Keeping In Touch – October 2017

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

As the issue of Unfair Dismissal is an issue which concerns colleagues significantly we have concentrated in this issue on unfair dismissal cases and new developments in this area. There had been, this year alone, some significant developments in employment law particularly in the area of Unfair Dismissal which it is important for colleagues to be up to date in respect of. It is quite clear to us that a considerable amount of legal argument is now arising in employment cases. This is probably different than applied in the Employment Appeals Tribunal. While the Employment Appeals Tribunal dealt with considerable and complex legal issues the decisions now issuing from the WRC and the Labour Court are quoting a significantly increased volume of case law. Equally the cases are becoming ones where significant legal arguments are being raised. This is both by employer representatives and employee representatives. It is effectively making it a lot more difficult for somebody to present their own case if they are not legally qualified.

While we have concentrated on Unfair Dismissal law in this issue we have covered a significant number of other areas which are of relevance to colleagues, in our opinion.

We would again like to thank colleagues for the very positive feedback we are receiving in respect of our newsletter for which we are most grateful.

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Keeping up to Date

Keeping up to date with developments in employment law and practice is time consuming. For those who are professionals it is necessary to review:-

All Court decisions being Supreme Court, Court of Appeal and the High Court. In addition there is the ECJ decisions which are very relevant.
Decisions of the Labour Court
Decisions of the WRC
New Statutory Instruments
New Acts of the Oireachtas
Developments in European Law in relation to new Directives and Regulations which may impact on clients into the future.

There is a significant volume of information coming. To a certain extent it can be information overload. To a certain extent there is a necessity to be able to filter the information into more manageable segments.

For this reason we produce this newsletter Keeping In Touch.

There are many other newsletters and bulletins which are produced by all the major law firms in Ireland who are involved in Employment Law. Following these firms on Linkedin or alternatively signing up for example for any of the newsletters from these firms, this will enable you to keep up to date with developments and hopefully point you to areas where there may be further investigation needed or where further reading is required.

If you are a solicitor of course publications such as the Law Society Law Watch is extremely useful. Irish Legal News is a wealth of information on all aspects of the law produced in easy to read daily bulletins.

We would encourage those who are interested in employment law and practice to make sure that they get as much information as they can from as many sources as they can and that these are reviewed rather

than put on the long finger. Unfortunately time needs to be set aside on a daily basis to review matters.

For those of us in the legal profession this does not count, unfortunately, for our CPD. However, it is an important aspect of any practice so as to keep up to date.

It might be thought that this newsletter is something that we get a credit for in relation to CPD. We do not. The Law Society in line with their usual procedures subjects members of this firm to an audit of our CPD for 2016. We passed the requirements with flying honours. We had significantly more CPD than was actually required. What was however interesting as an aside is that it was confirmed the Law Society does not count for CPD purposes our newsletter. This newsletter has never been produced for that purpose. It is produced not only for our clients and those that are interested in employment law but also as an aide memoir for ourselves.

We encourage colleagues to sign up for our newsletters and to newsletters from many of the excellent firms in this country who are involved in employment law. There are many excellent solicitors office who undertake this area of work and produce fantastic commentaries both in written form and by way of podcasts which are free to access and we encourage you to do so.

Review of Labour Court and WRC Decisions

In this issue decisions up to the 5th September 2017 from both the Labour Court and the WRC have been reviewed. The decisions from the WRC up to 5th September were on the WRC website as of 19 September 2017.

Employment Appeals Tribunal – Change of Address

The EAT is moving to Lansdowne House, Lansdowne Road, Dublin 4. Email: eat@dbei.ie , phone 01 6313006. The move will take place from the 3rd October 2017. The EAT will no longer operate from Davitt House from that date.

Colleagues who have hearings still scheduled before the EAT will be getting or should have received a letter from the EAT advising them of this change.

Forthcoming Lectures

Richard Grogan of this firm is delighted to have been asked to present a paper on "Tips and Traps in Employment Law/Avoiding the Pitfalls" to the Roscommon Solicitors Bar Association on the 25th October next. Subsequently on 7th December next Richard will be presenting a paper to the Lawyers CPD Club for an 8am lecture on "Tactically Approaching Employment Law Cases – A Practical Guide to the Workplace Relations Commission and The Labour Court".

