Keeping In Touch

We would like to welcome you to the November issue of our Newsletter.

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Introduction

October to December is traditionally a busy time for employment Solicitors and October this year has been no different. For November we are back to back with hearings.

On 6th December we will receive a Judgement in a case involving Nurendale trading as Panda Waste and a client of ours. This was a Judicial Review. It arose out of a case in the Labour Court where an Unfair Dismissal award against the company was made. The company did not bring a Point of Law appeal. The company issued Judicial Review proceedings effectively challenging the method of the appeal to the Labour Court. In this case the interesting aspect of the matter was that a Decision issued shortly before the Workplace Relations Act came into existence. An appeal was lodged with the Employment Appeals Tribunal and with the Labour Court after the date that the Act came into operation as we had a concern as to ensure that the appeal went to the correct entity. The Employment Appeals Tribunal directed that the appeal should not have been sent to them but to the Labour Court. An appeal was lodged with the Labour Court and the Labour Court heard the case. No objection to the jurisdiction of the Labour Court was raised at the time of the hearing and it was only raised subsequently. We will be covering this Judgement in greater detail in the next issue of our newsletter.

On the 30th November a Judgement is due in the High Court relating to an appeal against a decision of the Labour Court where the company is Philmic Limited. There are number of very technical issues raised in relation to this matter which were fully fought over two days in the High Court with full legal teams including Senior Counsel on both sides.

On the 23rd November there is an appeal to the High Court in respect of a case where we acted for employees. The employer has appealed in this particular case relating to the issue of the payment of Sunday Premium. The employer in this case is Trinity Leisure Holdings Limited.

On the 28th November we have an appeal on behalf of our client against the decision of the Labour Court in a case of Karpenko -and- Freshcut Food Services Limited. This is an extremely interesting case as it is, it appears, the very first case that has ever gone to the High Court on a Point of Law relating to the construction of the National Minimum Wage Act and in particular Section 8 of that Act as to how the hours of an employee is to be calculated for determining the rate of pay.

It has been a busy month in the area of press coverage and lectures. Richard Grogan of this firm was interviewed for an article in the Sunday Business Post relating to the issue of the dispute by Ryanair with their pilots, which was published on the 1st October. On 16th October Richard was quoted in an article in the Irish Times relating to the issue of employee entitlements to pay and the employer's obligations to pay in relation to non-attendance at work due to Hurricane Ophelia. Later that day Richard was interviewed on the Matt Cooper, on Today FM with a representative from ISME to discuss the same issue.

On 3 November Richard Grogan was interviewed for the six one news by RTE on the issue of harassment in the workplace.

On 25th October Richard presented a paper to the Roscommon Solicitors Bar Association in the Abbey Hotel on "Tips and Traps in Employment Cases - Avoiding the Pitfalls".

As a firm we are always delighted to accept any invitation from any Bar Association to present in relation to any aspect of our work relating to employment law.

In the Autumn issue of The Parchment Richard had an article published dealing with the National Minimum Wage Act entitled "Minefield of Traps".

As is usual, we have been active on social media in relation to article submitted to Irish Legal News on a regular basis and on ensuring that important cases and developments in employment law are published by us on LinkedIn and Twitter. This social media has two aspects to it. The first we readily admit is a method of marketing this firm. However, of an equal importance to us, is the second element which is providing relevant information in relation to employment law which is appropriate and helpful to colleagues. We do constantly try in both our newsletter and in our social medial posts to provide relevant practical information. We are extremely pleased with the positive responses which we receive from colleagues in respect of the newsletter and the posts on social media.

On 7th December Richard is presenting a paper to the Lawyer's CPD Club entitled "Tactically Approaching Employment Law Cases - A Practical Guide to the WRC and Labour Court."

Submissions to the Department about the Workplace Relations Act

On 14th September we received a letter on behalf of the Tánaiste Minister for Business Enterprise and Innovation responding to a letter of ours on 26th April 2017.

We raised the issue of compelling witnesses in Unfair Dismissal complaints. It has been confirmed that the Department is aware of the lacuna and that this anomaly will be addressed when suitable legislation is being drafted. That is whenever that is going to happen but at least it is accepted.

We have raised the issue of inspections which The Labour Court can undertake under Section 30 of the Workplace Relations Act 2015. We have been advised that as an Adjudicator can issue a witness summons under Section 41 of the 2005 Act there is no intention to increase the power for the Adjudicators to require an inspection.

We had raised issues in relation to Section 23 of the National Minimum Wage Act requesting that the requirement to serve a notice before issuing a claim would be deleted. Comments on a number of

claims by non-represented individuals which have been dismissed because of not sending the appropriate notice have been noted as regards an amendment to section 23 we are told had been noted.

We had raised issues where because of the way the form to the WRC was formulated issues relating to claims in Agency workers was resulting in all parties not being appropriately notified.

It appears from the response we received that this matter is a matter that the WRC is aware of and that steps have been taken to rectify matters.

In our view it is important for us to make submissions in relation to legislation not only in relation to making procedures more user friendly for practitioners but also more user friendly for individuals who are not represented. We are very pleased that the Government Departments are reviewing submissions made and are responding. Of course not all submissions are going to be accepted. That is a fact of life. We accept it. However all submissions that we made are made by us in good faith. Where any of our submissions are accepted as valid then that is great. Where some matters are rejected then that is fine. We have at least made the point. We have put it on record and we have made the argument as best we can. It is clear that submissions that we are making are being considered by the Department and are being considered by both the Labour Court and the WRC. That is great. In all submissions that we put in we try to be positive. There are matters which we have a negative comment in respect of we try to put a positive spin as to how matters can be rectified. We never make a complaint without putting forward a solution. Sometimes the solution will be accepted. Sometimes it won't.

We believe that it is important that Solicitors who are involved in employment law or any area of law do make submissions on issues that are relevant. It is the best way of ensuring legislation is taken on board. We have been successful in having certain amendments made to employment law. In the last two years we have had two amendments accepted to draft legislation. It is much easier to have matters dealt with before legislation is passed than dealing with a problem after it has been passed.

Dealing with an Ageing Workforce

It was previously that an individual got to 65 and retired. Currently the State Pension becomes payable at 66. This will rise to 67 in 2021 and 68 in 2028. There have been calls to increase the retirement age for the State pension to 70.

Most private occupational pension schemes pay out at 65. They usually have a provision in relation to a number of years where there are defined benefit schemes being a maximum of 40 over 60 but then usually reduce the payment by one and a half times the State Pension. This can leave a person retiring at 65 in quite an invidious position.

