity for that employer."

The Advocate General went on to state:

"Where peripatetic workers travel from home to their first customer and from their last customer to their homes they are not outside the scope of their employer's management powers. The travelling is done in the context of the hierarchical relationship which links them to their employer." An interesting issue was raised in the case, namely that fear was expressed that workers would take advantage of the journey at the beginning and the end of the day to carry out their personal business. The Advocate General stated that this fear is not sufficient to alter the legal nature of the journey time. The Advocate General stated it is up to the employer to put in place the necessary monitoring procedures to avoid any abuse. The Advocate General stated that whatever the administrative burden the operation of such monitoring involved for the employer is, it is the counterpart of the latter's choice to abolish a fixed place of work.

This is an extremely important opinion of the Advocate General. The full decision of the Court must be awaited but it is unusual that the Court would not follow the Decision of the Advocate General.

On the assumption that the ECJ will follow the view expressed by the Advocate General then this ruling will have a significant impact on the working hours of employees. For example: a van driver who will load his or her vehicle in the evening and will travel home with the vehicle so as to depart in the morning to the first delivery point, will now be held to be working during the travel-time home in the evening and the travel-time from home to their first delivery point in the morning. This is because the employer will determine that this is how the work is to be organised and that while the employee is travelling home in the evening the employer will thus in effect be able to stipulate that the employee must do so by the most direct route, thus it is not time that the employee can dispose of as they wish.

The ruling will have a significant impact on those who are sales persons travelling from their homes to the first customer in the morning and back home in the evening.

It will be interesting to see how this decision will be squared with the National Minimum Wage Act. Section 8 of the National Minimum Wage Act excludes from the calculation of working time any time spent travelling from a residence to a workplace. There are two ways in which this can be dealt with.

The first is that Section 8 of the National Minimum Wage Act will be construed as applying where an employee travels from their residence to a fixed place of work only. The second is that it will apply in a situation covered by the recent opinion of the Advocate General in which case for those of us dealing with employment law we could have a situation where an employee, for the purposes of a claim under the Organisation of Working Time Act, is working over 48 hours a week but, for the purposes of the National Minimum Wage Act could be working less than 48 hours per week. Clearly this is an issue which is going to be litigated upon at some stage and it will be interesting to see how these cases develop.

Weekend Working Common Place in the UK with Negative Impact on Productivity

A recent survey has been undertaken in the UK which found that almost half of employees, namely 47%, who worked Monday to Friday have needed to put in extra hours at the weekend.

The research related to more than 1,000 workers. The research suggested that work was done at weekends for 9.7 million people, in the UK in the last 12 months.

The average number of weekends that people worked extra hours is just 8. However, 14% of those polled said they worked more than 21 weekends in a year to keep up with their workload.

The results are interesting in that it revealed that women find it harder to switch off at weekends, with 38% of female workers admitting that this is an issue compared with 32% of men. This may be because of the perception particularly in macho cultures of the requirement for female workers to be seen or believe they need to be seen to work harder.
Some 66% of full time employees in the UK are not contracted to work weekends. However, large workloads were found to be a major contributor to an ever increasing extended working hours, with 52% of women and 42% of men stating that they used the weekends to catch up on work. What is quite disturbing is that some 13% of employees stated that their employer required them to be on call at all times.

Uncontracted weekend working is a creeping condition in the UK and probably also applies here in Ireland.

The roll of managers is vital in guiding employees so that there is a better understanding of workload requirements and priorities. Weekend working can lead to unnecessary stress, impaired performance and ultimately absence. In the UK and here in Ireland many employees will not have benefitted from proper rest and relaxation in advance of the coming week. An employee is entitled to 35 hours uninterrupted rest at a weekend.

This is the weekly 24 hour rest period which must be preceded by 11 hours being a total of 35 hours.

This is clearly set out in the Organisation of Working Time Act. If the UK survey was replicated here in Ireland it means that some 13% of employees and probably those who are higher paid and at management level potentially have significant claims against their employer.

Employers fail to understand sometimes that these rest periods are there for Health and Safety purposes. The Organisation of Working Time Act is a piece of Health and Safety legislation. It is based on research relating to the rest periods that workers need for the purposes of proper rest which impacts on the level of productivity and safety.

A Macho Work Culture Deters Talented Females

A recent survey in the UK has confirmed that there are gender barriers in certain sectors which are exacerbated by patronising male colleagues.

The survey which was conducted into male dominated sectors in the UK such as the military, construction and breweries found that a “macho” working environment was the biggest barrier to attracting talented female applicants into the sectors.

The survey of 1,000 women showed that the work environment was viewed as more significant than the actual job itself in attracting or deterring female talent.

What was interesting is that the respondents flagged aviation and medicine as the industries they thought were most likely to have patronising male colleagues. Some of us will remember quite a stir which occurred here in Ireland when an issue arose in relation to the sexual harassment of female doctors.

In the area of civil engineering the survey indicated that female workers have to work far harder than their male counterparts to earn respect, to progress and to be trusted technically.

There is no similar survey here in Ireland but it is probable that if a similar survey was undertaken here that similar attitudes would emerge.

The issue of work cultures is extremely important within organisations.

A culture of respect and dignity in the workplace for all is the cornerstone of any successful business. There is no place for a macho culture in the workplace, whether it is in constructions sites or a solicitors office, a hospital or a civil engineering firm.

A macho culture is a barrier for attracting talented females. A business which wishes to succeed needs to attract both male and female workers. A business or an industry which is seen to have a macho culture loses the potential of attracting a significant percentage of the workforce. That is just not good business.

Aggression in the Workplace

Studies have shown that being a victim of aggression, harassment and bullying in the workplace has a significant effect on individual performance. However, new research suggests that it can be just as detrimental to colleagues observing such behaviour.

Witnessing aggression or other inappropriate behaviour at work can affect the well-being of staff. It can heighten work-related depression, anxiety and emotional exhaustion according to a study from the Sheffield University Management School.

The survey which related to employees who have witnessed workplace aggression including everything from physical violence or the threat of physical violence to shouting and insulting remarks. It also included more indirect forms of bullying, such as withholding information and being given an unmanageable workload.

As part of the survey, employees were asked to complete a number of tests straight after witnessing an incident of unacceptable behaviour at work and to then take the test again at a later date. The results showed that participants who had been given support by co-workers and managers had a more positive outlook and felt more optimistic about the workplace. Six months later this group were less depressed compared with counterparts who had not received support.