It is always a great honour to be asked to present these papers. We are always delighted to do so.

As is the usual practice of Richard there will be a printed seminar note and as usual Richard will be speaking to the paper rather than simply reading it.

It is great to see such a continuing interest in employment law matters.

Employment Law Master Class with the Law Society of Ireland

The Law Society of Ireland is proposing to hold an employment law master class in early 2018. We are delighted that we have been asked to assist in helping to put this course together which will be a one day course. The idea behind this master class is that it would deal with the very practical aspects of presenting and defending cases before the Workplace Relations Commission and the Labour Court. The course will be designed for both the specialist and the non specialist. It will very much deal with the actual practical day to day issues which colleagues will need to address and at the same time giving the relevant legislative background.

The course is being designed for those who represent employers and employees.

The course is intended to deal with what could be called the tips and traps which collegues can fall into. Therefore the approach will be in dealing with matters when acting for employees as to what tips those acting for employers need to be aware of and similarly the speakers dealing with representing employers will be setting out the issues which can also be relevant for those who represent employees to know where the opportunities are for best presenting their client.

Ms. Katherine Kane of the Law Society is setting up this course. It is great to see that the Law Society is looking at matters from a very practical view point.

As we said this course will be for both the specialist and the non specialist. Further details will be issued by the Law Society in due course.

On our behalf we are delighted to have been asked to take part in such a prestigious course and to be able to facilitate and assist colleagues.

As is usual, Richard Grogan of this office, who will be presenting, will be foregoing any fee which will instead be given to the Solicitors Benevolent Association.

High Court Cases

On 16th November next Judgement will be given by Mr. Justice White in the case of Petraitis and Philmic Limited. The case involves the issue of the Terms of Employment (Information) Act, The Organisation of Working Time Act and issues relating to the procedures adopted in the relevant case for the Labour Court. On 23rd November we act for two employees in respect of an appeal by Trinity Lodge Hotel Limited against the decision of the Labour Court which again relates to the Organisation of Working Time Act

On 28 November next before the High Court a Point of Law case arises involving Karpenko and Fresh Cut Food Services Limited. This is a case under the National Minimum Wage Act. It is we understand the very first case under the National Minimum Wage Act by way of a

Point of Law Appeal. While another National Minimum Wage Act case did go the whole way to the Supreme Court that involved the implementation of an award by the Labour Court. Our case involves the interpretation of the legislation.

We are involved in one other Judicial Review where we act for the employee. In another Point of Law Appeal the employee claims have proceeded on a Point of Law appeal from a decision of the Employment Appeals Tribunal refusing to implement a Rights Commissioner decision under the Unfair Dismissal legislation. The case involves a company called Keegan Quarries Limited. We act on behalf of the employee in the case. We successfully obtained reinstatement before the Rights Commissioner.

Taxation Awards/Setting out Decisions to be Taxed Efficiently

In ADJ8474 the AO set out the decision as regards the claim as to a fixed amount for the economic loss and a further fixed amount as general compensation. This means under the tax legislation the economic loss element will be subject to tax in the normal way but that the general compensation will not be.

The issue of the setting out of awards to take into account the tax treatment is an issue which we have raised with the WRC on a number of occasions. By doing it this way it is fair to both the employer and the employee. Where an award is subject to tax then of course the employer has the employers social welfare tax that the employer must pay. Where the compensation element arises there is no tax on either the employer or the employee nor any social welfare liability. It is great to see that the cases are now being set out in this way.

Dismissal due to Failure to Meet an Employment Requirement

In the High Court case of Glenda Genochey and Governor and Company of Bank of Ireland 2017 IEHC498 the High Court dealt with an issue relating to the dismissal of an employee. The High Court held that it had always been a condition of employment that the employee would have a particular education standard. When it was found out that the employee did not have that standard the employee was

dismissed. The High Court held that such a dismissal was justified as it was a condition of the offer of employment that the employee had that particular level of qualification.

This is an important restatement of the law.

In our view it is very important that employers when setting out job applications particularly where a particular level of skill or expertise is required or educational requirement that that is clearly set out in any job advertisement and that it is made absolutely clear to any candidate. For example employing a solicitor or accountant there would be a requirement that they have actually obtained the qualification and are entitled to practice as a solicitor or as an accountant. If somebody has been taken on as a book keeper or as an accountant in a business where they would not be undertaking formal accountancy practice issues then the level of competency would be less relevant. For example in the case of taking on support or secretarial staff particularly computer competency or in the case of somebody who is typing skills and levels of output are all matters which are relevant and should be very clearly set out.