We also have the problem that people are living longer. When I first qualified the average life expectancy in Ireland was around 72 years of age. A person therefore got approximately 7 years retirement. Now life expectancy is 82 years. This means a pension has to be funded for a considerable length of time up from 7 years now to 17 years.

The solution for employees

The reality of it is, is that most employees now believe that they need to work beyond 66. This is typically so that they will have a standard of living. Many employees are concerned with mandatory retirement ages.

The approach of employers

While many employers themselves may wish to work after 65 or 66 many believe that retirement will be imposed upon their staff at 65 on the basis that this is the retirement age set in the company.

There is some talk that the Government will change the law to cease mandatory retirement.

EU Law

There is a considerable amount of EU law. The most important is the Council Directive 2007/78/EEC which established the general framework for equal treatment in employment and this resulted in the Employment Equality Acts 1998 – 2015. Article 1 of that Directive includes as a ground of discrimination the issue of age. There are two other pieces of EU law which are particularly relevant. The first would be the Lisbon Treaty of 2009 where Article 9 of the Treaty requires States to take appropriate action to combat discrimination on the grounds of age. Another provision which was rarely quoted but is becoming an issue which is quoted more regularly now in cases is the Charter of Fundamental Rights which is binding on the EU Member States since 2009 and specifically provides that the discrimination on the grounds of age is prohibited.

In deciding whether age discrimination has occurred it is necessary first to show whether it is justifiable. This means whether it is objective and reasonably justified by a legitimate aim and secondly the means of achieving the aim is appropriate and necessary.

This does place a significant burden on employers. It means that simply setting a retirement age effectively is probably no longer acceptable. It needs to be able to be justified on objective grounds.

The Law as it Applies

The Equality (Miscellaneous) Provision Act 2015 which amended Section 34 of the Employment Equality Acts is now necessary in specifying where discrimination occurs on the age ground that it can be justified if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The effect of this is that in our view having a compulsory retirement age on its face is no longer allowed in Ireland. Where an employer

wants to have a mandatory retirement age it will need to show that it can be objectively justified.

The first issue that must be dealt with is the issue of a legitimate aim. Now this must be a specific aim. Cases C-250/09 and C-260/09 being decisions of the EU clearly show that it cannot be some vague item thought of by the employer.

Various grounds have been accepted in the past by the European Court of Justice these would include to enable a balance to diverse age structure, to create opportunities in the labour market, to promote intergenerational fairness, to ensure the health and safety of employees and of the public, to preserve the dignity of aging employees, national social and employment policies. If an employer is going to say there is a legitimate aim they need to be able to come to show what that legitimate aim is.

It is also necessary then for the employer to show that the matter is appropriate and necessary. This would include such issues as the ability of the employee to obtain a pension on retirement. The interaction of the State Pension and retirement age chosen. It would include agreements by the parties or with unions. The agreement with parties we would have a view that if they simply put in a contract would not be sufficient unless the employee had been advised to get independent advice. The issue of flexibility is going to be there also and whether the employer is willing to consider whether retirement could be deferred in some cases.

In dealing with the issue of whether it is appropriate and necessary case C-190/16 which is one which the employer won has however specifically confirmed that a mandatory retirement age is prima facia discriminatory. Now that means that in an equality claim once the employee shows it was a mandatory retirement age that is prima facia evidence of discrimination. The employee therefore has passed the test of showing a prima facia case and then it is up to the employer to justify. The effect of that case is that effectively it has moved the test similar to that which would apply in the case of a dismissal of say a pregnant employee. Once an employee in those circumstances shows they notified the employer they were pregnant and they were then dismissed everything then passes over to the employer to justify. In the case of a mandatory retirement age the employee will need only

say there was a mandatory retirement age this is the documentation showing it and saying, "I was forced to retire". Then the ball is in the employers' court to prove that discrimination did not take place.

There will be some jobs where mandatory retirement ages are easier to justify. This will include such matters as members of An Garda Siochana, members of the Defence Forces, individuals undertaking very strenuous manual type jobs or where particular levels of physical fitness would be relevant such as in the case of Fireperson or as in DEC-E2011-142 a retirement age of 55 for a helicopter winchperson.

What should employers do?

It is important for employers who have a mandatory retirement age to now look at their retirement age. They need to look at how this is a legitimate age and how it is appropriate. Employers would need to show that the actions they are taking are appropriate and necessary.

It is vitally important for employers at this stage to consider reviewing their policies and practices. It is likely in our view that there will be a considerable about of litigation on this issue in the coming years.

The issue of compulsory retirement ages is becoming a significant issue for anybody who is involved in employment law. It is also relevant for those involved in pension law. Of course it has huge implications for employers and employees. In particular for employers the days of having a straight mandatory retirement age placed in a contract at the time that somebody joins the organisation with the same retirement age for those involved in physical activities in the employment and for those who may be in a more sedentary job is going to be difficult to justify going forward.

The litigation is there and is just waiting to be started. Prevention is always better than the cure and it is always a lot cheaper than finding yourself on the wrong side of decision which could impact not only in respect of that particular employee but could impact on your entire workforce.

Published in Irish Legal News.

Age Discrimination – Retirement Age

In ADJ5251 the AO in this case, being a case where the employer did not attend found that the employee had clearly indicated that she did not wish to voluntarily retire at the age of 66. Despite this the employee was told that she was "going".

The AO in this case has set out the law very clearly in relation to this matter. It is not possible for employers to unilaterally impose a retirement age without it being able to be objectively justified. Unless an employer can objectively justify a retirement age then in those circumstances the retirement will be deemed to be age discrimination. In this case €25,000 was awarded.

This case is again a further timely reminder to employers on the importance of having a retirement policy that is objectively justified in place. Where it cannot be objectively justified there is no way in which an employer can force an employee to retire without running the risk of an expensive equality claim.

The Mediation Act 2017

The new Mediation Act 2017 was signed into Law on the 2nd October 2017.

The Act will encourage the use of mediation to resolve litigation disputes. Mediation is a process for parties to negotiate a dispute and try to agree a resolution with the assistance of an independent and neutral mediator. It is a voluntary process and it is confidential which means that nothing said at the mediation or any documents that are produced can be used in litigation, if the matter is not resolved at mediation. If an agreement is reached at mediation, a settlement agreement is written up and signed. It is at this stage that the agreement is legally binding.