The survey has shown that work-related anxiety was significantly eased where there was manager support.

Bullying and harassment in the workplace can have a significant impact on performance and that has a direct impact on the performance and profitability of a company. The issue as to how it impacts on those who witness such actions but are not subject to it themselves has not had the same exposure.

For employers, it is important to make sure that bullying and harassment in the workplace is eradicated and that support is there; not only for the individuals who have been subjected to bullying and harassment but also for those who have been witnesses of such inappropriate behaviour.

When you think about it, it is simply just good business. Anything which impacts on the profitability of a company is not good for that company.

Protection of Employees (Temporary Agency Workers) Act 2012

In the case of Patrick Mulholland and QED Recruitment Limited a Judgement was delivered by the President of the High Court on the 13th of March 2015.

The background to the case is that the Appellant was a truck driver and worked as an agency worker as defined by Section 2(1) of the Act.

The case was lost before the Rights Commissioner and before the Labour Court. The matter was appealed to the High Court. Firstly, it was contended that the Labour Court misdirected itself as to the Law as regards a requirement of “universal” as opposed to “general” application in relation to employment conditions and rates of pay. Secondly, that the Labour Court imposed an arduous standard of proof and that the Labour Court fell into error in placing the burden of proof on the Appellant.

This case is important for reviewing the legislation as it applies to agency workers.

The High Court held that a person seeking to rely on the protections offered by the Act must be able to establish that a contractual term, collective agreement or some other entitlement or agreement is in place which they have been denied by virtue of being an agency worker. The High Court held that the Appellant in the case had failed to establish, even on a prima facie basis, that some generally applicable arrangement was in place. In relation to the standard of proof the Court accepted that it was a well established statement by Henchy J. in Kiely v Minister for Social Welfare that Tribunals or bodies exercising quasi/judicial functions are not strictly bound by the rules of evidences or formalities associated with Court run procedures. The High Court stated however that there was no evidence to suggest that the Labour Court imposed an excessively high standard of proof in the present case. The President of the High Court held that on the contrary there is evidence to suggest that the Labour Court accepted undated or one sided evidence from witnesses called to give evidence in support of the Appellant's case. The President of the High Court stated that at the hearing the Labour Court informed the Appellant of the possibility of seeking to have a summons issued to compel the attendance of a member of management from the hirer who could give evidence in relation to rates of pay. The President pointed out that the option was not pursued by the Appellant.

In relation to the burden of proof the President pointed out that while other statutory schemes, such as the Employment Equality Acts, allow for a complainant to establish facts, from which it may be presumed that the discrimination has occurred and which require a respondent to prove to the contrary, there is no such provision in the 2012 Act.

Clearly the issue of the burden of proof in these cases is difficult for any employee to prove unless they have access to payslips, contracts, collective agreements or other agreements with the workers employed by the hirer. What is however interesting in this case is that clearly the Labour Court will consider applications to seek a summons issued to compel the attendance of a member of management from the hirer to give evidence in relation to rates of pay.

This case is important for highlighting that when acting for such employees it may well be necessary to consider such applications.

When issuing proceedings under this Act it also may well be useful to request from the hirer particulars of rates of pay of comparable workers. If this information is not furnished then it will help an employee, that is working for a hirer who is from an agency, to seek to apply to have a member of management produce the relevant information to the Labour Court. When the new Workplace Relations Bill comes into operation there will be provision for an adjudicator even to require individuals to attend and to produce documentation.

The case is reported under neutral citation [2015] IEHC 151

Unfair Dismissal Fair Procedures

The case of Alicia Akinfaye and Tesco Ireland Limited UD630/2012 highlights the fair procedure issue.

In this case the employee was dismissed because there was an issue of the employee while away from work during her Maternity Leave that the employee availed of a large number of vouchers and attained significant discounts off the cost of shopping. The Tribunal pointed out that no evidence was adduced to show that the respondent suffered any loss as the result of the Claimant availing of the coupon/vouchers and the Tribunal was of the view that a reasonable employer would have ascertained whether or not there was an actual loss in assessing any disciplinary action or sanction.

The Tribunal found that the employer was unreasonable in not ascertaining whether any loss was incurred. The Tribunal was not convinced that the Claimant had acted improperly in any way in her interaction with check out staff and that the matter remained that the evidence showed to the Tribuna's satisfaction that there was some misuse of coupons and that coupons and vouchers for one particular product were used to obtain discounts on a different product. The Tribunal held that the claimant was not merely an ordinary employee of the respondent as she was at management level and it was inappropriate for her to be acting in that manner.

They pointed out that while no proof of financial loss was given by the Respondent there was potential for same and also for reputational damage to the company. Furthermore, the Tribunal held that such action was a poor example for staff over whom she had supervisory responsibility.

The Tribunal held that while the company was justified in taking disciplinary action they were not satisfied that the dismissal was fair either substantially or procedurally. They did however hold that the employee had contributed substantially to her own dismissal and in the circumstances awarded €10,000.

This case again highlights the importance of procedures.

The fact that the employer made believe that something wrong was done is not in itself sufficient.

At all stages there must be a fair investigation and the sanction must be reasonable in all the circumstances.

Redundancy - Failure to Follow Proper Procedures can Result in an Unfair Dismissal Award

In the case of Andrey Lisovtsov and Midland Webb Printing Limited UD1641/2013 is a case where the employee went out on sick leave arising out of an injury. While on sick leave the employee was dismissed. The employer was not in a position to demonstrate it had followed procedures to effect a lawful redundancy. The only letter which was presented to the Tribunal was a letter of temporary layoff and not redundancy. The Tribunal held that in those circumstances the employee had been Unfairly Dismissed.

This case highlights again the importance of procedures. If an individual is to be made redundant then they should be notified of same. In addition, they should be given the normal rights to appeal the redundancy. Where an employee is being made redundant it is highly advisable that they are advised on the basis under which they have been selected for redundancy.

Employees' Right to Cross-Examine Witnesses as Part of a Disciplinary Process

The case of Marius Serinas and Lucy Transport Limited case UD1015/2013 is an interesting case in itself but in particular it is interesting that the Tribunal stated:

"The Claimant was not permitted to cross-examine complainants against him. Witnesses have to be cross-examined."