Where an employer does this and the employee does not have the level of particular standard then on those circumstances the employer is in a much stronger position to dismiss.

Date of Termination of Employment

In case ADJ6906 the AO in this case has very helpfully restated the law in the case of Walsh –v- Health Service Executive UD501/2007 which specifically confirms that the date of termination of employment, where an employee resigns, is the date of their resignation not the date that the resignation is accepted.

The AO in this case also pointed out that the case of Stamp –v- McGrath UD1243/1983 is specific authority for the proposition which is well accepted in Irish Law, that where a person resigns the notice period is not added to the date of dismissal. By this we mean that if an individual resigns on 1st October and if they had been dismissed should have received four weeks' notice, in the case of a resignation the date of termination is the 1st October.

This case was held to be statute barred. It is sometimes forgotten in dismissal cases which is different that if an employee is dismissed on say 2 October and would be entitled to four weeks notice that their date of dismissal for unfair dismissal purposes is going to be the 27th October as they were entitled to that notice period. Where an employee would be entitled to a longer notice period as per their contract again the termination date will be the date that that notice would have expired.

An issue then arises in cases as to when proceedings should issue and whether proceedings might be issued too early.

It is probably best practice in those circumstances to issue as soon as is practicable and then to reissue at which stage namely after the statutory notice period would have elapsed and then again after their contractual notice period elapsed.

In cases where a person is put on garden leave then the date of dismissal will not be the date they are put on garden leave but when the garden leave expires. Again, it is probably best practice to protect matters if any issue arises that you would issue as soon as you become aware of the dismissal subject to the garden leave and again when the garden leave elapses. It is effectively a notice period. It is always possible then to ask that all claims be amalgamated together for hearing.

This might seem a very cumbersome process. The reason for saying this is that if you issue too early a defence can be raised that the claim has issued too early, there was no dismissal and therefore the claim cannot proceed. If issuing too late you can have a situation that an argument can be made that the dismissal happened at an earlier date and unless the proceedings were issued within 6 months of that date then the proceedings would be statute barred and you would have to apply for an extension of time which is on exceptional circumstances.

In the recent case where the AO ruled on is a useful restatement of the law and one that colleagues should be fully aware of. The whole issue as to what the correct date of dismissal is, in unfair dismissal

cases is far from clear. In saying this, it will be clear according to the law. It is just sometimes unclear as to what the actual facts were.

If an individual is of course summarily dismissed even though their effective date of dismissal may be a later date when notice period is taken into account, it is accepted practice that if the employment had been terminated on that date by the employer advising the employee that they are no longer employed. This could be by way of letter or even P45 being furnished or in some cases a text message even. The employee can use that date as the date for issuing proceedings or the date that the notice period would have expired or the contractual notice period.

One exception to this is where an employee is dismissed for gross misconduct in which case the notice periods will not apply for determining the termination date. In saying this, The issue is yet to be litigated upon where an employer was dismissed for alleged gross misconduct and it is subsequently determined that it was not gross misconduct this may well move the termination date forward.

Unfair Dismissal/Date of Dismissal

In ADJ4195 the AO had to deal with a case where the employee who was represented by solicitors and the employer who was represented by a consultancy firm was dealing with the issue as to first of all whether the employee had the appropriate service.

The employee contended that the employee commenced on the 9th June and it was agreed that the employees employment terminated the following year on the 11th June. The employer contended that the employee commenced on 15th June and had effectively resigned on the following 11th June.

The AO found that there was a dismissal. The issue then turned to whether or not the employee had the requisite service. In our view this element to a certain extent irrelevant. Once the AO found that there had been a dismissal on 11th June, even if the employee had commenced on 15th June (which the AO found was not the position in finding that the employee commenced on 9th June) the employee would still have had the requisite service. The reason for this is that the notice period would have been added to the service and that notice

period would have brought the employee even if he had commenced on 15th June in the preceding year to a deemed date of dismissal.

