Introduction *

Welcome to the May 2016 issue of Keeping in Touch.

March and April have been both busy and exciting times for this firm. On 24 March last Richard Grogan was nominated for the Sole Practitioner/Sole Principal of the Year for the Irish Law Awards 2016. The awards ceremony will be held on 6th May.

On 12 May next Richard will be presenting a paper on the Organisation of Working Time Act to the Employment Law Conference 2016.

On 13 May next Richard Grogan will be presenting a Law Society of Ireland Skillnet Course on the Workplace Relations Act 2015 to the Leitrim Bar Association, Longford Bar Association, Roscommon Bar Association and Sligo Bar Association in Carrick –on-Shannon.

On 24 June Richard will be presenting a day long course to CMP Training on the Workplace Relations Act and its practical aspects including the presenting and defending of employment law claims.

In the Spring Issue of the Parchment being the official publication of the Dublin Solicitors Bar Association an article by Richard on the Unfair Dismissal legislation entitled "Traps in Unfair Dismissal Cases" was published.

In this issue we cover,

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- Employers Obligation to Maintain and Produce a Register of Employees
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- A Commentary on the case of Martin v. Dunnes Stores, (Dundalk) Limited
- A Commentary on the case of Kelly and Lackabeg Limited relating to employers obligations to keep a premises clean.
- A Commentary on the effect of Tyres and their impact Road Traffic Deaths
- Accident Claims by Passengers
- Cyber Crime Legislation
- Local Property Tax Guidelines on the Revenue Website
- Bus Rail and Ferry Passes
- Pension Adjustment Orders
- The Companies Act 2015 Changes regarding the disclosure of Directors addresses
- Directors Compliance Statements
- The Case of a Solicitor being Negligent when sending a trainee to Court to assist Counsel

As this firm is involved in Employment Law, Personal Injury work and Tax work we have tried to cover all these areas in our latest issue. Our approach is not simply to produce this newsletter but also to give our commentary on cases and developments which are occurring. We hope that you find this newsletter useful. All comments are just our opinion. Before acting or refraining from acting on anything contained herein appropriate legal advice should be obtained from a solicitor.

We are delighted with the positive feedback which we have been receiving in respect of our newsletters and thank you for these.

Finally we would like to congratulate Michelle Moran who has been appointed a Senior Associate in the firm, heading up our Personal Injury practice.

New traps and not so new traps in Unfair Dismissal Cases

Whether acting for an employee or an employer in Unfair Dismissal cases the provisions of Section 14 of Unfair Dismissal Act 1977-1993 should never be underestimated.
Section 14 (1) provides that an employer shall not later than 28 days after an employee enters to a Contract of Employment give the employee a notice in writing setting out the procedures which the employer will observe for the purposes of dismissing the employee. If this is not done it is important, before any disciplinary process takes place that the disciplinary procedures are set out. Failure to provide the employee with disciplinary procedures may now result in the dismissal being deemed unfair. The employee should have a right to an initial investigation, and appeal, a right to representation and most definitely a right to all documentation and witness statements that the employer will be relying upon as part of the disciplinary process.

One issue which is constantly catching out representatives of employer is Section 14 (4) as inserted by the Unfair Dismissal (Amendment) Act 1993. Where an employee is dismissed the employer shall, and it is prescriptive, if so requested furnish to the employee within 14 days of a request particulars in writing of the principle grounds for dismissal. In an Unfair Dismissal case subsequently other grounds can, if they are substantial grounds, be taken into account. There is no penalty for an employer failing to respond. However, where

an employer does not respond an inference can be, and most probable will be, drawn from the failure of the employer to respond.

In Unfair Dismissal cases the provisions of Section 14 are often overlooked. It is a very useful procedure by an employee to utilise before proceedings issue. Because of the fact that, under the new procedures, an employee must set out particulars as to their claim, this Section may be used more often. If an employee furnishes a request and no response is furnished within 14 days then the employee has an important option. The employee can simply lodge a claim which states:

"I was unfairly dismissed. I made a request under Section 14 Unfair Dismissals Act 1977-1993 which the employer has refused to respond to. I therefore have not been advised, in accordance with law, of the grounds of my dismissal".

That will be more the sufficient for the employee to claim that they have made a valid complaint. In cases where the employer will be contending that the employee abandoned the job or resigned a failure to respond to Section 14 request, particularly where the employee claims that he/she was dismissed may well be treated on the basis that any reasonable employer would, in those circumstances, have responded immediately setting out that it was a resignation or an abandonment of the position. For colleagues who go through the Workplace Relations Commission and have a matter dealt with by an Adjudicator and wish to appeal it should be noted that the Labour Court requires the party appealing to lodge a detailed submission relating to their claim within three weeks of lodging the appeal. It is not three weeks form the request. It is three weeks from lodging the appeal. Therefore colleagues lodging appeals need to carefully consider getting all documentation in place for furnishing to the Labour Court. This would include an outline of all the relevant facts. It would include particulars as to the names of witnesses and the evidence that those witnesses are going to give. It would not be sufficient to simply lodge an appeal in broad terms. Detailed submissions will be required. The party responding to the appeal must also be given a copy and evidence must be furnished, to the Labour Court, that a copy of the appeal has been served on them or their representative. The party responding to the appeal will be written to by the Labour Court and given three weeks to lodge their paper work. Once appeal documentation is

received by the party who is not appealing immediate step should be put in place for detailed submissions to be prepared along with lists of witnesses and the evidence of those witnesses are going give.

It should be noted that it would not be sufficient to simply set out matters in general terms and to state that further and better particulars will be furnished at a later stage. You are required to set out your full case.

The Labour Court made it very clear that there will be no ambushing. Evidence to mitigate loss will be required from the employee. Employers would be required to set out all documentation relating to disciplinary procedures, how they were applied in practice and all documentation relating to the disciplinary process.

For colleagues dealing with Unfair Dismissal cases there is a significant front loading of work to be done. Cases will be dealt with before the Workplace Relations Commission hopefully within twelve weeks of claims being lodged. Decisions will issue in future within eight to ten weeks. Appeal will be heard by the Labour Court very quickly. The days of either lodging a claim or simply responding and waiting until the case comes on for hearing and then looking to start preparing your documentation for exchange on the day is no longer an option. Front loading of work on cases will require significant amount of work to be done well in advance of the hearing and furnished to the other side. Colleagues acting for employers will now need to consider, because of the cost involved in preparation of cases for hearing, the issue of an early settlement. Employers will need to aware, as well as employees, that the option for reinstatement, which was not really an option when an employee have been out of work for two years waiting for their case to come on for hearing, will now be a realistic option for an Adjudicator or the Labour Court. If an employee opts for reinstatement as a tactical move on the claim form they may well find themselves in a situation of getting reengagement with no back pay rather than compensation. The converse is that if the employer opts for compensation as to preferred option where an Adjudicator or the Labour Court determine that the actions of the employer were unreasonable and that the employee should get their position back, employers may well find that they end up with a reinstatement decision requiring the back payment of wages to the date of the dismissal and having to take the employee back. If taking the

employee back is a realistic option the employer should be notifying the employee through their representative if they have one or directly if they do not that the employer is prepared to reengage the employee. If the employee has opted for reinstatement they will need to consider very carefully taking up the positon under protest and letting an Adjudicator/the Labour Court determine whether it should have been reinstatement. If the employee has opted for compensation they may find it more difficult unless an Adjudicator or the Labour Court confirms that trust and confidence have been completely lost to justify not accepting reengagement and therefore that their loss would crystalize when the offer was made to reengage them.