In this case the Tribunal acknowledged that it can be awkward to get a customer to give evidence but where an Employee denied particular behaviour and even denied having been on site at the time of the alleged incident then in those circumstances he would have to be allowed cross-examine.

Disciplinary Hearing Invitation

Consistently issues arise in relation to what should be in a disciplinary hearing invitation.

It is absolutely clear from recent employment law decisions that the EAT is interested in the procedures used by an employer in dismissing an employee to a significant extent. This means it is essential for employers to keep a full and accurate record of the procedure used in all communications. This includes the information provided to an employee after an investigation has been completed and before a disciplinary hearing takes place.

An employer needs to be in a position to show that the employer provided fair procedures to an employee before any dismissal.

When calling an employee to a disciplinary hearing it is important that an employer sets matters out clearly in writing.

We are consistently asked about what should be in an invitation to a disciplinary hearing and therefore we thought it might be useful to set out a sample letter.

(Addressee)
(Date)
Hearing – Invitation to Disciplinary Hearing

Dear (employee name)

I am writing to inform you that you are required to attend a disciplinary hearing at (place) on (date) at (time).

The purpose of the hearing is to consider an allegation against you of (misconduct or gross misconduct – delete as appropriate) against you.

This allegation is that (you must set out specific details of what the allegation is).

The basis of this allegation is (give an overview of information obtained as a result of any investigation into the allegation. This should be sufficient to enable the employee or anybody reading the letter subsequently to clearly identify what issues will be the subject of the disciplinary hearing).

I am attaching a summary of the findings of the investigation. This sets out further details of the allegations. (I am attaching copies of relevant witness statements and other documents which may be used or referred to at the disciplinary hearing – these should be fully set out). You are entitled to call any relevant witnesses to the hearing. Please let us have their names as soon as possible and no later than (date). If there are any further documents you wish to be considered at the hearing please provide copies of these as soon as possible. If you do not have these documents please let me know what these documents are so that they can be obtained.

The hearing will be held in accordance with the disciplinary proceeding which is attached. (It is vital that a copy of the disciplinary procedure is attached. The fact that the employee may have received a copy of the staff handbook previously is not in itself sufficient. A further copy should always be furnished of the disciplinary procedures. If you do not have a disciplinary procedure then a copy of the Code of Practice on Grievance and Disciplinary Procedures should be attached and you should set out the procedures which will apply at the hearing.)

If it is found that you are guilty of misconduct or gross misconduct we may decide to (issue you with a written warning, a final written warning or dismiss you with notice, without notice or pay in lieu of notice.)

The hearing will be conducted by (insert name of person who will conduct the disciplinary hearing). The following people will also be present (set out their names in full). You are entitled to bring a fellow employee or a trade union representative to the meeting in accordance with our disciplinary procedure. If you wish to bring a companion who is not a fellow employee please let me know their name as soon as possible. (Where the employee is on suspension on pay pending the outcome of the disciplinary hearing you should state – your suspension on full pay will continue pending the outcome of the disciplinary hearing).

Please confirm you have received this letter and that you will attend at the time stated above. If for any unavoidable reason, you or your companion cannot attend at the time please contact me as soon as possible. If you have any specific needs at the hearing as a result of a disability or if you have any other questions please contact me as soon as possible.

Your sincerely,

(Name)

(Position within the company)

An issue which also arises regularly is whether or not an employee is entitled to be represented at a disciplinary hearing by a Solicitor.

The Supreme Court in the case of Alan Burns and Another –v- the Governor of Castlerea Prison and Another delivered on 2nd April 2009 is one where the Supreme Court made the following findings.

1. The absence of a reference to legal representation in the rules of the Prison Service did not necessarily preclude a right to legal representation.
2. That even if legal representation was expressly excluded that the constitution might require legal representation in "exceptional cases" irrespective of the wording of any rule, code or conduct.
3. That the issue as to whether legal representation is required essentially boils down to a consideration of whether legal representation is desirable in the interest of a fair hearing.

The Supreme Court approved six factors to be considered in deciding whether a fair hearing would require a Lawyer;

(a) The seriousness of the charge and the potential penalty
(b) Whether any points of law are likely to arise
(c) The capacity of a particular person to present his own case
(d) Procedural difficulty
(e) A need for reasonable speed in making the adjudication which would be an important consideration
(f) The need for fairness between the parties

A case which is sometimes referred to is Vidmantas Stoskus and Goode Concrete Limited 2007 No. 7066P. Neutral citation number 2007 IHC 432 in which case Ms. Justice Irvine on 18th December 2007 stated:

"If the plaintiff had not signed a contract of employment or had signed a contract of employment which was silent as to the disciplinary procedure to be followed in the case of alleged misconduct, then the plaintiff might be in a stronger position to contend that the rules of natural justice and fair procedures should be implied into the agreement so as to entitle him, in the context of his nationality, ability to speak English or other factors, to have a right of legal representation".

What is interesting in this case is that while the Court did hold against the Plaintiff as regards mandatory relief the Court stated:

"It appears to this Court that whilst the Plaintiff may have an arguable case he was entitled, as a matter of natural justice, to fair procedures, to legal representation at his disciplinary hearing. The Court concludes that the plaintiff's case does not amount to a good arguable case and is certainly not one which is "strong" such as would support his application for which this Court believes is truly mandatory relief. In the opinion of the Court the plaintiffs' claims is no more than merely statable".

This is an important statement of law, in that this was an application for an injunction which has an extremely high threshold.

Where an employee requests legal representation at a disciplinary hearing an employer may be in difficulties as regards fair procedures if such a request is refused in a subsequent Unfair Dismissal claim.

To minimise the risk to an employer, employers should exclude the right to legal representation in their contracts and handbooks to maximise their ability to exclude a Lawyer. If an employer does not have such a procedure in their contractual relationships with the employee then it is arguable that the employee who will request legal representation is entitled to it.

By including a specific provision in a contract of employment that there is no right of legal representation the matter is then a matter of private law as opposed to public law considerations.

Where the sanction to be imposed might result in dismissal this must be clearly set out in any letter sent to the employee in advance of the disciplinary hearing. Where dismissal may be warranted then in these circumstances there is a far greater potential that the employee would be entitled to legal representation. Where the disciplinary sanction which might be imposed would not include dismissal then this should be excused from any invitation to the disciplinary hearing and the employer will be in a far stronger position to argue that legal representation is not necessary as the employee cannot lose their employment. If however the result of a disciplinary action could result in demotion or reduction in salary then again there is a stronger argument that legal representation is required.