This issue of notice periods being added is sometimes argued before AO's but certainly has been argued before the EAT. The notice period has to be added in as it is deemed service. It is interesting though it didn't arise in this case that during the notice period that the employee would still have been entitled to obtain their rights to holiday pay and other entitlements.

In issuing claims where an employee is summarily dismissed it is useful to put in the claim form. The date of dismissal from the employer and then the deemed date when the notice period would have expired. It is a timely reminder once claims are brought that it makes is easier to argue the point.

Dismissal of Pregnant Employees

Case C-103/16 is an important opinion of the Advocate General Sharpston. The case concerned the Maternity Directive and relates to dismissal of pregnant employees particularly in relation to collective redundancies.

There is a detailed review of the legislation but it can be summarised as follows;

Conditions under Article 10 (1) of Council Directive 92/85/EEC of 19 October 1992 and measures to encourage and improve the health and safety at work of pregnant workers and those who have recently given birth does not correspond exactly with the expression "one or more reasons not related to the individual workers concerned" in Article 1(1) (a) of Council Directive 9a/59/EC which related to collective Redundancies. The Advocate General was of the view that a particular situation giving rise to a collective redundancy may where the circumstances warrant qualify as an exceptional case. The Advocate General was of the view that Article 10(1) of Directive 92/85 should be interpreted as meaning that where a pregnant worker can plausibly be reassigned to another suitable work post in the context of collective redundancy derogation from the prohibition of dismissal obtained in that provision will not apply.

The Advocate General went on to say that Article 10 of the Directive 92/85 requires member states to provide pregnant workers with both protection against dismissal itself and protection against consequences of dismissal to comply with their obligations. The Advocate General held that Article 10 of Directive 92/85 does not require member states to make a specific provision for pregnant workers to be afforded priority for retention in an undertaking in the event of a collective redundancy. This is an important statement of the law. The Advocate General went on to say that member states are free to make such provision by way of additional protection or in the interest of legal certainty if they so desire.

The Advocate General went on to state that for a notice of dismissal to fulfil the requirements of Article 10 (2) of Directive 92/85 it must both be in writing and state duly substantiated grounds regarding the exceptional case not connected with the pregnancy that permit the dismissal. Again, this is an extremely important opinion. It means that there must be documentation in writing that sets out the grounds which are exceptional and not connected to the pregnancy. Clearly this would have to be done before the Redundancy takes place.

This is an issue which employers need to be extremely wary of. It will not be a matter of subsequently appearing before the WRC or the Labour Court and contending that there were exceptional circumstances. The exceptional circumstance must be documented at the time that the pregnant worker who has the protection of Council Directive 92/85 is dismissed. While it is not stated in the Opinion clearly such statement in writing would have to be given to the pregnant worker at the time. It is probable that the pregnant worker would have to be given the opportunity to challenge same.

While this is only an opinion of the Advocate General it is an important opinion. The full decision of the Court will issue is due course. It is unusual that a decision of an Advocate General would not be followed.

Unfair Dismissal – Compensation - Employee who is Sick

There is a very interesting decision being ADJ 4045. In this case the AO has gone to some length to set out the facts and in particular the issue relating to the employees illness. The decision finds that the employee was ill for a certain period of time and the AO, in our view has correctly determined, in those circumstances that the AO was restricted in granting compensation for the period during which the employee was ill but was not restricted for granting it post that date. This is a very useful restatement of the law. This differs from a situation where the actions of the employer made the employee ill where the Allen –v- Independent Newspapers (Ireland) Limited case would be relevant which we have discussed in this newsletter also.

Unfair Dismissal - an Employee out Sick After the Dismissal

In ADJ5054 the AO had to deal with the situation where an employee was out sick from immediately after the dismissal. From reading the case it was quite clear that absolutely no fair procedures were applied and that the employer was in breach of their own procedures. The employee received the maximum award the employee could receive under the legislation being four weeks pay.

In relation to the issue of employees going out sick we are constantly finding in cases that employees appear, once they are dismissed to effectively immediately go out on sick. They get a certificate and claim that they are sick. The very fact that an employee is sick and is unable to mitigate their loss means that the maximum compensation is going to be four weeks wages.

In our view the decision of the AO was absolutely correct in this case.

We constantly get views expressed to us by employees who have been dismissed, that for some reason they are entitled to go on the sick and still get compensation. This is one of these cases which employees should read though probably many of them will not.