The advantages of mediation are that it is a shorter and less expensive process than litigation. The introduction of the 2017 Act will hopefully reduce the strain on the Irish Court System.

Placing mediation on a statutory footing is most welcome. It makes it a more acceptable and trusted process for parties who wish to engage in mediation rather than litigation. It will also be a less expensive alternative for clients. With the introduction of the new Act, it is expected that we will see a significant growth in mediation over the coming years.

Hurricane Ophelia

An Employer's Obligation

There are a number of useful guides which have issued in relation to Hurricane Ophelia and as regards the employers obligation to pay employees who do not attend at work.

The WRC has issued a useful guide on matters. One of the issues that they have raised which we would raise some concerns about is the issue of employees being placed on lay off. To place an employee on lay off it has to be on the basis that there is a lay off situation. This requires a notification under Form RP9 or a similar oral notification to the employees.

It would be our view that if an employer took the view that because of the advice from the Government and instructed employees not to attend work, that is not a lay off. It is not a position that there is no work available. It is entirely different if premises have been damaged by a storm or by a flood as a result of which employees could not attend in the workplace because of the physical danger to be in the particular workplace. It is an entirely different matter if an employer takes the view because of the dangers of an employee coming to work that the employer takes the reasonable approach of instructing the employees not to attend. In such circumstances that is not a lay off. This is a determination by the employer that the employee is not to attend. An employer is of course entitled to do this in any circumstance but in those circumstances the employer is obliged to pay. In respect of the rest of the WRC guideline we would have no difficulty in respect of same.

Where an employer did not instruct an employee not to come to work then in those circumstances where the employee does not come to

work there is no obligation on the employer to pay the employee for that day. Where such circumstances arise of course the best practice is to consider whether the employee could work from home or to allow employees to take the missed time off by making it up, for example shorter lunch breaks over a period of time (provided they get the minimum requirements). An employer would be allowed agree that an employee would take part of their annual leave entitlement. The employer cannot direct same without giving the appropriate notification to the employee which must be a month's notice. If the employee requests or had requested that that day would be treated as an annual leave day then in those circumstances that is an agreement between the employer and the employee and the employer is entitled to take a lesser notification from the employee and in those circumstances the employer is entitled to treat that as an annual leave day that would have to be paid.

An issue has arisen then as to whether an employer can discipline employees who don't make it in time to work. We would have significant difficulties with this. Where there is a warning that it is dangerous for an employee to turn up to work then in those circumstances it is highly unlikely that the employer could discipline the employee. Now this is not a blanket situation. There would be circumstances such as members of An Garda Siochana, or other emergency services where of course the employee would be expected to turn up to work. It would be effectively part of their requirement that they would turn up for work.

It is very useful to have in place a policy to cover situations where an emergency arises whereby employees cannot get to work. Of course we are not going to have Hurricane Ophelia again. But we do get snow. Even a small amount of snow can significantly disrupt transport. A light dusting of snow for some reason seems to bring all our major cities to a complete standstill. You also have situations of floods. Flooding is now more common. There are times when people will be cut off from their place of work or it is going to take significant extra time to get to work. We have situations where there are high winds as a result of which trees come down. In major cities this is not as difficult as there are normally a number of routes which people can take but in non-urban areas some employees can effectively have a significant additional journey that they will have to take where there

are fallen trees. It is not possible to set out all the circumstances but it is useful so that employers would have procedures in place.

In many cases it would be a question of an employee because of some disruption whether it is natural or because of bus strikes or train strikes etc that they can be delayed in getting to work to have a policy set out that employees will get to work as quickly as they can. It is useful to have a provision that time can be made up. It is important to have a provision that employees will advise employers as soon as possible of the fact that they are going to be delayed and the reason for same.

A very practical approach needs to be taken. You can be very legal as regards the duties of employees but that is not great at creating a good working environment. In addition for employers it is important that the policy is fair but is not open to abuse by some employee saying for example that there was a bus strike and it was going to take them two hours extra to get to work and two hours extra to get home and therefore on that basis they decide not to come to work. That is not reasonable. It might be reasonable in the case of an employee who has child minding duties but that should be able to be accommodated by them leaving earlier rather than them simply not coming to work.

There will be times when an employer decided because of danger to their staff to require the employees not to attend work. Where that has been done the employer takes on the responsibility of paying the employees.

There is no pro forma policy that should be put in place. Each policy should be determined by the requirements of each particular business. A policy which would be appropriate for say an accountant's office might be entirely inappropriate for a doctor's practice or for a business which is involved in emergency call outs. For employers it would be best practice to meet with a solicitor and to devise a policy which works for the employer in the majority of circumstances. There are issues which can always be identified. There will be parts of the country for example which are prone to flooding. This would be an issue which would be particularly relevant. It would be a common problem. A policy which is appropriate for a large urban city might be completely inappropriate for a smaller provincial town.

Many of the provisions will be similar but they need to be drafted to take account of the particular circumstances of the particular business and where the business is located and the type of work the business is involved in.

The very basis of preparing any policy is to look at the employer's duties and obligations to employees but equally the employee's duties and obligations to their employer and to strike a balance which is fair to both. This helps create a positive working environment which is good for business.

Five tips for claiming for storm damage

1. Alert your insurer.
2. Take photographs and videos of the damage.
3. Be safe. If there are any emergency repairs necessary, e.g. gas, electricity, have these carried out by a competent and qualified person. Do not do DIY work.
4. Do not permanently dispose of any damage items until your insurer has had an opportunity to inspect same.
5. Keep all bills, invoices and receipts for expenses incurred.

Storm Ophelia and Insurance Cover

On the 16th October 2017, a status red weather alert was in place for the country due to Strom Ophelia. Tragically, three victims were killed in storm related incidents. Thousands of homes and businesses were left without power, water, broadband, telephone and mobile services. Storm Ophelia damage claims are set to hit €800 million.

There has been much news circulating in the world of social media in relation to what insurance policies will and will not cover as a result of Strom Ophelia. The answer is that this will depend on the nature of your insurance policy. If you have home insurance, cover for storm damage will apply in the event of significant damage to the building or contents. What a home insurance policy will more than likely not include is damage to a fence or a gate or a garden. Depending on the nature of the policy, an excess may apply. In relation to car insurance,

if you have comprehensive car insurance, you will be covered for damage caused by falling trees or other storm damage. Business insurance policies will cover storm damage to the business premises and any stock and possibly interruption to the business, if it is the result of storm damage.