We are now in a completely new environment relating to Unfair Dismissal cases. Employers are going to need to react very quickly and particularly to Section 14 requests. Equally employees are going to have to know that cases are going to come on quickly and that hard choices may have to be made at relatively short notice.

Because matters are now so front ended there is going to be a cost issue. There is going to be a considerable amount of work which is going to have to be undertaken virtually immediately whether acting for an employer or an employee. Detailed and comprehensive instructions will need to be taken on whichever side you are representing. Once a claim is lodged immediate action and work is going to have to be undertaken. This will be a cost issue which those wishing to have legal representation will have to address at the start. I would caution colleagues who are undertaking Unfair Dismissal work to read the Labour Court guidelines on the Workplace Relations Commission website along with the Workplace Relations Commission guidelines. Failure to comply with these could have a negative impact on your client. This is therefore a risk issue which colleagues must be conversant with.

There are traps there for an unwary and I hope this article will help avoid the traps.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Unfair Dismissal and Applying Fair Procedures

The case of Nurendale T/A Panda Waste and Robert Burke involved an employee who was involved in the collection of refuse. It was contended by the company that collections were being made which were not being returned to the employer, which resulted in financial loss to the business and constituted gross misconduct. The activities complained of, by the employer were admitted by the employee. The employee contended that a named individual who was a brother of the principal shareholder of the company was the instigator and that no action was taken against him. As part of the investigation an independent individual is recorded as referring to this person who is referred to in the Decision as "JW" and "Mr. Panda"

The Labour Court concluded that there was no issue but that the employee had engaged in unauthorised collection of waste for personal gain. The Court states that viewed in isolation this could undoubtedly amount to gross misconduct. However, in reaching its Decision the Labour Court took account of the fact that the company took no account of the involvement of JW in initiating and participating in the arrangement. The Court stated there was ample evidence to indicate that JW was the instigator of the enterprise giving rise to the dismissal. This is what the employee maintained throughout the investigation and the disciplinary process. The Court held that his version of events was collaborated by Mr. K who has told an investigator from the company of this fact. The Court pointed out that this was regarded by the respondent company as irrelevant and no investigation or disciplinary action of any form in response to the allegations concerning JW's involvement was undertaken. The Labour Court importantly stated,

"At its most basic level the requirement of fairness in employment dictates that similar situations be treated similarly. It follows that where an employer acts inconsistently in responding to misconduct, dismissal can be rendered unfair".

The Court referred to the case of Kelly v. Power Supermarket Limited [1990] ELR141 and the case of Bank of Ireland v. Reilly [2015] IEHC241.

The Court found that the reasons proffered by the company for the difference in approach as there was no proof of wrong doing on the part of JW and that his involvement has been sometime previously lacked credibility.

In the circumstances the Court came to the conclusion that the decision to dismiss the complainant was tainted with unfairness and that the employee was entitled to succeed in his appeal. The Court awarded compensation to the employee of €35,000. The Court did take into account the provisions of Section 7(2)(b) of the Act where the employees conduct was taken into account as a contributing factor.

This office did represent the employee in this case.

In this case there had been a management meeting. At the management meeting the Court had requested submissions from both representative's relating to the issue where one employee is dismissed and another employee is not. The case was interesting in that the case management meeting was designed to ensure that both parties had an opportunity of addressing legal issues which arose from one or both submissions which had been lodged. The approach by the Labour Court in the management of the case again portrays the approach of the Court to ensure that neither party is taken short in relation to any legal argument and that both parties get an additional opportunity to make submissions which are exchanged on legal issues which may arise as part of one of both parties submissions. The case can be found under UD15/1. This case was reported in the April 8th issue of the Industrial Relations News

Protected Disclosures

Statutory Instrument No. 464 of 2015 being the Industrial Relations Act 1990 (Code of Practice on Protected Disclosures Act 2014)(Declaration) Order 2015 was made on the 28th of October 2015.

Many employers do not currently have a Whistleblowing Policy in place. Any such policy should be drafted taking account of this Code of Practice.

We will be dealing with this particular Statutory Instrument in greater detail at the Skillnet Seminar in Carrick On Shannon on 13 May.

Post Termination Restrictions

In a UK case of Bartholomews Agri Food Ltd -v- Thornton an employee's contract stated that he could not solicit any customer contracts of the company for six months after his employment terminated. Unusually the restriction provided for the employee to receive full pay throughout its duration. The UK High Court ruled that it was a restrain of trade and was not enforceable. They ruled that the restriction was signed up when the individual was a junior member of staff with no customer contacts. The Court ruled that it was unenforceable at that time and remained unenforceable regardless of the employee's subsequent promotion to a role where it would have been regarded as reasonable. In addition the Court found that the restriction was unreasonably wide as it applied to all the companies' customers and not just those the employee had worked with. The UK Court referred to the case of Pat Systems –v- Neilay. In that case it was held that a restriction would be unenforceable when it was agreed in view of the employees status and role at that time and would remain unenforceable even if the employee had subsequently been promoted to a role in which the restriction would have been reasonable.

The implications of this case are that post termination activities have to be carefully drafted and legal advice should be sought. The Clauses will only be enforceable if they go no further than is necessary to protect the legitimate business interest of the company such as its customers, trade secrets and confidential information. In a case of Non-Dealing Clauses if it is too wide it will not be enforceable. If it seeks to prevent an employee dealing with all customers, not just those with whom he or she had dealt with there is the distinct possibility that it will be unenforceable.

Restrictions are not generally appropriate for junior members of staff. If an employee is to be promoted then it is important that the restrictions are put in at that time.

Unfortunately many companies work on the basis of a contract that is put in at the start of the employment which then goes with that employee through their entire employment. Employers need to be careful to ensure that when an individual is promoted that at that stage a new contract is put in place dealing with their new position and any restrictions post termination which should then be dealt with in an appropriate manner relating to that particular employee in the particular role they are in.

For example an employee that was brought in as a junior office administrator should have no real post termination restrictions on dealing with customers. If that employee is promoted to a sales person then it may be appropriate to have a post termination restriction relating with the customers the employee would have dealt with in their role as a sales person. If they are then promoted to a regional sales manager then of course the restrictions may be wider. The higher up the employee goes in the company the greater the restrictions which can be put on the employee. This does mean that employers need to seriously consider having different contracts of employment in place for different employees at different levels within an organisation and that where an employee is promoted that a new contract with appropriate post termination restrictions relevant to that individual in the position that they are in is put in place.

Catch All Contracts are not appropriate.

With an upturn of the economy we can see that there are going to be employees moving between jobs and the issue of post termination contractual provisions are going to be more relevant.