Unfair Dismissal Compensation Where an Employee is Still Out Ill

The case of ADJ4965 is an interesting case for colleagues to read as it does specifically refer to the case of Allen v. Independent Newspapers (Ireland) Limited. This particular case before the WRC confirmed that the employee was ill because of the actions of the employer and therefore the normal issues in relation to mitigating loss do not apply. In this case the AO awarded a total of €25,000.

The case is also interesting in relation to a secondary issue relating to a claim under the Organisation of Working Time Act. While the legal representatives for the employee had been in contact with the employer, the claim was not lodged within six months of the relevant breach. Where an issue arises under the Organisation of Working Time Act it is imperative that the claim issues as soon as practical. The issue of writing to an employer and seeking to have matters sorted out by way of correspondence and negotiation is one that of course should be utilised. However, because of the very strict time limits and the issue concerning extensions of time it is always best practice to issue first and then to start the negotiations. There is nothing to stop the claim being issued and writing to the other side and advising that the claim has been issued as a protective matter but hoping the matters can be sorted out.

Once proceedings are sent to the WRC the other side are not going to get them for approximately three weeks anyway so there is plenty of time to raise issues and if necessary if something needs to be withdrawn, it can be withdrawn very quickly.

If parties want to negotiate they can use the WRC Mediation Service once a claim issues.

Fair Procedures in Disciplinary Matters

This has been the topic of some discussion in recent times. An interesting Labour Court decision being Woodies DIY Ltd and Ikoro UDD1739 is a case where the Labour Court held that the investigation undertaken by the Respondent company was not comprehensive to the degree that the outcome could be assured to provide a basis for

conclusions to be drawn on the balance of probabilities following the Respondent company's disciplinary investigation.

In this case the Court assessed the financial loss to the employee as being €17,000. An award of €15,000 was made. This is a very important restatement of the law by the Court. It is also important for determining the level of compensation which is likely to be awarded where employers fail to follow fair procedures for drawing conclusions which cannot be based on the facts.

Unfair Dismissal and Fair Procedures

In ADJ6103 the AO dealt with the issue of fair procedures. The case of Lyons v. Longford/Westmeath Education and Training Board 2017 IHC272 which was covered by us in previous issues of our newsletter was raised.

The AO in this case determined that fair procedures were not applied in relation to the issue of the right to cross examination which is a specific right referred to in the Lyons case in that the employee was only allowed cross examine by way of written questions and was not allowed cross examine face to face.

It appears in this case that an assistant production manager was the person who commenced the first complaint against the employee. It appears this individual was involved in the investigation process. The AO has found that this was not a breach of fair procedure as this individual was involved with another individual as a part of the process. It was found that the assistant production manager was only a joint investigator. We would have a concern if it is found that this is appropriate. It is very much a situation of fact that a person should not be involved who is the person raising the complaint. We would have serious concerns if that could be regarded as fair.

The AO found that the procedure was fair as the employer had acted in line with their own policies. Again we have a difficulty with this. The fact that the employer has a policy that it acts in conformity with does not mean that it is a fair policy.

The AO in this case had found that as regards the right to cross examine that the procedure adopted was not fair.

In our view once that has been found then effectively the procedure is not fair. Either the procedure is fair or it is not fair. If it is a finding that it is not fair then in those circumstances the employee is entitled to win the unfair dismissal case as fair procedures were not applied. Of course any contributory element of the employee can be taken into account in setting compensation but that does not mean that it is a fair dismissal.

This is not a case where the parties were represented by solicitors or barristers. They were however represented by the Trade Union and a well-known HR consultant with significant experience. It is unclear whether the employee was ever advised of his right to legal representation.

This case is interesting as it is the first case, which we are aware of where the Lyons case has been specifically referred to. The decision of the High Court in that matter is absolutely clear as regards the rights and once those rights are not provided in our view that puts an employer at serious risk of a decision being found to be an unfair dismissal.

It would be very interesting to see what happens when one of these cases runs where both sides are legally represented.