Where evidence taken as part of an investigation is to be tendered to the employee, the employee must be entitled to cross examine those individuals. Failure to allow a right to cross examination by having those individuals available for the employee to cross examine effectively means that that evidence cannot be used in any disciplinary process.

For employers it is important to:

1. Review contracts of employment as regards disciplinary procedures

2. Ensure that any staff handbook and disciplinary procedure is up to date and complies with fair procedures and the code of practice on Grievance and Disciplinary Procedures as set out by the Labour Relations Commission.

3. That the employer ensures that the employee has signed a contract which incorporates any disciplinary procedure so as to be in a position to claim that the employee has agreed to same.

The issue of fair procedures is consistently highlighted by the Employment Appeals Tribunal and we presume will also be highlighted by the Labour Court when Unfair Dismissal claims are heard by them after the Workplace Relations Act becomes operational on 1st October.

Our sample disciplinary letter should of course not be regarded as legal advice it is simply setting out our view as to what should be included in an invitation to a disciplinary hearing. All practices within any organisation should be adapted to the operational requirements of the organisation and in line with the practices operated within the organisation.

Where disciplinary action could result in dismissal it is always advisable to get advice from a Solicitor who specialises in employment law.

Constructive Dismissal

An employee who brings a Constructive Dismissal case bears the Burden of Proof. In an ordinary Unfair Dismissal case the Burden of Proof is on the employer.

An issue which has arisen relates to non-payment of wages. In the case of Kevin Kilkerr –v- Burke Fabrications Limited (UD470/2013) the EAT held that

"When an employee provides labour and services to an employer it is reasonable for the employee to expect to be paid for its labour and/or services."

The Employee won his case with the EAT ruling that he was justified in resigning his employment from his employer due to the failure on their part to pay his wages.

Where an employer puts in place a deduction in wages, sometimes across the board, without the consent of the Employee then the Employer runs the risk of losing a Constructive Dismissal case if the Employee leaves.

Now in saying this and the following does not refer to the preceeding case, the EAT have held that except in very limited situations an employee must exhaust all avenues for dealing with his or her grievance before resigning. This would in theory mean that the employee would have to go through the entire internal grievance procedures. Would it be necessary for the employee to bring a Payment of Wages claim? This issue has never been addressed by the EAT.

There can be problems with internal grievance procedures. Sometimes employees can feel that they are under significant pressure due to sometimes aggressive and even offensive emails and verbal communications. The problems can become serious, particularly where there is a lack of clear management structure and where the complaints are against a senior member of management.

Employers need to make sure that they ensure that their communications, by way of emails and verbally, by managers including senior managers, is done in an appropriate way with professional verbal communications and email communications.

Employers should ensure that there is a grievance procedure which clearly outlines a valid procedure for dealings with complaints and in particular for those employees reporting to senior managers and/or the owner of the business.

There appears to be a trend developing whereby employees are being put under significant pressure. This could be that we are coming out of a recession and that businesses have extra stresses but do not have the resources to take on additional staff. For those managing such businesses it is important to consider the HR functions within the organisation. If there is no dedicated HR function then it is advisable to have appropriate qualified HR specialists and employment lawyers whom the employer can contact for advice.

Reduction or Deduction of Wages

In the case of Earagail Eisc Teoranta and Ann Marie Doherty and others the issue of a Reduction/Deduction came before the President of the High Court Mr Justice Kearns under Citation [2015] IEHC 347.

In this case there are two interesting aspects.

The first is that the High Court has referred the matter back to the EAT on the basis that the EAT failed to provide adequate reasons for a number of findings.

The decision of the High Court is extremely useful in confirming that Section 5 of the Payment of Wages Act 1991 as regards to Subsection 1 (a), (b), and (c) are not to be taken conjunctively. The President pointed out that the word "or" is expressly used in the provisions and it is clear that each subsection concerns separate instances, which might give rise to an exception to the rule that an employer shall not make a deduction from the wages of an employee. He held that Subsection (b) stated that the deductions are allowable where they are authorised by virtue of an employee's Contract of Employment and this is something the Tribunal should have considered independently of subsection (c).

The President held that the Court was satisfied that the Tribunal failed to provide adequate reasons for a number of other findings. The President held that it is established that the duty to give reasons does not require extensive analysis of every aspect of a complaint and that the "gist" of the basis for a decision is sufficient. The President held that it is not clear how the Tribunal arrived at the determination it did and there is not as much as a fleeting reference to the vital matters such as the reduction or deduction argument or why in this particular case a particular Section of the company handbook was not applicable.

In many Payment of Wages cases the McKenzie decision has been relied upon by the EAT to refuse compensation.

This case is interesting in that in this case the wages of the employees were subject to a reduction or deduction, whichever phrase you may wish to utilise. The relevant element of the decision of the President which is important states:

"The Court is also satisfied that the decision in McKenzie is distinguishable from the facts of the present case in a number of respects. The Court accepts the submission of the Respondents that the remarks of Edwards J in relation to 'Reduction v Deduction' issue were obiter. Furthermore, McKenzie related to the reduction in an allowance payable in respect of Motor Travel and Subsistence. The definition of 'Wages' in the 1991 Act expressly excludes any payment in respect of expenses incurred by the Employee in carrying out his employment and so the findings of Edwards J. that the "RDF allowance" did not come within the scope of a deduction under the Act relates to an entirely different situation to the present case where employees salaries were reduced.

I am satisfied therefore that the Tribunal was entitled to proceed to consider the complaints on the basis that the reduction to the employees wages in the present case may have constituted a deduction in breach of the 1991 Act".

This element of the Decision is extremely helpful in clarifying an issue where there has been quite a lot of dispute in the past as to what the Mckenzie Judgement related to. The McKenzie Judgement related to allowances. The provisions of the Payment of Wages Act specifically exclude allowances from the jurisdiction of the EAT under the Payment of Wages Act.

There have been a number of appeals that went onto the High Court relating to deductions of wages, where it has been held by the EAT that it was a reduction and that the McKenzie Judgment meant that no award of wages could be made. A number of those were overturned in the High Court but there was no written Judgement. It is important to note that this issue in relation to the McKenzie Judgement has now been clarified by the High Court.