There has been much concern in relation to whether insurance companies will raise the cost of insurance premiums in the aftermath of claims made as a result of Strom Ophelia. Insurance Ireland have not yet ruled out the possibility of a raise in insurance premiums as a result of the claims and have stated that it is too early to assess same. Given that policy holders can go years without making any claim on a householder business policy, insurers should be well prepared for an event such as Storm Ophelia and it may be hard to justify any raise in premiums in those circumstances.

We are in the very early stages of the aftermath of Storm Ophelia and the net cost of the storm remains to be seen.

Furnishing a Contract of Employment

An interesting case arose in TED1723 involving the Grosvenor Cleaning Services Unlimited Company and Pawel Wojtowicz. In this case the employee was employed from the 28th October 2005 and ceased working for the employer in February 2006.

In 2008 the employee applied for a job which had been advertised by this employer for whom he previously worked and commenced employment on the 28th November 2008. The Labour Court has held that this was two separate occasions and in those circumstances the employee was entitled to a signed written statement of terms and conditions in respect of the second period. The Court held that this was a new and distinct period of employment.

The Court awarded four weeks remuneration to the employee.

In our view it is not unusual for an employee to leave and then to come back at some later date to work for the same employer. In such circumstances this is a new employment. This case is a useful reminder for employers that in those circumstances a new contract of employment should be put in place and given to the employee.

Relying on a Contract of Employment

An interesting issue arose in a case of Department of Education and Skills and Michael O'Loughlin PWD1725.

The case is interesting in itself but what is particularly interesting is that an issue arose in relation to a contract.

The Labour Court in this case quoted to case of Superwood Holdings PLC -v- Lyons and London Insurance PLC [1995[3 IR 303 where Blayney J quoted with approval the following passage from the decision of Budd J in Coen -v- Employer's Liability Insurance Cooperation [1962] IR 314:

"… the repudiating party cannot be allowed to approbate and reprobate. He cannot just be allowed to say 'I deny the existence of the contract which you say exists between us, but I also rely on a term of that contact'…"

This, again, is a very useful statement by the Labour Court restating the law. It is an issue which can arise in the WRC at times and we are simply quoting this case as an aid memoir for colleagues and those reading this should that argument ever be raised or that anybody is thinking about raising it.

Unfair Dismissal and Re-Engagement

The employee in this case ADJ-625 issued a claim on 1st December 2016. A hearing took place on 22 June 2016 and a decision issued on 21 September 2017. In this case the Adjudication Officer directed re-engagement of the employee.

Cases before the Employment Appeals Tribunal where re-engagement or reinstatement was unusual because of the delay between lodging a claim and the case coming on for hearing and determination. Now we do not know the background of this case as regards the exact date of termination but an issue arose in September 2016. Therefore the

dismissal occurred someday between the 19th September 2016 and the 1st December 2016.

The claim was lodged on 1st December. Under the proposals from the WRC this case should have been listed within 10 weeks and a decision should have issued eight weeks later. On that basis the matter should have been fully determined by the end of March or the beginning of April. Therefore the issue of reinstatement would be an issue where the employee would receive their full back pay and would be a matter which would have been dealt with relatively quickly. In this case you have a situation of nearly 10 months between lodging claims and a decision issuing.

This is neither fair to employers or employees. The issue of the employee being out of work for that period of time and not getting any compensation other than the job back in the intervening period where reengagement is appropriate is one where if the matters had been dealt with more quickly possibly reinstatement might have been an option.

From an employer's point of view the employee's employment was ceased. They may very well have replaced the employee. Now they will be in the position of having to dismiss another employee who has been taken on as their replacement. Depending on when the dismissal took place then the replacement employee may very well now be protected by the Unfair Dismissal Legislation. This is an intolerable position. It is completely contrary to what the original proposals from the WRC were. The WRC are clearly not meeting its targets.

I am not putting any blame on the AO. The AO received the hearing date on the date that it was given to them. The time between the hearing and the decision issuing might indicate to those reading matters that it took from the hearing date to the date the decision issued for the AO to deal with matters.

That is incorrect. AO's submit their decisions to the WRC. Staff in the WRC then send out the decisions and date them. It can take a considerable length of time and sometimes more than a month between an AO submitting a decision to the same being dated and sent out.

Again, I am not blaming the staff in the WRC. There are not enough of them.

There is a solution but of course the senior managers and by that I mean the top senior management in the WRC are not going to take it on namely;

1. Provide some typists
2. Give the AO's a Dictaphone and let them dictate their decisions or better still voice dictation.
3. Give the AO's the time saved in typing up their decisions to be used to hear additional cases to reduce the backlog of cases waiting to be heard.
4. Once a decision has been typed up that the Secretary assigned to a particular AO would then date it once approved and have it sent out.

The WRC are not identifying the time it is taking for AO's to prepare decisions compared with the time it then takes the WRC to send them out. As matters stand it would appear in the particular case that it took the AO 3 months to prepare a decision. We do not believe that it took that length of time. What we believe is that this decision sat somewhere before it was sent out.

We do know that the WRC senior management do review this newsletter. We seriously doubt however if any action is going to be taken to speed up matters because of the "culture" of having a paperless system where the AO's would write up their own decisions. Nobody in the WRC is going to admit that that system is not working and is ineffective and is a waste of AO's time. The typing up of decisions should be a matter for staff at a lower grade than an AO.

Unfair Dismissal – Mitigating Loss

In case ADJ5715 the AO in this case found that the employee had been unfairly dismissed. The AO decided the reinstatement was not possible or re-engagement.

What is interesting in this case in awarding €3,500 the AO pointed out that from June 2016 until the hearing in August 2017 the employee had been deemed fit for work but had not been active in seeking work. The AO in this case quoted the case of UD858/1999 being Sheehan and Continental Administration Company Limited to support the view that there is an obligation on an employee to mitigate their loss. By this it is meant going and looking for work. This is an important restatement of the law. For some reason some employees believe that once they are dismissed that they are entitled to two years compensation and that they need to do nothing to mitigate their loss. Hopefully a few more decisions from the WRC will put this fallacy to bed once and for all. The Labour Court has consistently set out there is an obligation on employees to mitigate their loss.

Unfair Dismissal – Setting Compensation

In ADJ7001 which is a case against a Solicitors office the AO in this case found that the dismissal was procedurally unfair. In setting compensation the AO rightly pointed out that the respondent in this case had taken little action to minimise loss and a compensation of €2,500 was awarded. This case is a timely reminder for everybody.

For employers is important that there is procedural fairness in relation to any dismissal.