The issue of how the Lyons case will be applied in practice by the WRC and by the Labour Court is going to be interesting and we would anticipate that it is possible that there would be judicial reviews or point of law on unfair dismissal cases arising out of how this particular case of the High Court is interpreted in its application by the Labour Court and the WRC

A further useful decision for colleagues to read is ADJ6103. While it does not deal with Lyons case it does deal in some depth with the legal issues involving including the relevant legislation but in particular the case of the Labour Court in Kilsaran International Limited v. Vet UDD1611 this is a very important decision of the Labour Court dealing with fair procedures which the AO has set out in this particular case in great detail.

Unfair Dismissal/Fair Procedures

In ADJ3058 the AO in this case held against an employee in relation to an Unfair Dismissal case.

The facts of the case itself are quite interesting. What is more interesting in relation to this case is that the AO has spent some time to deal with the case on the issue of the appropriate sanction of dismissal and found that it was appropriate in the circumstances because of the potential impact of the business. In addition the AO has held that the procedures adopted were fair. The AO has found that the employee in this case had a right of representation at the original hearing being the disciplinary hearing and had the right of full legal representation at the appeal hearing.

It is an issue in relation to fair procedures that even though the employee in this case thought the AO did not refer to it, had no legal representation at the original disciplinary hearing the employee did have same at the appeal and this would have cured any defect in procedures. The issue of legal representation is now a significant issue which employers need to consider failing which in light of recent decision of the High Court which we have reviewed a dismissal may become unfair simply because the right of legal representation was not afforded to an employee.

Unfair Dismissal and Appeals

In ADJ4698 the AO found in favour of an employee and awarded €15,000 for an Unfair Dismissal.

In this case there is an interesting element in that the employer contended that the employee had not appealed. The AO found that there had been an appeal but it had been outside the five day period specified by the employer. The AO in our opinion quite rightly and properly was of the view that there was no prejudice to the employer where an appeal is outside the five day period of time. The five day period of time, is one, in our opinion has no legal basis. Provided an appeal is put in within a reasonable period of time and provided any delay in lodging the appeal will not prejudice matters then an employee is entitled to pursue an appeal. Five days is a very limited

period of time. In many policies it would set out that it is five days. It may not even be five working days and on that basis if an employee is dismissed on Tuesday of a particular week the time limited to lodge an appeal will actually realistically finish during the weekend which would mean that an employee would have to lodge their claim effectively within three days.

In our view the AO in this case was quite right in rejecting the argument that there had been no appeal where an appeal had been lodged but it was outside the five day period of time.

The issue of what is a reasonable period of time for an employee to appeal will be decided in each individual case and in our view and we believe the AO in this case was absolutely correct will depend on whether there was any prejudice to the employer.

Unfair Dismissal and Appropriate Sanctions

In UDD1738 being a decision of the Labour Court being a case of DHL Express (Ireland) and Michael Coughlan the Court had to deal with a situation where an employee was dismissed for alleged gross misconduct during an accident with a vehicle.

This case is interesting for three particular facts.

The first of these is that the Labour Court has again confirmed that the compensation, which in this case was 104 weeks wages amounting to over €72,000 was for a loss of earnings and was therefore taxable.

The second issue is that the Court held that where a disciplinary process had a provision that warnings would be expunged from the record that they cannot be taken into account in determining the sanction to be imposed or having any part to play in a sanction being imposed. The Court was of the view that previous warnings which had expired were taken into account contrary to the provisions of the disciplinary policy. This is a warning to employers when reviewing disciplinary files or an employee's files that matters which have expired should not be taken into account and should not actually be on the file. While it is not part of this case it is interesting that the

new data rules being the GDPR which will come into effect next year would require an employer to have these removed from the file. It is an important role for employer and particularly HR Professionals to ensure that expired warnings should be removed so that they can have no bearing on any subsequent disciplinary matter.

Thirdly, the Court determined that dismissing an individual for gross misconduct involving an accident where they have misjudged the width of a gateway was a disproportionate sanction. Compensation of 104 weeks wages was awarded which is the maximum award is quite clearly a warning for employers on the importance of fair procedures.

It would certainly be our advice to employers that personnel files should be reviewed regularly. Expired matters should be removed automatically from the file. Nobody undertaking a disciplinary process should have access to any matter which has expired.

An Employee Must Mitigate Loss to Bring a Successful Unfair Dismissal Claim

In ADJ4685 the AO found on the employees own evidence that the employee had not been seeking work after the employee was dismissed. The AO held that the employee had been unfairly dismissed. In such circumstances the AO in this case awarded the maximum compensation which the AO could award in accordance with the Unfair Dismissal Legislation being 4 weeks wages for the unfair dismissal. This decision is absolutely correct in relation to the application of the law. It is a sad fact that many employees do not understand this provision and can come as a considerable shock to them.