In relation to a finding of fact by a Tribunal or the Labour Court the President of the High Court also mentioned a case of Dunnes Stores v. Doyle [2014] 25E.L.R.184 where Mr. Justice Bermingham held:

"Identifying the contractual entitlements of an employee of course involves legal determinations. Where such legal determinations are made by a tribunal then there is the option of having the conclusion reviewed in the High Court, through the appeal on a point of law route. When that occurs and the High Court is asked to consider whether the Tribunal correctly applied the law there is no scope for the doctrine of curial deference".

This confirms that even when there is finding of fact, if that finding of fact involves a legal determination, then that issue itself is open to an appeal on a point of law and there will be no curial deference.

This Decision of the President of the High Court is an extremely important Decision and it is one that any and all employment solicitors and barristers will be reviewing. It is a very important Decision and for those interested in Employment Law I would recommend that it is a decision which is read. Copies are available on the Courts website courts.ie

Parental Leave

It is becoming quite common that due to children being on summer holidays that parents will look to avail of Parental Leave to look after the children during these holidays. For some working parents it is often a position where they have little or no option but to seek this leave. This can be because of the significant cost of childcare in Ireland and the lack of affordable short term child care options.

For employers, of course the challenge with such leave is not having the employee in the workplace.

It is important that employers have a clear policy which is communicated to employees on how parental leave is to be applied for and the criteria which will be considered in postponing parental leave.

It is important for employers to understand what parental leave actually is.

The Parental Leave Act 1998-2013 allows for up to 18 weeks of unpaid leave from work to both men and women for each child to care for their young children. Normally to avail of the leave the child must be under the age of 8 years of age. There are exceptions.

The leave must be taken in a continuous block for 14 weeks or two separate blocks of at least 6 weeks. This is the legal entitlement which the employee has.

Some employers will agree that the leave will be taken on a different basis; namely a number of days in any particular week or perhaps a month off in the summer over the course of a number of years or some other arrangement. For an employee who has for example two children under the age of 8 years of age then both parents will have a total of 36 weeks which can be taken.

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Postponement of Leave

This issue is often raised by employers.

An employer is allowed to postpone leave on one occasion for business need reasons. In very limited circumstances the employer can postpone the leave for a second time due to the volume of work. Before postponement the employer however must first consult with the employee and give a written reason for the postponement. There is no right for an on-going postponement. Therefore, for example if an employee requested 9 weeks off in July and August 2015 the employer could postpone it. However, if the employee puts in a subsequent request for the same period in 2016 the employer will have to show that there can be a postponement due to the volume of work. However, come 2017 the employee will be entitled to take that block and there is nothing the employer can do about it.

Applying for Parental Leave

An employee who wishes to claim parental leave must make a written request to the employer. This request must be at least six weeks before the intended leave date. It must set out the length of time-off requested and the expected return date. The employee must then sign a written document with the employer four weeks before the leave is due to start.

What can the Leave be used for?

The employee must use the time off to care for his / her children. If this is not the case then the employer has the right to cancel the leave. It is important as part of any parental leave policy that the employer sets out that any abuse of the parental leave provisions is a disciplinary matter and may result in dismissal. The leave is there to enable the employee to care for a child or children. It is not there for the employee to take an extended holiday with the children being left with a grandparent. There is of course nothing to stop a parent during the parental leave taking the children on holidays but the use of parental leave is there to care for the children. It is time to be used by the parent with their child or children and not for any other reason.

KEEPING IN TOUCH

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Returning to work

It is sometimes forgotten that an employee returning from parental leave does not have an absolute right to their own job. The employer can place the employee in a suitable alternative position.

On the return to work the employees often request a short term change in work hours. There is absolutely no obligation on an employer to agree to this.

The Future Developments

In 2015 the Minister for Children launched an inter – departmental group to examine the cost and quality of early year and school age care. It is likely that this is going to result in an extended debate on the issue of parental leave. Saying this, there is no proposal at the present time for new legislation but we would anticipate that such legislation is likely to arise.

Hussein and the Labour Court
And by Order Mohammad Younis
Citation 2015 IESC 58

On 25th June the Supreme Court gave a decision in the above case. What is widely being reported is that the Court awarded the chef in this case €92,000 for unpaid wages. However, this case is an extremely limited decision of the Supreme Court on specific legal issues.

In this case the employee brought claims under the Terms of Employment (Information) Act 1994, the Organisation of Working Time Act and a claim under the National Minimum Wage Act. These claims were brought on 30th April 2010. On 12th October 2010 the Rights Commissioner held a hearing. On 31st March 2011 a decision was made. Mr. Hussein did not pay the notice party being Mr. Younis. The Supreme Court pointed out that under Section 27 of the Organisation of Working Time Act and Section 27 of the National Minimum Wage Act there was a right of appeal. This appeal was not utilised. On 7th December 2011 and 9th September 2011 the Labour Court issued decisions under the 1997 Act and the Act of 2000. In February 2012 Mr. Younis made an application to the Circuit Court by way of Notice of Motion for enforcement of the award. In March 2010 an application was made by way of Judicial Review in respect of the two decisions of the Labour Court.

The High Court held that Mr. Younis had no standing to invoke the protection afforded by the employment legislation.

The Supreme Court pointed out that it must be underlined and we regard this as an important point that no application was made and no leave granted for Judicial Review of the decision of the Rights Commissioner who awarded the sums in question to Mr. Younis. The Supreme Court held that the order of the High Court was limited to setting aside the decisions of the Labour Court. The Supreme Court held that the High Court appears to have concluded as a matter of fact that Mr. Younis did not have a work permit and that he was not entitled to make the claims. The Supreme Court has held that the alleged illegal nature of the contract appears to be based on a finding fact by the High Court that there was no work permit. Any such finding of fact by the High Court constitutes a finding on the merits. The Supreme Court held that the Rights Commissioner made no such finding of fact and that it was not open to the High Court in Judicial Review to make a new finding of fact on the merits in a Judicial Review case and in any event the decision of the Rights Commissioner was not the subject matter of a Judicial Review. The Supreme Court pointed out that as regards the decisions of the Labour Court which were the subject of Judicial Review it was not within the statutory function of the Labour Court under these sections to consider or make any finding of fact concerning the merits of the Rights Commissioner Decision. The Supreme Court held accordingly it did not and could not make any finding of fact relating to the merits of the claim before the Rights Commissioner and that the application to the Labour Court was simply an initial step in the enforcement procedures. The Supreme Court pointed out that the Labour Court had no power to review the decision of the Rights Commissioner. The Court took some time to set out what the statutory function of the Labour Court is when a decision has not been appealed and has not been carried out.