When Disciplinary Proceedings follow on from a Criminal Conviction

There is a misconception that a criminal investigation into an employee with charges being brought or even a conviction is sufficient to ground a dismissal. A criminal investigation into an employee or even a conviction of that employee is not in itself sufficient to ground a dismissal. It of course is a matter which is properly to be taken into account but it is important that employers pursue fully the disciplinary process including a right of appeal before dismissing. It is also important to differentiate between different types of criminal

offences. A conviction for drunken driving for a sales person where they are banned from driving will in a properly drafted contract be a ground to terminate the employment. However, if the employee has appealed the conviction from the District Court then the employer may well have to wait for the outcome of the appeal to the Circuit Court. Where the employee is an office based worker a conviction for drunken driving even though it is a similar criminal conviction will be hard to justify as a ground leading to dismissal.

There will be cases where an employer may believe that the matter that the employee was convicted of so seriously impacts on the good name of the employer that the conviction warrants dismissal. If those sort of grounds are to be relied upon then it is imperative that the employer goes through the full disciplinary hearing and gives the employee the opportunity to challenge and defend the employees right to continue to be employed.

It is important for employers in any employment contact and staff handbook to have provisions for suspension without pay pending an investigation and a disciplinary hearing. It is important for an employer particularly if there is an issue relating to honesty and the employee would deal with cash or have access to company accounts that there is a provision on the contract to enable the employer to suspend the employee until the disciplinary meeting is determined. It is important to remember that an employee who is suspended must be paid while on suspension. Non payment of an employee while on suspension may well be deemed to be a dismissal and that that dismissal would have been without going through the disciplinary procedures.

Unfair Dismissal and Discriminatory Dismissal

Section 101(4)(A) of the Employment Equality Act 1998 (inserted by Section 17 of the Credit Guarantee (Amendment) Act 2016 provides that a person who has referred a complaint relating to dismissal under both the Unfair Dismissal Act 1977 and the Employment Equality Act 1998 to the Director General of the Workplace Relations Commission has to elect between one or the other by a prescribed date or the relevant date to be inferred from Regulations from the Minister. If the person fails to elect by this date the discriminatory

dismissal complaint under the Employment Equality Act 1998 will be deemed to have been withdrawn.

Statutory Instrument No.126 of 2016 prescribes that the relevant date for the purposes of Section 101(4)(A) of the Employment Equality Act 1998 should be 42 days from the date of notification to the employee concerned who referred a claim under Section 77 of the Employment Equality Act and a claim for redress under the Unfair Dismissals Act 1977 in respect of a dismissal to the Director General of the Workplace Relations Commission. The notification for the purposes of these regulations is the notification from the Workplace Relations Commission informing the employee concerned that subsection (4)(A) of Section 101 applies in relation to the claim.

There is an issue as to whether this is legally correct. As our Equality Laws come from EU Directives it is arguable the Unfair Dismissal not the Equality Dismissal claim should be dismissed.

Paid Paternity Leave

The introduction of a statutory right for employees to be paid paternity leave is likely to be included in the Family Leave Bill by September 2016. In last years Budget it was announced that employees would be entitled to two weeks Paternity Leave at a rate of €230 per week. This is the same as Maternity Benefit. It is subject to the same PRSI.

A father of a newborn child will be able to avail of the leave at any time within 26 weeks of the date of birth of his child. It has been reported that the Government has agreed to fast track the legislation so that the Heads of the Bill will be prepared.

In Ireland there is no statutory obligation to pay Maternity Leave over the State Benefit entitlement nor will there be any requirement to pay Paternity Leave over the State Benefit entitlement.

Because this new benefit is coming into place we would strongly advise that employers will put in place appropriate leave policies to cover Paternity Leave.

Use of Mediation in Litigation including Employment Law

There is no doubt that in litigation that it can often be beneficial to both parties to attempt to resolve matters without the need for a Court hearing. Of course negotiation between the representatives of the two sides is the simplest method. However, Alternative Dispute Resolutions (ADR) which includes mediation or conciliation is another method to resolve matters. It has gained some popularity.

ADR as it is often called by lawyers is seen as a voluntary process. It has the advantages of reducing costs and it also saves time. However, ADR is not always appropriate. Everybody has a right to have a hearing.

In Employment Law ADR is called mediation. To an extent this is a misclassification of matters. While it is called mediation in employment law cases it is effectively a form of conciliation and can often be nothing more than a glorified negotiation with the benefit of an independent person. However, where parties do wish to avail of mediation in employment law cases it is a useful method of resolving disputes. It is particularly useful if the parties are still in employment. If one of the parties is not in employment then mediation effectively is a negotiation meeting rather than a mediation meeting. In employment cases all mediation under the Equality Legislation is confidential and nothing that is said at such a meeting can be discussed outside.

In other types of litigation the Court rules in Ireland permit the Courts to order that proceedings be adjourned while an attempt is made to resolve proceedings using ADR. This is set out in Order 56A Rule 2(1) of the Rules of the Superior Courts. If a party unreasonably refuses to participate then that party runs the risk that ultimately they may not obtain the full extent of their costs regardless of whether they win. This is set out in Order 99 Rule 1(b) of the Rules of the Superior Courts. In personal injury cases Section 15 of the Civil Liability and Courts Act 2004 allows the Court to compel the parties to engage in ADR. How are these applied in practice? Certainly in recent cases for example the case of Ryan v. Wall Construction Limited Mr. Justice Kelly stressed that to be effective the ADR process has to be voluntary. In another case the Court of Appeal was clear that while the Court

had a discretion to direct the parties to engage in ADR they would only do so where it was appropriate to do so and the Court pointed out that the Court should consider when directing parties to ADR the extent of which ADR was capable of resolving or narrowing the issues in dispute.

We are always of the view that ADR processes should always be considered. If the process is not successful then our clients are entitled to bring the proceedings in Court in the usual manner. The advantages of ADR for our clients is that it reduces costs. It enables cases to be resolved quicker. At a minimum in appropriate cases it enables the issues between our clients and the other party to be limited down to the points in issue. In many cases there are agreed facts which can be agreed to reduce the time spent in a case being litigated. We see ADR as a process which is beneficial in all types of litigation including personal injury cases and certainly in all employment cases. Unfortunately in employment cases there is a very slow take up in mediation but hopefully this will change.

Holiday Pay and Commission

There has been a recent UK Employment Appeals Tribunal case which has confirmed that UK law can and should be interpreted to give effect to the decision of the European Court of Justice (ECJ). That is that result based commission must be taken into account in calculating workers holiday pay. This was held in the case of British Gas Trading v Lock.

In that case the ECJ held that result based commissions should be included in the calculation of Statutory Holiday Pay.

That is the EU law on matters. In the UK the matter went back to be considered by the UK EAT as to whether their working time regulations were capable of being interpreted in line with the ECJ's decision. The decision in March 2015 is that they could be and it implied words into the regulations to that effect.

The UK EAT followed the decision in Bear Scotland Limited –v- Fulton which in similar circumstances found that the Regulation should be so interpreted.

The case of British Gas Trading –v- Lock went on appeal. The appeal was lost by British Gas.

The case may still go on appeal on a Point of Law.

The issue which is interesting here is whether the Irish legislation can be interpreted in line with the ECJ decision. If it can then there is no issue. If it cannot be then there is an issue of a potential claim against the State for failing to properly implement the working time Directive.