Mitigating Loss in Unfair Dismissal Cases

In UDD1737 being a decision of the Labour Court involving A&T Drain Services, Drain Doctors and Brian Duggan. The Labour Court in this case determined that there had been an Unfair Dismissal. The facts of the case its self are interesting. What is however particularly interesting in this case is that the Labour Court determined that the employee in this case had not made any significant efforts to seek

work and minimise his loss. In those circumstances the Court determined that this was not a case which warranted two years compensation because of the fact that the employee had not been seeking to mitigate his loss. In these circumstances the Labour Court therefore determined that the appropriate compensation was on €15,000.

There are two lessons to be learned from this case. The first is again for employers that dismissing an employee and not applying proper fair procedures is an issue where the employer can be liable for up to two years wages. From the employee perspective it is a reminder of the importance of employees mitigating their loss. This means that they go actively seeking work.

Setting Compensation

We have previously raised the issue as to the tax treatment of awards. It is interesting that in case ADJ 3750 the AO in setting compensation under the Unfair Dismissal legislation has now in this particular case set out that the award was subject to any lawful deductions.

The decision is also helpful in that the AO has set out how the level of compensation was awarded being 50% of the loss of earnings. The AO has set out in that the employee had obtained an apprenticeship subsequent to their dismissal.

This type of determination is useful in that it allows both employers and employees, in reviewing cases, to understand how compensation is set.

Unfair Dismissal Claims and Losses

In ADJ5027 the AO in this case had to deal with the issue of an Unfair Dismissal. The employee was successful. The AO in this case properly set out, in our view that during the period that the employee was sick, after the termination, while the employee was not available to work, the employee suffered no economic loss. This is exactly in line with the legislation. The AO in this case determined that in this particular case thereafter the issue of compensation arose and set the

compensation on that basis. Where an employee is not available for work, then in our opinion compensation cannot be awarded.

The Application of EU Directives in Irish Law

In DWT 1722 being a decision of the Labour Court a very comprehensive decision has been given by the Court as to why the Court could not apply a European directive which had not been properly implemented by the Oireachtas.

This is the case where this office represented the employee. We do not actually disagree with the decision of the Labour Court. They are in our view correct.

Then why was the case brought. Well effectively it had to be brought. The reason for this is that there is now going to be a claim against the State for failing to properly implement the Directive.

The issue relates effectively to the right to holiday pay while out sick. The particular case involved an employee who was out sick for a period prior to the provisions of Section 19OWTA being amended and after that date. For the period prior to the legislation being amended the Court contended that it had no jurisdiction even though there is a European Court decision which held that the employee was entitled to same for the full period of her employment limited to 18 months as regards sick leave.

We will be issuing a case against the State in early course.

Discrimination in Equality Claims and Collective Agreements

In ADJ5316 the AO had to deal with case where an employee was refused a redundancy package. It was accepted that the employee had a disability. It was found that the employee was not granted the right to claim the voluntary severance package while other employees who would have been in the same category as her were offered the package. It was found by the AO that she was not allowed apply for the voluntary severance package because of the fact that she was on

long term illness due to a disability. The employee in this case was awarded the sum of €5,000

What is further interesting is there was a collective agreement between the Union and the employer regarding the selection for voluntary redundancy. The AO found that that particular policy was discriminatory of individuals who would have a disability and would be on long term illness. The AO found that collective agreement between the Union and the employer was void by virtue of the provisions of Section 86 of the Employment Equality Acts. The AO directed that going forward same should be amended so as not to have a discriminatory element.

Contracts of Employment

In case TED1719 the Labour Court dealt with a case involving Team Obair Limited as the employer.

An issue arose in that case which is arising in many cases before the WRC and hopefully this decision of the Labour Court will put some of those arguments to bed once and for all.

The employee in this case had claimed that there had been a number of breaches of the provisions of the Terms of Employment (Information) Act. The employee contended that he had not received a document which complied with Section 3 which set these matters out. In some of the defences put forward by the employer an argument was put that while the information may not have been provided in the "contract of employment" it had been provided by way of other documentation.