The Supreme Court held:

“Judicial proceedings are not, in any sense, an appeal from the decision concerned. They are concerned with reviewing whether the decision maker has acted within his or her powers and in accordance with those powers.”

The Court went on to state:

"In this context I do not think there is any basis for suggesting that the applicant would be entitled to have the decision of the Labour Court set aside Ex Debito Justitiae. This is because the form and subject matter of the Rights Commissioner decision, the fact that Judicial Review of that decision is outside the scope of these Judicial Review proceedings, these Judicial Review proceedings in which leave to bring these proceedings, leave having been sought and granted only in respect of the Labour Court decision."

The Court concluded that for the reasons stated the Labour Court cannot be said to have erred in Law. The Court set aside the decision of the High Court.

This is a very technical decision of the Supreme Court. It deals with the process of Judicial Review.

This case might have been different if Mr. Hussein had sought a Judicial Review against the decision of the Rights Commissioner or if Mr. Hussein had appealed the decision of the Rights Commissioner to the Labour Court. If Mr. Hussein had appealed the decision to the Labour Court then there would have been a finding of fact by the Labour Court as such decisions are a De Nova hearing. Mr. Hussein did not either appeal the decision or include the Rights Commissioner as part of any of the Judicial Review proceedings. This decision of the Supreme Court highlights the importance to an employer if they are dissatisfied with a decision of the Rights Commissioner, to appeal matters to the Labour Court or, as appropriate, to the Employment Appeals Tribunal currently. Where an employer fails to do so then, as part of the implementation process, the implementing bodies being the Labour Court or the EAT, have a function only to ascertain only whether such a determination was made.

Thereafter in the implementing procedure to either the Circuit Court currently, or in certain circumstances, to the District Court and the District Court going forward post 1st October. The Court will not be able to review the merits of any decision by a Rights Commissioner or in future an adjudicator.

The importance of appealing decisions where an employer has a concern about same or does not agree with the decision cannot be overstated and certainly this recent decision of the Supreme Court highlights this fact.

UK and Zero-Hour Contracts

In May the UK Government introduced new Legislation whereby employers who do not guarantee staff any hours of work but prevent them from working for another employer could face legal ramifications from the 26th of May 2015 under the Small Business Enterprise and Employment Act.

The ban on the use of exclusivity clauses in Zero Hour Contracts was proposed by the last UK government after a lengthy public consultation.

In the UK 83% of respondents to the consultation voted in favour of a ban on exclusivity clauses.

In the UK the CBI director for employment and skills Neil Carberry said that the banning of such clauses was a

"Proportionate response to tackling examples of poor practice."

There is a view that certain rogue employers will try to circumvent the ban.

In Ireland the issue of Zero Hour Contracts is under review by the Government and it will be interesting to see whether a similar approach to exclusivity clauses will be introduced here in Ireland.

However, in relation to the UK Legislation it has already been subjected to a significant amount of abuse.

The rogue employers have, in the UK, now moved to declare significant numbers of individuals as "self-employed"; this effectively takes the employee out of the protection from the Zero-Hour Legislation.

However, for an employer to avoid the UK Legislation it is not really that relevant.

While employers cannot enforce exclusivity clauses the UK Legislation is completely toothless. If an employer, in the UK decides to operate the policy of reducing or not offering hours to those who work elsewhere then there is absolutely nothing that a UK worker, on a Zero-hour contract can do about it.

There is no penalisation provision like there is in the Irish Working Time Legislation. Effectively, the UK Legislation has no protection for an employee as soon as the staff member lets their manager know that they had worked elsewhere, in that their manager can simply reduce their hours or cut them altogether.

The banning of Zero-Hour Contracts in the UK could be regarded as a perverse joke. It looks good. In reality it does nothing. The flexibility of Zero-Hour Contracts which will allow employers to effectively reduce or stop giving work to a worker who takes up work with anybody else means that for most employers they won't be unduly troubled by the new laws.

The UK Government has stated that they will be able to use secondary legislation to create a route for redress for any individual who's employer ignores the ban but has yet no such secondary legislation has been introduced.

It is going to be interesting to see in Ireland how the Irish Government deals with the issue of Zero-Hour Contracts and whether the penalisation provisions which would apply to the Organisation of Working Time Act (OWTA) will be applied to any new Zero-Hour Contract Legislation introduced here in Ireland.

The UK Zero-Hour Contract Legislation does not apply to workers who earn more than STG£20 per hour. That is quite a novel approach in that it is effectively over 3 times the National Minimum Wage. If such a clause was applied here in Ireland it would apply to workers who had earned more than €25 an hour, which on an ordinary 35 hour week would be equivalent to a salary of somewhat over €45,000. Effectively, it excludes more senior individuals. There is every reason why any new Legislation in Ireland could exclude individuals on more than €25 per hour.

It will be interesting to see how matters develop in Ireland.

French Employees may compete with an Employer during Paid Notice Periods.

In France, employees are entitled, normally, to a number of months notice upon resignation or dismissal.

In France an employer may decide that the Employee will not work during all or part of that Notice Period. The Employer must, however, pay the Employee during the entire Notice Period.

Even though the Notice Period has not ended, as soon as the Employee stops working he or she is free to start working for any other employer.

The French Supreme Court has recently confirmed that, during a Notice Period an employee is free to work for a competitor, except where he or she is banned by a Non-Compete Covenant. This decision issued on the 6th of May 2015.

EU Information and Consultation Obligations

The European Commission has commended on a consultation process for the possible consolidation of the Directives relating to information and consultation obligations across Europe. This would relate to collective redundancies, transfers of undertakings, along with European Works Councils.

The most notable defect identified is the disparity in the definitions of what 'information' and 'consultation' actually mean in different circumstances. This could lead to a revision of each Directive separately or a recast of the existing Directives into a new consolidated Directive.

No Pregnancy in the Workplace Policy

Could anybody really have such a policy? The answer is yes. In the US a Texas Church is now a little short of $75,000 lighter in their church funds after a federal judge determined that having and enforcing a "no pregnancy in the workplace" policy, which prohibited the continuing employment of any employee who became pregnant, violated the Civil Rights Act of 1964.