For employees it is equally important that they seek to minimise their loss by seeking employment.

Constructive Dismissal – A Case the employee won

Case ADJ3645 is a case where the AO found that the employee had been constructively dismissed because of the actions of the employer. In this case the employer, it appears suspended the employee. The AO

referred to the case of Bank of Ireland and James Reilly being a decision of Mr. Justice Noonan and pointed out that the employee had been suspended without any rudimentary explanation as to the reason for the suspension and had no opportunity to respond. The AO found that at a meeting suspending the employee the employee was not made aware of the allegations against her and was simply then escorted from the premises after being suspended. The AO found that there had been a decision to suspend prior to the meeting with the employee taking place. The AO found that the employer had acted in such a way as made it reasonable for the employee to resign. The AO in this case importantly set out the tests set by the Labour Court in EED0401.

This is a very useful decision for those involved in employment law to read. It is one of those unusual cases where the employee actually wins a constructive dismissal case. It is important for employers to read this case as it sets out what should not be done by employers.

Constructive Dismissal

The Labour Court in the case UDD 1744 G4S Secure Solutions (Ireland) Limited and Shine had to deal with the issue of Constructive Dismissal.

The Labour Court has helpfully set out quite a lot of case law including the case of Beatty -v- Bayside Supermarkets UD 142/1987 and the opposite argument effectively in the case of Allen -v- Independent Newspapers (Ireland) Limited [2002] ELR 84.

The Labour Court has helpfully set out in relation to the relevant facts that they could not see how the respondent was guilty of conduct in relation to the complaint which was such as to entitle the employee to terminate his employment without having sought to ventilate and resolve whatever grievance that he had through the internal procedures. They pointed out that the complainant had the benefit of a trade union representative and was advised by the operations manager to raise any issue he had in relation to his relocation with the respondent through his union. The fact that the employee failed to do so, the Court held, negated any possible basis upon which his

subsequent decision to resign could be regarded as a reasonable response to the situation then pertaining.

This is a very useful restatement of the law.

There is, in our opinion, a misconception that in every single case the employee to back up a Constructive Dismissal case must show that they went through the internal procedures. The Court in this case, in our view, is saying that it is advisable and better that that is done. However, the Court has recognised that there are circumstances in which it would not be necessary for the employee to go through the internal grievance procedures.

In our view the Court has properly stated the law. It would also be our view that the number of occasions under which it would be reasonable for an employee not to go through the internal grievance procedures are very limited. The circumstances which would warrant an employee resigning without going through those procedures would require that there was an extremely serious breach which went to the very heart of trust and confidence or at a very minimum that the employee would be in a position to show that there was no realistic prospect that any grievance was going to get any kind of fair hearing. Even that latter point may be difficult to get over the line except in exceptional circumstances.

It is extremely useful that the Labour Court has taken the time to restate the law in relation to this issue. There is a huge level of misconception as regards the whole issue of what constitutes Constructive Dismissal.

Constructive Dismissal

In case UDD 1744 G4S Secure Solutions (IRE) Limited and Shine the Labour Court in this case has helpfully set out the applicable law. The relevant legislation quoted by the Court was Section 1 of the Act and Section 6.1.

The Court has helpfully set out that Section 1 of the Act envisages two circumstances in which a resignation may be considered a Constructive Dismissal. Firstly, where the employer's conduct

amounts to a repudiatory breach of the contract of employment and in such circumstances the employee would be entitled to regard himself or herself as having been dismissed. This is often referred to as the "contract test". In Western Excavating (EEC) Limited -v- Sharp [1978] IRL 332 it was held that to meet the "contract test" an employer must be "*guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance*" as held.

"Secondly, there is an additional reasonableness test which may be relied upon in either an alternative to the contract test or in combination with that test. This test asks whether the employer conducted his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be treated to put with it any longer, if so, he is justified in leaving."

The Court helpfully quoted the case of Batty -v- Bayside Supermarket UD 142 [1987] relating to the need to utilise grievance procedures and at the same time quoted the case of Allen -v- Independent Newspapers (Ireland) Limited 2002 ELR 84 as the alternative where it was held that it would not be reasonable to expect the employee to use the said grievance procedures.

In this case the Court held that it could not see how it would have been reasonable for the employee to terminate the employment without having sought to ventilate and resolve whatever grievances he had through the internal procedures.

This is a very useful restatement of the law.

Constructive Dismissal

The issue of constructive dismissal is an issue which regularly arises.

Two recent decisions under ADJ7212 and ASDJ2730 are both very useful decisions for colleagues to read for review of the legislation relating to constructive dismissal.

In particular they set out that the burden of proof is on the employee. Very useful decisions have been given in quoting UD1146/2011 where the EAT held in such cases a high level of proof is needed to justify the complainants involuntary resignation from the employment. i.e., he must persuade the Tribunal that his resignation was not voluntary. In the case of UD1350/2014 Emery –v- Orricle EMA limited where the EAT stated it is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair. Case law is set out to show that the internal procedures must be used unless they are unfair but it also points out that case of EAT in Donegan –v- Co. Limerick VEC UD828/2011 that the claimant must show that the respondent acted in such a way that no ordinary person could or would continue in the workplace and also that the respondents conduct was so unfair or so damaging to the claimants rights and entitlements that she had no option but to resign her position. In case ADJ2730 the Adjudication Officer did refer to the case of Berber –v- Dunnes Stores 2009 ELR61 also.

These are very useful decisions and ones that those interested in constructive dismissal cases should read. There is a significant amount of case law specified in these and the appropriate extracts from same are all set out.

Redundancy

In case ADJ8826 the Adjudication Officer had to deal with a situation where a company had ceased trading. The Adjudication Officer in this case held that the employee had not resigned. The Adjudication Officer held that the employee had not been dismissed. The Adjudication Officer then went on to find in a claim that the employer should engage with the employee on the basis of paying the employee redundancy.

We find this decision hard to countenance. The claim was brought under the Redundancy Payment Acts. Either it is a redundancy or it is not a redundancy. Where a company goes into Liquidation and ceases trading then the employee's employment has effectively been terminated and it is a redundancy.

Now it is not clear what notices were served on the employer. If a notice had been served under the Redundancy Payments Acts, being the RP9 then clearly the notice has been served and the employee would be entitled to a ruling one way or another as to whether it was a redundancy. Alternatively, if it was a lay off situation that was only contemplated and the employee had served the appropriate notice without a counter notice the employee would have been entitled to claim redundancy.