This issue has yet to be ruled on by the Labour Court. It would be interesting to see when the first case comes before them what the decision is. It will equally be interesting to see if the case is appealed. If a case went before the Labour Court and was lost by the employee then there would be every chance that the employee would consider bringing a case against the State. Such cases would cause a significant cost to the State as a claim against the State is a High Court claim. It will be interesting to see what happens. However, we would contend that really this issue needs to be clarified by way of a simple piece of legislation to amend the Organisation of Working Time Act so as to be in compliance with the ECJ decision. It is probably that it would be sufficient to do so by amending the Statutory Instrument on the calculation of Holiday Pay.

We may however have an unusual situation which could arise which is that Holiday Pay would be calculated on one basis but that Public Holiday pay which is not an issue covered under the Working Time Directive would be calculated on a different basis namely that commission would not be taken into account in calculating same. There is, in our view, a need for absolute clarity on the legislation which applies in Ireland. This is important for both employers and employees. In addition, there is no reason why the State should leave itself open to a possible claim which only incurs unnecessary legal costs to the State who would ultimately then be responsible for compensating the employee in a Holiday Pay claim, for his / her economic loss but also for the compensation for breach of his / her rights under the Directive by way compensation for breach of that right.

Hopefully the incoming Government will address this issue sooner rather than later.

Discretionary Bonus Payments

The case of Cleary and others –v- B&Q being the High Court decision of the 8th January 2016 is an extremely important decision in relation to the issue of what is a Discretionary Bonus.

The High Court held, in this case, that the company was not entitled to withdraw a Discretionary Bonus Scheme where the employees had a legitimate expectation that the Bonuses were accruing and would be paid.

In January of this year the High Court upheld an appeal which was brought by 10 workers against the decision of the Employment Appeals Tribunal that the removal of a Bonus, which has been paid for several years up to early 2012, was not a deduction of pay in breach of the Payment of Wages Act 1991. Until 2012 the employees were eligible to receive a winter-summer Bonus under a Discretionary Bonus Scheme. This was paid twice annually.

The Contract and Staff Handbook clearly stated that all Bonus Schemes are discretionary and are subject to the Scheme Rules. “They may be reviewed or withdrawn at any time”.

In April 2012 the employees were advised that the company was withdrawing the Bonus Scheme with immediate effect. No further Bonuses were paid. The employees argued that while the employer might be able to cease the Scheme going forward the employees had a contractual entitlement to the Bonus in respect of the period August to January as this had already been earned. The EAT took the view that if the employees were not content with the company retaining the right to unilaterally review or withdraw the payment they should not have entered into such a Contract.

The High Court took a very different view. The High Court took the view that while a company may withdraw a Bonus Scheme that such discretion must be exercised reasonably. The High Court took the view that the company was not entitled to withdraw a Scheme which had already been earned and was due. The High Court decision notes that the use of the word “discretion” is not always a determining factor of whether a contractual entitlement arises under a Bonus Scheme.

The case is a timely reminder for employers that if they are intending to cease or change a Bonus Scheme that legal advice should always be obtained. The case is authority for the view that a Bonus Scheme cannot be terminated by an employer in respect of Bonuses earned up to the time that the Scheme is withdrawn.

Some employers already have a position in place in respect of any Bonus payment that a Bonus Scheme is announced on a year to year basis and automatically terminates after that year is up. It is then up to the employer to decide to reintroduce a Bonus Scheme for the next year or not to do so.

A lot of problems which employers get into, in relation to contractual rights, arise because of the way Contracts and Staff Handbook documentation is drafted. A considerable number of these difficulties can be avoided by proper drafting undertaken with appropriate advice from an employment lawyer.

Make Sure You Get the Basics Right

The case of Crowe v. HSE is an important Equality Case. In this case the employee worked as a paramedic. The employee suffered injuries while carrying out her job. She alleged she was discriminated against in the workplace on the grounds of sexual orientation and disability. She also claimed she was victimised by her employer. The Equality Officer did not find discrimination under the grounds of sexual orientation. However the Equality Officer found that the employee was not accommodated on her return to work after her accident. She was not provided with appropriate training. This had been advised by occupational medical advisors. The Equality Officer found that the failure to accommodate persisted for a significant amount of time despite a request from the employee. The Equality Officer accepted that the employee was victimised due to the company failure to engage with her. The employee remained in employment and the Equality Officer awarded her €10,000 for discrimination on the grounds of disability and €8000 for victimisation.

This case highlighted the importance of an employer getting the basics right when an employee suffers from a disability.

Employment Permits (Amendment) Regulations 2016

These regulations were signed by the Minister on the 25th January 2016.

These amend the Employment Permit Regulations 2014 to provide for the following,

- In Schedule 3 there is a change of the list of employments in respect of which there is a shortage of qualifications, experience or skills which are required for the proper functioning of the economy.
- In Schedule 4 there are changes to the list of employments in which an Employment Permit shall not be granted.

For Example: Working in a private home as a Domestic Operative is excluded as is Legal Associate Professionals. For employers considering applying for the Work Permit it is important to look at the new Regulations.

Work Permits

If you are applying for a work Permit a recent decision by the Court of Appeal is interesting. New permits are generally only approved where the job falls into an eligible category (as deemed by the Minister) and has a minimum salary of €30,000. The Court held that there was a potential conflict regarding two specific provisions of the Employment Permits Act 2006. Minimum levels can only be specified in Regulations made by the Minister. The refusal of the permit was on the basis that it was inconsistent with current Government economic policy. The Minister did not have the power, without specific Regulations, to refuse the permit on the basis of the remuneration level.

There are statutory instruments in place which provide for those who are eligible to apply. The €30,000 salary provision has not been set by Statutory Instrument. We would expect that a Statutory Instrument will issue to rectify this issue.

Transfer of Undertakings

A recent matter has been referred to in the European Court of Justice under case C-681/15. The issue is whether Article 3 of Council Directive 2001/23/EC of 12 March 2001 precludes a provision of National Law which provides that, in the event of a transfer of an undertaking or business, all conditions of employment agreed between the transferor and the employee, individually and in the exercise of their freedom of contract, in the context of employment transfer to the transferee unaltered as if he had himself agreed with them in an individual contract with the employee where National Law provides consensual and unilateral adjustments by the transferee. The second question is does Article 16 of the Charter of Fundamental Rights of the European Union preclude a National Provision enacted to implement Directive 77/187/EEC or Directive 2001/23/EC which provides that, in the event of a transfer of an undertaking or a business the transferee is bound by the conditions of employment agreed individually and in the exercise of their freedom of contract by the transferor with the employee as if he had agreed that himself even if these conditions incorporates certain provisions of a collective agreement which would not otherwise apply to the employment contract into the employment contract dynamically in so far as national law provides for both consensual and unilateral adjustments by the transferee.

It will be interesting to see what the outcome of this Court decision will be. It may have a significant impact on what are commonly called TUPE cases.

References – A nightmare for employers

An employer is not legally obliged to provide a reference unless it is specifically provided for in a contract. Where an employer decides to provide a reference the employer owns a duty of care to the employee to ensure that reasonable care is taken in preparing a reference and that it is true, fair and accurate. In the case of HSE –v- A Worker AD1248 an employee was awarded €10,000 for distress and a recommendation that the employer engage the employee in a permanent position where the HSE sought to rely on a reference from a previous employer which the employee disputed.

Many employers will, where they have been in business for a period of time, have created a custom in practice where the employee can reasonably expect a reference.