We simply raised this case to highlight that there are times when for the safety of a pregnant employee such an employee can be placed on Safety Leave. However, it must be noted that to do so the Employee must be paid their normal wages for 1 month. Before doing so, an appropriate Health and Safety assessment should be carried out by a person who has the appropriate qualifications.

Sick Leave in Philadelphia

The issue of paid Sick Leave in Philadelphia came into play on the 13th of May 2015. An employee who works 40 hours or more a year can earn for each 40 hours 1 hour of paid Sick Leave.

The maximum number of paid time which an employee can claim in a year is 40 hours. The employee must have worked for the employer for a minimum of 90 days before any paid Sick Leave can be claimed. It covers not only paid time off to cover where the employee has their own health issues but also to care for a family member.

The new law in Philadelphia is interesting. It only applies to employers who have more than 10 employees. For employers with 9 or less employees they can continue to provide unpaid sick leave.

The new Legislation provides that if there is any retaliation against an employee for having claimed paid Sick Leave then claims can issue to the State Agency responsible for same from the 15th of September of this year.

The issue of paid Sick Leave being limited to larger firms, and I appreciate firms of over 10 might not be regarded by some as larger firms, would exclude, if it was applied here in Ireland, a considerable number of small employers for whom paid Sick Leave would be a massive cost.

It is quite a novel approach as to how to deal with Sick Leave.

Au Pairs

The Migrant Rights Centre has estimated that up to 20,000 families are turning to au pairs who are paid about €120 a week as a cheaper form of child care.

Live-in au pairs are supposed to do up to 30 hours of light housekeeping and baby-sitting in return for average pocket money of around €120 a week.

According to recent estimates, a crèche place for one child now costs around €1100 a month and a live-in employee would cost over €1600. However, a live-in au pair can cost as little as €480 per month.

The Minister for Jobs, Enterprise and Innovation has confirmed that all individuals legally employed on an employer-employee basis are entitled to legal protection. In certain cases the Labour Court has found that an au pair has the status of an employee. Where a person is deemed to be an employee the cost of an au pair working 30 hours a week will rise from €120 to €259.50 together with PRSI. The law only permits a maximum deduction of €54.13 per week for room and boarding. This means that families using au pairs as an alternative to a crèche could see a significant rise in the cost of child minding.

It is very unfortunate that families may be turning to effectively the exploitation of individuals as an alternative to using a crèche.

It will be interesting to see how many claims under the National Minimum Wage Act may issue as a result of the Migrant Rights Centre of Ireland highlighting this abuse. In addition to a National Minimum Wage Claim, claims might also issue under the Terms of Employment (Information) Act in certain circumstances and also under the Organisation of Working Time Act in respect of Public Holiday Pay and Holiday Pay. For both of these, compensation of up to two years' wages can be awarded. This can be a significant sum as it would be based on the National Minimum Wage.

Equality – Disability

In the UK case of Donelien –v- Liberta UK Limited UKEAT/0297/14 it was held that the duty to make reasonable adjustments and not to discriminate against a disabled employee only arises where the employer has actual or constructive knowledge of the disability. In this particular case the employee had been absent from work for 128 days in the leave year for a variety of reasons. She was referred to an occupational health service, asking whether there was any underlying medical condition, with the conclusion that she was not disabled. It was held that the company had done enough to avoid being fixed with constructive knowledge of her disability. Although the employee was not disabled at the time of the report she was disabled at the time she was dismissed. However, although the company did not follow up with further questions it had done enough to avoid liability.

This case highlights the importance of employers undertaking occupational assessments. It equally is important for employees to notify employers at the earliest date possible when they have a disability.

Slips and Falls

It is an unfortunate fact that many people will suffer an injury on another person's premises. When this happens it is important to firstly establish who is the occupier and the owner of the premises. Secondly it is important to establish if that person owed you a duty in respect of the injury or damage caused to you.

The Occupiers Liability Act is the law in Ireland which sets out the rules in relation to the recovery for injury or damage suffered as a result of a dangerous state of an occupier's premises.

In a Court case the level of control which a person exercises over a premises has to be examined. This is to work out if it is reasonable to impose upon that person a duty towards you in respect of a particular danger as a result of which you suffered an injury. If there is more that one occupier than the test has to be applied to each occupier. Dangers are present due to the state of the premises.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

What happens if you are a visitor to a premises?

Visitors are defined in the legislation as a person who is present on the premises with permission or by invitation of the occupier. This will include the occupier's family or any person ordinarily residing in the premises or present for social reasons.

What does this mean in practice?

In practice if you have a slip or fall in a shop you will be treated as a visitor. If you go to a house and have a slip and fall you will be treated as a visitor. If you go to a social function and you pay to go in or are invited to a party on the premises you will be deemed to be a visitor.

What duty of care is owed to you as a visitor?

An occupier of a premises has a duty to take reasonable care in all the circumstances to make sure that you, as a visitor, do not suffer any injury due to a danger existing in the premises.

The Courts apply a reasonable standard of care.

The Courts will look at the level of care you are expected to exercise for your own safety. However, the Courts will look to see whether it was reasonable that steps could have been taken to prevent any injury.

What happens if I suffer an injury due to a slip or fall on premises used for recreational purposes?

When you are on a premises with or without permission or invitation you must be on the premises free of charge. This would not include a small fee for parking. It must be for the purposes of recreational activity. This would include such matters as sports activities, visiting historical sites or buildings. A duty of care is owed to recreational users.

An occupier of premises owes a duty to avoid injuring recreational users intentionally. This means they must avoid acting with reckless disregard for your safety. Reckless disregard will include a number of factors such as whether the occupier knew that a danger existed and that you were likely to be near it and the case you were expected to take for your own safety and any warnings given in respect of the dangers.

What happens if I am a trespasser on premises?

Even if you are a trespasser on premises, occupiers of premises may be liable for an injury suffered as a result of intentional or reckless disregard of the safety even of a trespasser.

Medical Negligence Cases

At the present time such cases are managed in the Court in the same way as any other Personal Injury case. It is to be noted that in 2010 a working group of medical negligence and periodic payments proposed the introduction of pre-action protocols in case-management, similar to those in operation in the UK, in a bid to reduce costs and delay.

The programme published by the government in Autumn 2014 indicates that heads of bill for this Legislation are due in 2015.

Pre-Action protocols encourage a full exchange of information to ensure that the parties have the clearest possible view of the others position at an early stage. This enables the two sides to agree a settlement before commencement of proceedings and is designed to avoid litigation. In the UK the protocols provide for a letter of claim, response exchange of essential documentation, negotiations and alternative dispute resolution and cost penalties.