In this case the AO has issued a decision which is difficult to fathom. If the employee or the employer appealed there is no decision to appeal. Now it is probably arguable that the employee can contend that the decision which issued was such that it was sufficient for the employee to bring an appeal to the Labour Court. This should not be necessary, in our view. If a redundancy situation arises then in those circumstances the employee should receive the redundancy by way of an appropriate decision.

That is just our view.

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Redundancy

In the case of Brian Cahill trading as Jerpoint Inn and Helen Green an issue arose as regards the jurisdiction in relation to the issue of a claim under the Redundancy Payment Acts. What is interesting in this case is that the legal representatives were arguing about the fact that the claim had not been lodged within 6 months of the purported date of termination.

The Labour Court pointed out that there appears to be a misunderstanding in relation to the time limit on claims for Redundancy Payment. The Court pointed out that the limitation period under Section 41 (6) of the Workplace Relations Act 2015 applies and that the appropriate limitation period is 52 weeks from the date of termination of employment.

This is an important reminder of what the law on this issue is. It is one of the cases where the 6 months period does not apply.

The issue arose then whether or not the employee was entitled to Redundancy. The issue was effectively determined on to whether there had been a transfer under the Transfer of Undertakings Regulations.

The Labour Court helpfully referred to case 24/85 Spijkersv Gebroeders Benedik Abbatoir CV and set out the views of the ECJ in relation to that. It is useful that the Court has set out what the test was, namely:

"In order to establish whether or not a transfer has taken place in a case as such before the National Court. It is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated inter alia by the fact that its operation was actually continuing or resumed by the new employer, with the same or similar activities."

The Court went on to state that the ECJ had stated:

"To decide whether these conditions are fulfilled it is necessary to take account of all factual circumstances of the transaction in question including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stock, the value of intangible assets at the date of transfer, whether the majority of the staff were taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between the activities before and after the transfer, and the duration of any interruption in those activities. It should remain clear, however, that each of these factors is only part of the overall assessment which is required and therefore they cannot be examined independently of each other."

In this case the Court found that all stock, furniture and equipment, the 7 days publican's licence and the use of premises all transferred. The Complainant transferred. Supplier accounts transferred. The customer base transferred. There was no period of interruption. The activities, before and after the transfer, mirrored one another. The Court therefore held that there was no entitlement to a Redundancy payment. They however importantly also pointed out that the complainant in this case was entitled to continue in the new employment on terms no less favourable than she had previously had.

This is a very important decision of the Labour Court clarifying the time limits for a claim under the Redundancy Payment Acts and giving further clarity in relation to the Transfer of Undertaking Regulations.

Redundancy in the case of a Doctors practice

In the case of ADJ7878 is an interesting case dealing with a situation where GMS contract moved to another practice. The employee sought redundancy. This was objected to by the first doctor on the basis it was a transfer as the relevant employee had taken up work immediately afterwards with the new practice.

Normally under the Transfer of Undertaking Regulations one would take it that when the business, which in this case would be the business of dealing with patients under the contract transferred to a new practice that there would be a transfer under the Transfer of Undertakings. This does not actually apply when you have GMS Contracts. The GMS contract is personal to the particular Doctor. The individual working for the Doctor whether they are a nurse or a receptionist are not working under that contract but are deemed to be working in assistance to the person who has the contract. When the contract ceases it is re-advertised and it is effectively a new contract with a new Doctor as happened in this case. In such circumstances there is no transfer. In those circumstances an employee working for the Doctor who had the contract would be entitled to claim redundancy. This is what the AO held in this case.

This is one of the difficulties with the Transfer of Undertaking Regulations in that there is a perception by many that simply because of business or part of a business moves to another entity that the transfer of undertakings automatically applies. That is most definitely not the position and it is important to look at the entire of the issue to ascertain whether in fact a distinct business has transferred.

Redundancy

Decision ADJ8865 is one where the AO in this case has set out all the relevant information in a concise and precise way which enables any employee claiming redundancy to submit a fully completed form with a decision in a format which will be satisfactory to the Department of Employment Rights and Social Protection.

The AO should be commended for the manner in which the decision is set out. It is not usual that we would review who actually signed the decision. We tend to comment without doing so. However this decision is so well set out it screamed to us that this must have been done by somebody who had experience in the EAT. When checked the name stood out immediately as a person with considerable experience of dealing with these matters in the EAT.

Redundancy – How will the employee enforce a claim?

In ADJ7254 the AO found that there was a redundancy. We reviewed the decision. It does not give a start date in the decision. It does not give a finishing date. It does not give a rate of pay. It does not give the employees date of birth. Now all of those are needed for the employee to go to the Department of Employment Rights and Social Protection to put a claim into the fund. At a very minimum the decisions have to set out start date, finishing date, and the rate of pay. The decision which has issued is effectively unenforceable if the employee has to go to the Social Fund. This is the type of case where an employee may have to appeal to the Labour Court which is an unnecessary additional cost. Alternatively, may have to bring a claim back to the Workplace Relations if the Department refuses to pay up. Decisions relating to redundancy should set out the basic information which is required by the Department.

Agency Workers

Case ADJ303 is a timely reminder of the importance of suing the right party. In this case the employee was employed by an Agency. The employee contended that the employee had been dismissed. The employee did not bring the claim against the agency. The employee

brought the claim against the end user being the supermarket whom the employee worked for. This is absolutely correct.

Normally people might think that you would bring the claim against the party who pays you or whom your contract of employment is with. That is correct. However, that does not apply in the case of agency workers. In the case of an agency worker a claim for unfair dismissal will issue against the end user not the agency the employee is employed by.

Other claims such as claims under the organisation of Working Time Act or the Terms of Employment (Information) Act will issue against the agency.

In considering cases for an atypical worker it is important to check the definition as to who the correct employer is for the purposes of each particular Act. If there is any doubt as to whom the correct employer is the best advice we can give issue everybody and work it out later on. Do not, particularly if time is of the essence try to work matters out first. Just issue the proceedings against everybody that might possibly be liable and then work it out afterwards.