Where an employer is considering giving a reference the employer must be aware of the Data Protection legislation. The Data Protection legislation gives an employee the right to see and be provided with a copy of any reference which is created. The Data Protection Commissioner has confirmed there is a high threshold to be met where the employer seeks to rely on an expression of opinion where the reference/opinion was given on a confidential basis. It is important that if an employer is given such a reference that it is stated that the requirement of confidentiality is in a text of the reference itself. Employers need to ensure that sensitive personnel data such as records of sickness absences etc. should not be included. Employers need to also ensure that they do not include any information in a reference which could be connected with the nine grounds of discrimination under Equality legislation being: gender, marital status, family status, age, sexual orientation, race, religion, disability and membership of the Traveller Community.

Many employers now are seeking to minimise the risk.

The easiest way of minimising risk is to have a clear reference policy.

Some employers putting in a reference policy which provides that the reference will simply state when the employee joined, the level within the organisation or job title that they joined at, the starting salary, particulars of any promotions or salary increases which they received and their finishing date, finishing salary and status. If such a reference is going to be provided it is important that such a reference should include a copy of the company policy on giving references.

If that form of references is stated in the policy then it is important that the employer only provides that form of reference. If a more extensive reference is given to a particular employee then the employer may be faced with a claim by other employees that they are entitled to an equally extensive reference. Some employers are now providing their references will not be given over the phone and this is specifically stated in the policy.

If an employer wishes to give more extensive references then again the form of any reference and what information will be provided should be set out in the policy.

It will be our view that employers might consider providing only a basic statement of employment with a bare minimum of factual information.

All references provided should be retained.

In addition employers should clearly specify within the organisation who is entitled to give references.

A manager or supervisor who is contacted and/or who is not authorised to give a reference may very well bind the company to whatever reference was furnished and can create liabilities for the employer. It is therefore important to provide in any policy related to references that only certain individuals or roles within the organisation can give a reference and that anybody else who gives a reference that this would amount to a disciplinary matter.

Employers must also be very careful to give references which are truthful. Giving a reference stating that an individual is honest, trustworthy, a good worker and a good time keeper and got on well with everybody when that individual may not have achieved all of those levels and may in fact be a very bad worker, did not get on with individuals and may not have been the most honest worker that the employer ever had then the future employer relying on the reference may well have a claim for any loss the future employer had because of an incorrect reference being given.

Employers should be aware that they have two potential claims against them for an incorrect reference. The first is from the employee that left and the second is from any future employer who relies on that reference.

We cannot stress too much the importance of employers having in place a proper reference policy, clearly communicated and that that reference policy is not deviated from under any circumstance.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Employment Practices which should be illegal

A new report to the Government relating to transactions such as those which preceeded the closure of Cleary's last year should be made illegal according to the new report. While the transactions that produced this result have been lawful the Report raises the issue that it is difficult to avoid the conclusion that it would be preferable if it were not. This report was prepared by the Labour Court Chairman Mr. Kevin Duffy and Company Law Lawyer Nessa Cahill.

The authors have recommended that major new protections be introduced for workers including increased compensation of as much as two years pay.

A number of proposals are put forward. One is that employees would have the opportunity for consultation for at least 30 days before collective redundancies took place whether the company was insolvent or not. At present such a period does not apply in a business that is being wound up. In situation where the right to a consultation is not respected compensation for workers should be increased from 4 weeks pay to 2 years pay. The 30 day period would also be triggered if the company or person was contemplating a significant decision in relation to an asset that will lead to collective redundancies. The report has also recommended that where an employer transfers assets out of the business with the effect of perpetrating a fraud on the employees there should be a mechanism for recovering the assets or the proceeds of its sale.

This report is to be most welcome and will be interesting to see what actions are taken by the new Government, whenever that will happen, to implement this.

There are however other issues in the employment law arena which are still not being addressed. The first relates to companies which are simply dissolved. In such cases the employee has no right to continue claims as the entity has ceased. It would be much more preferable where a company is dissolved the employee would be entitled to continue the claim against the dissolved entity as if it were in

liquidation or alternatively that the employee would be entitled to bring a claim either initially or by amending proceedings already in place against the Directors and Secretary of the company and that they would stand in the shoes of the dissolved company and be liable for any award made.

The current situation of companies simply being dissolved and thereby frustrating the rights of the employees and then finding that the same individuals who promoted the dissolved company now set up a new company and commence a new business with impunity is a scandal which needs to be addressed sooner rather than later. This issue of dissolving companies and then proceeding to set up a new company thereby frustrating rights of the employees of the first company is an issue that does need to be addressed.

The issue of employees issuing proceedings in the Courts against Directors is not feasible particularly as the cost of same is prohibitive. Those claims should be able to be processed through the Workplace Relations Commission.

We still have a situation where employers do not properly advise employees as to the legal name of the entity employing them. Little or no action is being taken against employers who do not put in the place the full legal name in documentation to employees.

Labour Court Fees

Labour Court Fee S.I. 536/2015 being the Workplace Relations Act 2015 (Fees Regulations 2015) set out the basis for the Labour Court being entitled to charge a fee.
The Labour Court has now introduced a fee of €300 for appealing first instance WRC decisions to the Labour Court. This only applies where the party appealing did not attend at the WRC. The fee has to be made by electronic fund transfer. Evidence of payment should be included with the appeal application.

The appeal application has to be submitted to the Labour Court within 42 days from the date of the first instance Adjudication Decision.

The fee of €300 can be refunded where the Labour Court determines there was a good reason for the party appealing failing to attend the first instance hearing.

Former Clerys Workers Awarded Compensation Over Breach of the Redundancy Payments Act

Sixty-one former Clery's workers were awarded a sum of nearly €120,000 by the Workplace Relations Commission (WRC). The claim under the Protection of Employment Acts 1977 provides that consultation must take place at the earliest opportunity and at least 30 days before the Notice of Redundancy is given. A breach of the legislation can result in awards of up to 4 weeks pay being made or a fine of €5,000 on summary conviction.

In this case the WRC found that the OSC Operations had breached the legislation. The WRC relied on the Decision of the Court of Justice on the European Union in case C-255/10 which held that the EU Directive of 89/59 on the approximation of the laws of the Member States relating to collective redundancies,

"Must be interpreted as applying to a termination of the activities of an establishment that is an employer as a result of a judicial decision ordering its dissolution and winding up on grounds of insolvency even though the event of such a termination national legislation provides for the termination of employment contracts with immediate effect".

The WRC held that the EU Directive applies in insolvency situations even where national legislation provides that employment contracts terminate automatically when a company is wound up.

This case has significant implications. Section 589 of the Companies Act 2014 provides that the winding up of a company by a Court shall be deemed to commence at the time of the presentation of the winding up petition in respect of the company. The argument is that this means that the company's corporate existence ceases and the employees automatically become redundant before the Liquidator is even appointed.

There is a degree of commercial reality relating to matters. It is unlikely that liquidators are going to change the way they operate. In

such circumstances where claims are ultimately successful before the WRC or the Labour Court on appeal the award will then be paid by the Social Insurance Fund.

The Clery's case was a very high profile case. It will be interesting to see how matters develop going forward and whether there will be any significant number of claims arising on insolvency.

Employment and IR Legacy cases.