In Ireland for such protocols to be workable there would need to be an extension of the Statute of Limitations or the stopping of the clock at a pre-action stage. This would be similar to how the Injuries Board currently operates.

If case management procedures are to be brought in then this would require rules regarding the running of a split liability/ quantum trial, rules relating to containing costs for example the limiting of the number of experts and the rules on offers to settle.

The issue that would then also need to be looked at is whether, if these cases ultimately need to go to trial, whether it is going to be necessary to serve the appropriate notices on the Injuries Board. If case-management procedures are to be brought into place then they will be as part of the Court System rather than as part of the system operated by the Injuries Board.

There is a view which has been expressed that the benefits to the Administration of Justice and the Public in having public vindication of victims and their families and accountability of health professionals in exposing unacceptable medical practices should not be put aside in favour of obtaining a faster system. Some have argued that medical negligence cases have resulted in greater safety procedures being put in place in hospitals and have raised the awareness of patients of their rights.

This is not something that we would have a difficulty with if protocols, similar to those which apply in the UK, were brought into place in Ireland. The costs for a family in bringing a Medical Negligence case are currently significant. A system which reduces the complexity of matters for patients in bringing claims is one we would welcome.

In Medical Negligence cases it is often the defendants who drag the case on to the door of the Court where, if proper case management procedures were in place, cases would have settled earlier.

The High Court has recently identified the issue of periodic payment orders which has been raised by the High Court on a number of occasions in the past. New Legislation to deal with periodic payment orders does need to be addressed sooner rather than later. While large lump sum figures get the front pages of the papers, the reality on matters is that those family members having to deal with an individual who has suffered serious injuries with ongoing medical treatment and caring issues which will have to be dealt with over many years have the ongoing worry of whether there will be sufficient funds there to look after the individual. Periodic payments would resolve a lot of these problems.

Avoiding Car Accidents

Distracted driving puts everyone at risk. A recent survey has found that one in four car accidents has been caused by the use of a mobile phone while driving.

The use of a mobile phone, while driving, is going to distract the driver from keeping their eye on the road.

It is very easy for a driver to become distracted. It only takes a second for an accident to happen.

KEEPING IN TOUCH

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In the United States a government survey estimated that some 420,000 individuals suffered some type of injury in an accident caused by distracted driving in 2013 alone. 3100 of these accidents had victims who did not survive the accident.

What constitutes distracted driving?

In recent years, most people most closely associate distracted driving with texting or using a cell phone.

However, distracted driving is considered to be operating a motor vehicle while engaging in any type of behaviour which causes one or more of the following:

(a) Cognitive distraction which takes your focus away from the active driving;
(b) Manual distraction which causes you to remove your hands from the steering wheel; and
(c) Visual distraction, which takes your eyes off the road in front of you.

As you likely know, it is extremely easy to engage in any of these types of distractions at some point while you are driving.

For example, if you have a small child in the back seat and that child starts to cry, you may quickly reach over into a bag on the passenger seat, grab a toy and hand it back to the child. While this action may seem completely routine for any parent in the process, this causes both manual and visual distraction and possibly a cognitive distraction as well. Such a simple task can put your life and the lives of motorist around you into jeopardy along with the life of the child in the back of the car.

Some other forms of distracted driving behaviour include:

(a) Eating or drinking.
(b) Checking a GPS or map.
(c) Texting or emailing.
(d) Talking on the phone or to a passenger.
(e) Personal grooming.
(f) Reading. Yes some people can be seen reading a newspaper in the car.
(g) Focusing on an audio book or podcast.
(h) Changing the radio manually.

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Possibly one of the most dangerous forms of distracted driving is texting while driving.

A survey conducted by the Virginia Tech Transportation Institute found that texting while driving increases drivers crash risk by 23 times.

As a solicitors firm, where one area of specialism which we have is in the area of Personal Injury, we see injuries caused by accidents on a daily basis. We see the suffering they cause. We see the impact on the lives of drivers, passengers, pedestrians and cyclists who have been injured by a car accident. We see the impact on their lives and the lives of their family. We see people whose earning capacity into the future can be significantly diminished.

While we are here to represent individuals who have been injured in a car accident, we support safe driving on our roads.

Here are some simple steps that we think will help reduce accidents:

1. Never text while driving.
2. If you receive a text pull-in, stop the car in a safe place and then check the text.
3. Better still, turn off your phone while driving. You do not need to be available 24 hours a day 7 days a week 365 days a year.
4. If you must have a phone in the car use a hands-free kit but it is better just to turn off the phone.
5. Do not eat or drink while driving. It distracts you. It is better to stop if you need to eat and drink rather than trying to drive and do these.
6. Personal grooming, and reading in the car just should be avoided.

We accept that this advice is probably not going to be possible. Virtually every driver believes that they are a safe driver. We however see a significant increase in car accident claims and approximately 25% of all claims that we see where accidents have occurred have been as a result of a driver of one of the vehicles using a mobile phone while driving.

On-Line Filing – Revenue

On 28 April of this year the Revenue announced an extension of the ROS return filing and payment date for certain self-assessment Income Tax customers and for those liable to pay Capital Acquisitions Tax.

For those filing their 2014 Form 11 Return and who make the appropriate payment through ROS for

- Preliminary Tax for 2015, and
- Income Tax balance due for 2014
  the due date is extended to Thursday 12 November 2015.

For those who received gifts or inheritances, with valuation dates in the year ending 31 August 2015, who make the returns and the appropriate payment through ROS the due date is also extended to the 12th of November 2015.

To qualify for the extension customers must pay and file though ROS.

Is an Injury to Feelings Taxable?

This may sound strange. But it has arisen in the case of Timothy James Consulting Limited –v- Wilton UKEAT/0082/14. In this case the UK EAT found that an award for injury to feelings was not taxable. This decision of course does not bind the UK Revenue. This is in conflict with the decision in Morrthy –v- HMRC [2014] UK FTT 568 which held that compensation for injury to feelings was taxable as a termination payment if it was made in connection with the termination of an employment. That decision is under appeal.

Disclaimer

This publication does not purport or claim to give legal advice. Before acting or refraining from acting on anything contained herein legal advice from a Solicitor regulated by the Law Society of Ireland should always be obtained.