Do not get worried about the fact that there could be any criticism of you doing this. There might be. However, the legislation is far from clear. There are huge issues at the present time under the Payment of Wages Act as to who the correct employer is in the case of a person who would be employed by a school but where the monies for the purposes of paying them would come from the Department of Education. There is an issue as to who the employer is in those circumstances. There is a view as a result of a recent case that it is in fact the Department of Education. You might then have a claim under the Organisation of Working Time Act. It could be for example not getting proper rest intervals. That would be against the school. You might have a claim that the employee did not get their proper holiday pay. Now is that against the school or is it against the Department of Education. Quite frankly the whole issue is up in the air. This is a matter covered under the Payment of Wages Act or is it a separate matter under the Organisation of Working Time Act and is it the responsibility of the Department to make sure that the person gets paid their proper pay or is it the responsibility of the school. It is far from clear what the answer to that question is though we have our

suspicions. But pending those proved to be either right or wrong our view in those circumstances would be that you sue both the Department and the school.

Unfortunately we have badly drafted legislation in Ireland. That is something we have to work with. It is something the WRC/ Labour Court have to work with. The Courts have to work with it. In a recent case in the Court of Civil Appeal it was quite clear that the whole issue as to who is an employee and an employer of a particular employee is often far from clear when the legislation is reviewed. It may well be that for various Acts and employee may have different "employers" against whom claims might need to be brought. That may seem strange but unfortunately that appears to be the way legislation has been drafted.

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Sunday Premium Payments

In CNN172 being a case before the Labour Court concerning Key Guard Security Services Limited and the Workplace Relations Commission being an appeal of a compliance notice the Labour Court had to deal with a case relating to the issue of Sunday Premium. This is a most important decision from the Court in clarifying the law.

There was an issue as to whether a correct appeal had been lodged. The Labour Court determined that one had been. There appears to have been some technical defects in completing the claim form but the Labour Court did hold that an appeal had been lodged and while the appeal form had to be returned to be amended it did not mean that a valid appeal had not been lodged.

The Labour Court helpfully set out the Legislation in Section 14 OWTA.

There was an argument made that the employee had received a payment in excess of the National Minimum Wage and therefore this amounted to a premium. The counter argument was made that the Labour Court previously in a case of Viking Security and Tomas Valent DWT1489 had held that simply paying in excess of the National

Minimum Wage did not mean that the additional sum amounted to a Sunday Premium.

It would be our experience that in many cases this is a standard argument made by employers. It is extremely useful that the Labour Court has confirmed that simply paying in excess of the National Minimum Wage does not mean that a Sunday Premium has been paid.

The employer in this case had contended that staff were paid breaks and that this amounted to a premium. The Labour Court ascertained that not all staff were given paid breaks and therefore this procedure did not have universal application within the company and therefore could not be regarded as a premium payment. This makes absolute sense and is in line with previous decisions of the Labour Court. The employer then contended that having to pay a Sunday premium would place it at a competitive disadvantage. This argument was roundly debunked by the Labour Court.

We comment on this case because of the fact that the arguments put forward by the employer are nearly the standard arguments that are regularly put forward by employers in claims seeking a Sunday Premium. This decision of the Labour Court is extremely important in restating the law and clearly setting aside three of the more standard arguments that are put forward, It is absolutely clear that in relation to a Sunday Premium the Labour Court has in previous cases clearly set out there is a requirement that the element of the Sunday Premium be specifically specified in a contract. In this particular case the employee was covered by an ERO for the Security Industry which had a set hourly rate and could not be deemed to include any Sunday Premium.

This is a decision which we would commend colleagues to read because it is a clear, precise, easy to read and concise statement of the law.

Obligation to pay holiday pay when employment ceases

In ADJ7820 the AO had to deal with a situation where an employee had not been paid his holiday pay amounting to a little over 66 hours

when the employment was terminated by the employer with the employee simply being told to go home.

The AO in this case has simply ordered that the respondent employer pays the outstanding monies due.

The very basis of the Organisation of Working Time Act is that any award is intended to be persuasive of an employer going forward. Where an employer is simply required to pay the amount due it is hard to comprehend how this is going to be persuasive of any employer paying monies due when an employment ceases.

We fully accept that under the Minimum Notice Legislation and under the Unfair Dismissal Legislation there is no provision for a penalty to be persuasive of an employer going forward not paying minimum notice or for unfairly dismissing somebody. However when it comes to the Organisation of Working Time Act, which is a piece of Health and Safety Legislation, which is different from the other piece of legislation, it is incumbent, we believe, on an AO to consider whether compensation on top of monetary loss is warranted. We fully accept that there will be circumstances where it will not be warranted but in those circumstances it should be clearly set out as to why that is.

It would be clear from the particular decision that the employee was not represented.

In our opinion where an employee appears before the WRC and their cases it is incumbent upon an AO regardless as to whether the person is represented or not to consider the full weight of the legislation and to set out a decision in such a way, where compensation for the breach itself is not warranted as to why it is not warranted. Equally of course if compensation is to be awarded on top of the economic loss then there is the issue as to why it is being set at that figure which is equally important in our opinion.

Time Limits for Bringing claims to the WRC

In Case ADJ7212 the Adjudication Officer had to deal with a claim under the Payment of Wages Act. The case was dismissed because it was well outside the six month period. But it is useful that the AO in this case, went through the legislation, dealt with Section 6 (4) of the

Payment of Wages Act which provides that a claim must be made within 6 months beginning on the date of contravention.

The AO referred to the High Court case of Moran –v- The Employment Appeals Tribunal 2014 IEHC 154 and Health Service Executive –v- McDermot 2014 IEHC 321 where the High Court was asked to consider the meaning "within the period of 6 months beginning on the date of contravention to which the complaint relates. These High Court judgements confirmed as the AO pointed out having regard to how the complaint was described, which is the period that is well beyond the 6 months statutory period provided and therefore the claim was out of time. The AO pointed out that Mr. Justice Hogan in the Moran Decision relying on the Moran Decision in the McDermot decision held;

"This was because the complaint was formulated by the complainant in that case related to a time period of alleged contravention to which it was plainly statute barred". This issue often arises.

If a claim is put in on say 1 January 2018 to make matters easy and the employee is looking to go back 12 months then it should be two claims. The first claim should be for the period for 6 months back from 1 January 2018. The second claim should be made for the period preceding six months period and claiming "reasonable cause" to go back the additional six months.

If the claim is simply put in for the full twelve months then in those circumstances the complaint did not occur within 6 months and the claim is statute barred, unless the "reasonable cause"" submission is accepted.

It is important to ensure when bringing claims that a portion of any claim is not going to become barred because of the fact that an additional period of time is claimed.

When it is not covered in that decision there are other time periods which are slightly different.

In a claim under the Organisation of Working Time in respect of holiday pay or not receiving the annual entitlements despite what

might put in any company policy the leave year runs from the 1st April to the following 31st March.