The Director General of the WRC Mr. Kieran Mulvey has stated that a time frame of the middle of 2016 to clear the backlog of cases at the WRC which they inherited from the former LRC and the Equality Tribunal is the target.

By the end of 2015 the delay in having Equality cases heard reduced from 2 years to 12 months. The Rights Commissioners and Equality Officers became WRC Adjudicators Officers on 1 October last. 17 new Adjudication Officers have also been selected. The new 17 Adjudication Officers were working on Equality cases first as this was the worst backlog.

Cases submitted to the WRC in some cases were heard before December 2015.

Our experience is that the WRC is taking a proactive approach to clearing the backlog and also to ensuring that cases which are lodged under the new system are being heard quickly. Unfortunately the timeframe in their procedures document are not currently being met. There is a considerable amount of work and commitment by the staff of the WRC which is not generally recognised. There are professional, competent, capable and dedicated staff within the WRC whose work often goes without recognition.

For the new procedures to work effectively and efficiently the importance of dedicated and professional staff within the WRC to organise and manage the case load is the very basis under which the new system will work effectively and efficiently.

It is a pity that there is no user forum in place as such a forum could assist in creating even greater efficiency and savings within the

system. It is hoped as the systems develop that the option of a user forum will be considered as a method of increasing effectiveness and efficiencies.

The system is designed to be "paperless". This is a concept but the reality that this is not practicable has yet to be understood by those managing the system. Users, staff and in my opinion Adjudicators recognise the "paperless" office concept is not working. The computer system was "purchased" not designed for the WRC. It takes no account of the practical issues especially where there are large volumes of paper such as Unfair Dismissal or Working Time cases. Hopefully this will be rectified.

The Interpretation of European Law and Age Discrimination

In the case C-441/14 being the case of Dansk Industri (DI) and Estate of Karsten Eigin Rasmussen the ECJ held that EU Law is to be interpreted as meaning that a National Court adjudicating in a dispute between private persons falling within the scope of Directive 2000/78 is required, when applying provisions of National Law to interpret those provisions in such a way that they may be applied in a manner that is consistent with the Directive or, if such an interpretation is not possible to disapply, where necessary, any provision of a National Law which is contrary to the general principles prohibiting Discrimination on grounds of age. Neither the principles of legal certainty and the protection of legitimate expectations nor the fact that it is possible for the private person who considers that he has been wronged by the application of a provision of a National Law that is at odds with EU Law to bring proceedings to establish the liability of the Member State concerned for breach of EU Law can alter that obligation.

This case may have wider implications. It may well mean that interpreting any Irish Legislation which has a contrary provision than that set out in EU Law particularly as, for example an exemption, then if that is contrary to EU Law as established by the ECJ then clearly there may be an obligation on, in employment cases an Adjudicating Officer or the Labour Court to disapply an Irish provision and apply the Directive.

This is a very recent Decision which issued. It issued on the 19th of April 2016 and it will be interesting to see the commentaries as to how it will apply in practice.

We believe that this case may have a significant bearing on how cases are applied going into the future.

PAYE/Employers Obligation to Keep Maintain and Produce a Register of Employee's

The Tax Briefing of June 2014 being Issue 5 outlined that for the purposes of the PAYE system an employer has a statutory obligation to keep and maintain a Register of Employee's. An employer on being requested to do so by a Revenue Official and within the time specified by the Officer an employer has a statutory obligation to produce that employers Register of Employee's, or a certified copy of it, or an extract from it to any Revenue Officer. An employer that does not keep and maintain a Register of Employee's is liable to a penalty of €4,000 and where the employer is a company the secretary of the company is liable to a separate penalty of €3,000. Where an employer fails to comply with a requirement of an authorised officer in the exercise of that Officers powers or duties under Section 903 Taxes Consolidation Act 1997 to produce any record which that Officer requires for the purposes of his or her enquiry, that employer shall be liable to a penalty of €4,000.

It should be noted that the obligation on an employer to keep and maintain, for PAYE purposes, a Register of Employee's is separate and distinct from the employer's obligation to register with Revenue for the purposes of the PAYE system.

An employer must keep and maintain the Register of Employee's either at the normal place of employment of each employee or at the main place of business of the employer. For employers who have a place of business in more than one location and the payroll records, staff records are held in just one location then one location where the records are held may be accepted as that employer's main place of business for the purposes of being the place of retention of that employer's Register of Employee's. It is to be noted that PAYE Regulations 8 provides that a Revenue Officer may require an employer to produce within a period specified by that Officer, an

extract from that employers Register of Employee's. In this regard such an extract may, for example relate to the employees of a branch of a business that a Revenue Officer may visit.

The rules relating to this are strict and it is useful to look at Tax Briefing June 2014 Issue no. 5 whether you are an employer or representing employers relating to any PAYE issues.

Compliance of Tax Laws

Revenue eBrief No. 33/16 which issued on the 23rd March announced increased compliance interventions in the construction sector. This will focus to a significant extent on the reverse charge for VAT, Country Money and Relevant Contracts Tax.

For subcontractors and principals/subcontractors operating in the construction sector it is important to remember that failure to operate the VAT, PAYE or RCT requirements correctly will impact on their compliance history. It also may result in penalties being applied and/or the RCT deduction rate being increased.

One issue which regularly seems to cause problems is the issue of Country Money and has been a feature of Revenue interventions in the sector. There are strict criteria for Country Money which employers need to be aware of. There is a link in the Revenue eBrief No.33/16 to the issue of Country Money.

An Employers Duty to an Employee is not Absolute

The case of Martin v. Dunnes Stores (Dundalk) Limited [2016]IECA85 is an interesting case in restating the law on this issue.

The Court of Appeal held that while the Plaintiff was a loyal and hard working member of staff because of her commitment to her employer and her desire to meet a customer's needs she took on a task which was contra indicated by her training and did so in circumstances she knew or ought to have known she might sustain an injury. She did not seek assistance as she might have done having regard to her training and further when faced with moving a heavy bag of potatoes which was obviously wedged in position such that it could not be

easily extracted without force proceeded to try to "yank it free" thus causing her an injury.

In this case, the Court restated the Decision in the case of Bradley v. CIE [1976] IR217 at 223 where Henchy J stated as follows,

"The law does not require an employer to ensure in all circumstances the safety of his workmen. He will have discharged his duty of care if he does what a reasonable and prudent employer would have done in the circumstances".

The Court pointed out the provisions of Section 8(1) of the Safety Health and Welfare at Work Act 2005 which provides that,

"Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees".

The Court went on to state what words "reasonably practicable" means is as defined in Section 2(6) of the 2005 Act namely,

"For the purposes of the relevant statutory provision, "reasonably practicable" in relation to the duties of an employer, means that an employer has exercised all due care by putting in place the necessary protective and preventative measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to the health at that place of work".

This case is interesting in that the Court held that it was accepted that the Plaintiff was trained in manual handling techniques on a regular basis. After each such manual handling course she was tested in respect of her knowledge. This involved her considering a range of questions on a questionnaire and answering them in a ticked box format.

This case highlights the importance, in our view, of employers not only having health and safety training but also in ensuring that appropriate testing takes place after such health and Safety training.

Where an employer does so they are going to be in a stronger position to defend a claim in an accident case where an employee acts contra to directions given to him or her.

Employers be Careful to Clean Up

In the recent High Court case of Sharon Kelly and Lackabeg Limited T/A The Arc being a Judgement of Mr. Justice Barr delivered on the 29th January 2016 is a case where the High Court considered the duty on Bars and Nightclubs to maintain clean bathrooms and dry floors in a personal injury claim.

In this case the incident was captured on CCTV and the Court was satisfied from the footage that the Plaintiff fell vertically down in one sudden movement. The Court held that this meant that she must have slipped rather than tripped.

Complaints had been made about the conditions of the ladies toilet and the parque floor prior to the fall.

The Decision highlights the onus on occupiers of premises to take all necessary steps to ensure the safety of their patrons. It appears that Bars and Nightclubs must not only have adequate cleaning systems in place throughout their premises but they must also be in a position to show such systems are being sufficiently implemented particularly when matters are busy. The citation of the case is [2016]IEHC63

RSA Says Defective Tyres played role in many road deaths

A recent study by the Road Safety Authority ("RSA") has found that defective tyres were a significant factor in a number of fatal collisions on Irish Roads.

The study found that 111 lost their lives and 30 were seriously injured in collisions where vehicle defects were a contributory factor.

The RSA said defects may not have been the sole cause of the collision but coupled with the combination of other pre crash behaviour resulted in these deaths. The study found that over half of collisions where vehicles with defective tyres, tyres were dangerously worn while 10% of cases tyres were under inflated.

The largest group driving with defective, worn or underinflated tyres were those aged 17-24.

The Minister has stated that work is underway to bring offences of defective or non roadworthy tyres within the penalty point system.

Recently there has been quite a lot of criticism of the level of awards in the Courts in accident cases.

The recent report from the Injuries Board has indicated that there has been a 6% increase in claims but only 1% increase in the level of awards. At the same time there has been approximately 30% increase in premiums.

A considerable amount of criticism is levelled at the legal profession and the judges relating to the level of awards. What is not being highlighted is the lack of implementation of the Road Traffic Acts as regards defective vehicles and what their contribution would have to the overall level of accidents if the Road Traffic Laws were enforced in this country.

The same applies in relation to drunken driving and speeding.

The compensation awarded to persons injured in accidents is always the easy route to take. The issue of implementation of the Road Traffic Laws is one that is less likely to be highlighted.

The crashing of lights seems to be endemic whether this is by motor vehicles and particularly by cyclists. How often do we see people dashing across the road quite close to pedestrian lights but failing to use the pedestrian lights.

The level of compensation that is awarded has seen increased insurance for road traffic users could be vastly reduced if enforcement of the Road Traffic Laws is seriously undertaken.

Accident Claims by Passengers

It is an unfortunate fact that a number of passengers in private vehicles, on motorbikes, in commercial or other vehicles, or, on public transport suffer injuries due to an accident.

Where a person is a passenger in a vehicle which is involved in an accident then you may be entitled to claim compensation for the injuries you suffer and the loss of income and other expenses incurred by you.

Where such an accident happens it is the duty of the negligent driver's insurance company to deal with your personal injury compensation claim. It is not a driver themselves. If the driver was uninsured or if the vehicle which caused the accident left the scene and is untraced it may still be possible to claim through the Motor Insurers Bureau of Ireland Scheme (MIBI). The MIBI compensates victims of accidents which are caused by uninsured, untraced, or, unidentified drivers.

Where there is an uninsured, untraced or unidentified driver the first step is to notify the MIBI of the accident and that you intend to persue a claim for damages. A claim notification form will be required to be submitted detailing all information in respect of the accident. This would include such issues as time, date and location. It would include your personal details, the vehicle registration number, the injury sustained, what hospital or doctors you attended and details of any Garda who would have attended. The duty of the MIBI is then to nominate an insurance company to deal with a claim.

Where there is an uninsured, untraced or unidentified driver claims can be complex. You will need the services of a Solicitor. It is advisable and best practice to speak with a Solicitor as soon as possible after the accident.

In most cases passengers are an innocent party. The main issue would be the extent of your injuries, the losses you sustained and what level of compensation you should receive.

There are factors which could result in a claim that you were guilty of contributory negligence.

This is failing to take due care and attention to your own safety. This would include such matters as:

- Failing to wear a seat belt;
- Travelling in a vehicle knowing the driver is intoxicated, this would include both drink and drugs;
- Travelling in a vehicle knowing it is not covered by insurance; or
- Travelling in a stolen vehicle.

These are the main examples. Where you have been involved in an accident as a passenger in a vehicle appropriate specialist legal advice should always be sought from a Solicitor.

Only Solicitors are properly qualified, regulated and trained to properly represent you to ensure that you get a level of compensation you are entitled to.

Cybercrime Legislation

In Autumn 2015 a Bill entitled the Criminal Justice (Offences Relating to Information Systems) Bill was placed on the "A list". The Bill was finally published on 19th January 2016. The purpose of the Bill is to give effect to certain provisions of the EU Cybercrime Directive. This is Directive 2013/40/EU. The Directive seeks to address the increased occurrence of hacking. It also is there to deal with attacks on computer systems, networks, and, data by improving cooperation between EU Member States. This Directive was due to be implemented by 4 September 2015. As is usual the Irish are not great at meeting deadlines. This piece of legislation which is there to tackle Cybercrime fell once the Dail was dissolved. We would expect that with the importance for action by Ireland this Bill will be reactivated when there is a new Government.

The Bill as introduced provides five dedicated cybercrime offences being;

1. Accessing an information system without lawful authority;
2. Interfering with an information system without lawful authority so as to intentionally hinder or interrupt its functioning;
3. Interfering with Data without lawful authority;
4. Intercepting the transmission of Data without lawful authority; and
5. Use of a computer, password, code or data for the purposes of a commission of any of the above.

The legislation as introduced proposed a sentence on indictment of up to 10 years in the case of interfering with an information system without lawful authority. The other offences carry maximum sentences of up to 5 years on indictment. The legislation provides that a Court can treat identity theft as an aggravated factor when sentencing in respect of the offences of interfering with information systems and data. It would be an offence to obstruct the Gardai acting under the authority of a search warrant investigating a cybercrime offence. Company Officers may be liable individually if an offence was committed by the company with their consent or connivance.

This is an important piece of legislation and hopefully it will get onto the Irish Statute Book sooner rather than later.

Local Property Tax - Revised Guidelines on the Revenue Website

Changes have been introduced which would mean there will be a number of cases where general clearance applies without having to refer the matter to the revenue. From 1 November 2015 these are;

1. There is a general clearance certificate where a property is sold for €300,000 or less and this is regardless of what chargeable value was declared on the property from getting a LPT Clearance Certificate.
2. The allowable valuation margins by which the sale price / value exceeds the valuation / chargeable value declared has been increased.

(a) In relation to properties outside Dublin City and county from 15% to 25%.
(b) In relation to properties in Dublin City and county from 25% to 50%.

The above increased allowable margins are carried through to the general clearance certificate conditions to expenditure on enhancements to the property.

Bus, Rail and Ferry Passes

The Tax and Duty Manual part 05.03.11 sets out the conditions relating to salary sacrifice arrangements in accordance with Section 118B of the TCA 1997.