Therefore to put a claim in within 6 months the claim must issue by the 30th September, preferably the day before hand being the 29th. In such circumstances the 6 months goes back beyond the 1st April therefore that entire annual leave year is taken into account as regards claims for holiday pay or not receiving the appropriate 20 days holidays. In an equality claim provided an incident occurred within the last six months any other incidents of a similar nature which occurred going back maybe many years of the employment can be taken into account in the Equality claim.

In a National Minimum Wage Act claim the employee must issue a request under Section 23 within 12 months. They have a further 6 months to bring a claim and the claim goes back for 6 years from the date that the claim is lodged.

However, in most cases it is limited to a six month period from the date that a claim is lodged back. It is therefore vitally important in lodging claims that they are lodged as early as possible. Delaying matters for the purposes of having negotiations or otherwise is not best practice. The best practice is to issue the proceedings first and then to get into discussions. There is no difficulty in issuing a protective claim. You can always, when lodging the claim, say that you wish to go to mediation.

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Submitting claims to the WRC

A recent issue has arisen in this office relating to submitting documentation to the WRC. In all cases where we submit we request a delivery receipt and a read receipt. You get an automatic message from the WRC confirming receipt and there is a standard letter of response.

However, it is important for colleagues in submitting claims to be very careful on the receipt received from the WRC. We have come across cases recently where the date that is set out in the letter from the WRC as having received the complaint is different that the delivery

receipt and the acknowledgement letter that is automatically generated from the WRC confirming receipt.

This normally would not have any impact on anybody but it could if a claim was close to the time limit.

Because of this it is our advice to colleagues to always request a read and delivery receipt when submitting documentation to the WRC.

Claim under the wrong Act

In ADJ-9049 an employee brought a claim for Minimum Notice but issued it under the Redundancy Payment Legislation. The Adjudication Officer in this case rightly held that there was no provision to enable the Adjudication Officer to award the compensation.

It is quite evident that this is another one of those cases where the employee was self-represented.

It is equally quite evident that the format of the WRC claim form is such that unrepresented individuals are now finding it extremely difficult to issue the claim under the right Act. That simply should not happen.

Is there a way that employees can get over this problem where they are not legally represented? There is actually a very simple situation. The employee completes the claim form. They then, instead of lodging it online, print it off. They then write a letter to the Director General addressed to the Director General, Workplace Relations Commission, Lansdowne House, Lansdowne Road, Ballsbridge, Dublin 4 and send the letter and the claim form to the Director General and sets out all the complaints they have.

Because there is no statutory claim form in those circumstances the letter itself is a claim form and it can therefore encompass all of the claims that the employee wishes to lodge and there is no requirement to set out the relevant Act.

That is a piece of simple advice that we can give to people.

The reality of matters is that we should not be raising this issue. The claim form should be so easy that any man or woman without legal representation should be able to fill the claim form out. We are constantly coming across cases on the WRC website which clearly indicates that people cannot use the form correctly.
It is necessary in our opinion that the form is amended so that ordinary people can use the form as it is, without legal representation, virtually becoming impossible and there is too many cases being dismissed because individuals are lodging the claims themselves and under the wrong Act.

Data Access Requests

It is our view that once the GDPR comes into operation on 25th May next year employers are going to see a considerable number of data requests.

Currently documentation would be provided in hard copy. The new rules will provide that they must be provided in soft copy when requested. The converse would appear to be that particularly in employment cases that hard copies can be requested and that in those circumstances a soft copy provision only applies where there is a specific request for soft copies.

The new time limit will be reduced from 40 days to 1 month.

The current fee is going to effectively go unless the employer in employment cases can show that the request is excessive. This is going to be difficult to show.

In addition additional information such as details about data retention periods, the extent of automated decision making used and the source of personal data will have to be provided.

We would also anticipate there would be considerable claims issuing when data is not provided.

Employment Equality Claims

Case ADJ2269 is a useful decision for those interested in employment law to read as the AO in this case has taken the time to set out considerable amount of the relevant case law and tests to be applied in equality discrimination cases.

Dissolved Companies

In ADJ8020 the Adjudication Officer in this case held that the claim was against a dissolved company. The AO in this case held, following a case of MWD6-2012, where the Labour Court held that there was no jurisdiction to entertain a claim where there was a dissolved company that the AO could not proceed with the case.

There is an issue with the Irish legislation as to whether the directive dealing with insolvency of employers has been properly implemented in Ireland. There is a problem with dissolved companies being able to pursue them.

There were four other associated cases which means that five employees were unable to pursue claims.

Rates of Pay for the Construction Sector

S.I. 455 of 2017 has set out the new rates for pay for those working in the construction industry. The rates apply from the 19th October 2017. These are Sectoral Employment Order for the Construction Sector.

The rates of pay are as follows:-

- A general operative who is over the age of 18 years and enters construction industry for the first time will have an hourly rate of €13.77 per hour.
- A Category 1 worker, being a person who has more than one year's experience working in the sector is entitled to a rate of €17.04 per hour. It should be noted that this is not experience

working for a particular employer but working in the Construction Sector.

- A Category 2 worker who is a skilled operative being a scaffolder, who has an advance scaffolding card and who has 4 years' experience, bank operatives, steel fixers, crane drivers and heavy machine operators will be paid €18.36 per hour. A bank operative is more generally known as a banksman. The rate for craft worker will be €18.93 per hour.
- Apprentices will be paid between 33.3% of the craft rate and 90% of the craft rate between year 1 and year 4.

The relevant Sectoral Employment Order includes recommendations in relation to sick pay, pension and unsocial hour payments. The new regulations will apply to all workers in the Construction Sector. It will currently affect some 50,000 workers.

When we used to have the Registered Employment Agreements we regularly came across defences from employer to state that they were not members of the Construction Industry Federation or some similar defence. That will not apply. This is a Sectoral Order. It will apply to all those working in the Construction Industry.

We would expect to see from early next year claims proceeding against those employers who are not paying the sectoral rates of pay. We would anticipate considerable resistance from some employers to paying these rates. It will be interesting to see how matters develop.

There are dangers for employers who are in the Construction Industry who do not pay the correct rates of pay. It is not just a Payment of Wages claim that they could face. By not paying the correct rates of pay they could be caught with claims for not paying proper Public Holidays. They could be caught with claims for not paying proper Annual Leave payments. Both those claims can result in awards of up to two years' wages. It will be interesting to see how matters develop in relation to this Sectoral Order.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**