This manual has been updated to clarify that an employee may enter into a "salary sacrifice" arrangement in respect of bus, rail and ferry passes more than once in a year where the conditions of the scheme are otherwise met.

To avail of the relieve it is not sufficient for the employer to purchase the relevant travel pass and then recoup the expense from the employee. The following conditions must be met:

1. There must be a bona fide and enforceable alteration to the terms and conditions of employment (exercising a choice of benefit instead of salary with the consent of the employer).
2. The alteration must not be retrospective and must be evidenced in writing.
3. There must be not entitlement to exchange the benefit for cash.

The employee may enter into a salary sacrifice arrangement more than once a year with the agreement of the employer.

The salary sacrifice is generally understood to mean an arrangement under which an employee agrees with the employer to take a cut in remuneration in return the employer provides a benefit of a corresponding amount to the employee. As a general rule the Revenue do not regard salary sacrifice arrangements as reducing the employee's taxable income. If an employee forgoes salary payable

under an existing contract of employment in exchange for benefit the employee remains taxable on the gross income payable.

Where a benefit is fully taxable in the hands of the employee it generally makes little difference in terms of Income Tax whether the charges under gross remuneration or on a mixture of cash salary and benefits. Where a benefit is not taxable as in the case of bus, rail and ferry passes coming within Section 118 (5A) there is a tax saving to the employee if arrangement can be put in place under which the provision of a bus, rail or ferry pass by the employer can legitimately be classified as a benefit-in-kind i.e. an expense incurred by the employer under Section 118 (5A) TCA 1997. Section 118B or the Act places on a statutory basis Revenue practice in relation to salary sacrifice arrangements for the provisions of travel passes.

Pension Adjustment Orders

If you are dealing with a Pension Adjustment Order (PAO) it is important to remember that the tax rules on PAO's may have the effect of discriminating against separated and divorced people.

Couples who separate or divorce may have their pension split by way of a PAO. This means that the spouse who was not a member of the pension scheme may acquire rights to a pension which was built up by the other spouse in during the marriage.

Under Revenue rules the maximum benefit which a member can take from a scheme is exactly the same whether or not part of the benefit is a subject of a PAO. If you take the position of a spouse who has a pension which in the circumstances is a maximum benefit allowed under Revenue funding rules if half the pension is given to a spouse by way of a PAO there is no ability for the pension scheme member to make further provision, for example, for a new family. This is because for funding purposes Revenue treats the couple as if they were still married. In this way the PAO has the potential effect of significantly curtailing the member's ability to fund for a new family situation. It should be noted that the Excess Fund Tax which allows for taxation at an effective rate of up to 70% on funds that exceed a certain threshold does cause difficulties to spouses who have contributed to a pension which is subject to a PAO. It is important to remember Sections 787

(95) (B) of the TCA 1997 which states that the PAO cannot be taken into account when calculating the pension benefit. Excess fund tax potentially affects people with an annual pension of over 60,000. There is a degree of irony in that a spouse who is benefiting from the PAO is not disadvantaged at all in terms of making further pension contributions, on top of the amount received, by way of the PAO. For Revenue purposes the marriage was never dissolved.

We do have a crazy situation here in Ireland that the Revenue will regard couples as still married when they are divorced.

Unfortunately there is no equity in Tax Law.

Companies Act 2014 – Changes regarding the disclosure of directors' residential addresses

Under the Companies Act 2014 an officer of a company can apply to have his/her residential address exempt from appearing on the Register Of Companies. Previously there was no such exemption available. They were required to disclose their residential address. To obtain the exemption the director must prove by way of statement from An Garda Síochána that the publication of the residential address on the Register of Companies could pose a personal safety or security risk. The application with a supporting statement from the Gardai must be sent to the Registrar of Companies accompanied by a Form T1. Where successful the applicant must provide the address of the company's registered office in place of his/her residential address. Separate application requesting an exemption must be sent to the Registrar in respect of each company which the officer wishes to obtain such as exemption for.

Directors Compliance Statement

The Companies Act 2014 which came into effect in 1 June 2015 imposes a new compliance related requirement on many company directors. The requirement can be simply stated:

1. Acknowledging responsibility for securing compliance with relevant obligations.

2. Confirming that certain things had been done or providing explanation for things not done.

The requirement applies to all directors who lodge balance sheets over 12.5 million and turnover over €25 million which are Irish limited companies and PLCs. It does not apply to investment companies.

The actions that need to be taken are to:

1. Draft a compliance policy statement setting out appropriate policies regarding compliance with relevant obligations.

2. Putting appropriate arrangements and structures in place to secure material compliance.

3. Conducting a review during the period of the arrangement and structures.

Solicitors' Negligence when sending a trainee to Court to assist Counsel

In the recent case of Dunhill –v- W Brook and Co. [2016] EWHC165 the Court had to consider the negligence of a firm of Solicitors and Counsel for settling at an undervalue.

In 1999 the claimant was hit by a motorbike when crossing the road resulting in head and leg injuries. A claim issued. At the trial the claimant was advised by Counsel to accept a settlement offer as her main witness did not attend Court and in Counsels view the prospect of success were bleak. Counsel recommended a full and final settlement of STG£12,500. The trial was attended by a trainee from the first defendant Solicitor firm who was unable to advise the claimant and followed Counsels advice. In 2006 the claimant reopened the litigation that due to her injuries she lacked the required mental capacity to consent to a settlement. In 2014 the matter the matter appeared before the Supreme Court in the UK. The value of her claim was thought to be over 2 million. In 2015 the Court awarded the claimant 55% of her personal injury claim. The claimant then pursued

the defendant for negligent conduct during the litigation, negligent advice, taking instructions from a client without mental capacity and advising to settle far below the value of the claim.

Counsel was held not to be negligent in advising the claimant to settle. Counsel is held to have correctly analysed the evidence provided and the claimant's chance of success.

The Court then considered the relationship between Solicitors and Barristers with regard to liability. It was accepted that if Counsel was found not to be negligent then the Solicitors who act on Counsels advice would also not be negligent. However, a Solicitor has to exercise his or her own independent judgement if he / she believe the Counsel to be "obviously or glaringly wrong". The Solicitors firm which attended with Counsel sent a trainee who was six months into his training contract. In the Courts view he should not have been sent. Despite being a trainee the first defendant Solicitor firm charged his time as a qualified Solicitor. The Court found that should Counsel have been found to be negligent in his advice then the first defendant would also have been negligent in sending a trainee to Court as the trainee through no fault of his own would not have been able to detect Counsels error.

The case highlights that Solicitors should not blindly follow Counsels advises when advising a client and need to show that they have considered all the facts. If their analysis differs from Counsel this should be raised with Counsel.

The case also highlights that firms would be found negligent for sending trainees to act in matters where they lack experience.

It may be argued that trainees require exposure. It may be argued that clients will be reluctant to pay for the attendance of both a qualified fee earner and a trainee.

A trainee is a trainee. There was a time they were Apprentice Solicitors. They are there to be trained. Where a firm bills out a trainee at a qualified Solicitors rate there may be serious issues of negligence if something goes wrong. Sending a trainee other than to attend with Counsel for very basic matters creates significant exposure for any firm.

This case is a chilling reminder that it is very easy to be caught to be negligent in such cases where a trainee is sent to Court.

Conclusion

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