The Labour Court was very clear in relation to this argument by the employer and rejected it. Where matters were not contained in the contract of employment then the Court held that the employee had not received a document which complied with Section 3.

In this case before the AO an award of €1000 was made. On appeal the Labour Court awarded the employee a sum of 3.4 weeks wages. The Court pointed out, quite rightly in our opinion, that the decision must be effective and efficient but must also have a persuasive effect.

The employee in this case had made an argument that there had been 9 breaches of the Act and therefore brought 9 separate claims. The Labour Court quite rightly, in our opinion, was very clear in setting out that there had been a breach but there had not been a situation where the employee had not received 9 contracts it was that he had not received a contract which complied with Section 3 in respect of which there were a number of breaches.

Each breach does not warrant a separate application. While this is not stated in the decision, it is the clear import of same. Equally it is clear from the decision that the number of breaches will be taken into account in setting compensation.

It regularly arises now before the WRC, in particular, that arguments are made that while the document itself may not have complied with Section 3 other documentation furnished would have set out the relevant information. The requirement under Section 3 is to furnish the employee with a statement that sets out the relevant information set out therein. This must be done within the statutory time limit specified. Unless it is done, there is a breach.

Our commentary would that for example an employee's contract may not specify a rate of pay. The fact that he subsequently receives a payslip and has a rate of pay does not mean that he has been advised as to his rate of pay. It might be different that within the statutory period the employee had received a payslip signed and dated for and on behalf of the employer that set same out in that that could be deemed to be a statement under Section 3.

It may well be going forward that if these defences are consistently being raised that some matter has been dealt with by way of some other document that was not dealt with within the relevant period of time. That an argument could in new cases coming forward, be made by an employee that the defence by the employer is frivolous and vexatious and that that should be taken into account in setting compensation. It would be interesting to see how matters develop.

European Communities Protection of Employees and Transfer of Undertakings Regulations 2003

In ADJ2984 the AO held that the Respondent in the relevant case was not the relevant party as all rights and liabilities would have transferred to the transferee. The Respondent in the case opened various case law. The employee relied on a decision of the Labour Court being TUD176. This is a decision of the Labour Court which was given on the 19th May of this year. The AO decided to hold in favour of European Case Law that had been opened to him on the basis that it effectively trumped a Labour Court decision. It was pointed out that the case law opened to the AO had not been opened to the Labour Court and this was one of the grounds given for not following the decision of the Labour Court. To a certain extent we can understand the rationale of the AO. However, the fact that the case is not referred to before the Labour Court would not in our view be to assume that the Labour Court were not aware of relevant European cases.

We are not saying that the AO or the Labour Court were correct. What we are saying is that where a decision has issued only a couple of months ago and the case law quoted as regarding the ECJ predates the decision of the Labour Court that in our view an AO is obliged to follow the determination of the Labour Court. It will be interesting to see does this case go on appeal.

Where a transferor does not consult then if the decision of the AO is correct then the Regulations being Regulation 8 are effectively null and void in that the claim for non-consultation by a transferor would actually have to go against the transferee. This is an interesting decision. It would never appear to us that where these cases arise that where a claim is to be made for non-consultation say for example a transferor and a transferee it would now appear to us that is it necessary to issue one claim against the transferor for not consulting and a mirror image claim against the transferee for the fact that the transferor did not consult. Possibly a separate claim against the transferee on the basis that the transferee themselves did not consult. There is considerable confusion in this area. It is interesting to know that on the same day that this decision issued, ADJ7635 also issued and in that case the AO took the exact opposite position and held against the transferor for a breach of the legislation.

Again this is an issue that is extremely worrying that there is a lack of consistency in this WRC this is not a criticism of either AO. It is however an issue that it is important that the WRC and we would say whether they are right or wrong in applying the law apply a similar approach to cases for the purposes of certainty. There is no difficulty as far as we are concerned that a party may know that they will lose in the WRC and may have to go on appeal or that a party will know that they will win. The issue is where there is lack of clarity with what the WRC is going to do. All we can say is we now have a situation on the same day that two completely opposite decision issued. Who is right and who is wrong that is another days work but it is worrying, as we have stated before, that there would be conflicting decisions issuing from the WRC.

To be fair if we were to put a bet on it we would be inclined to take the view that the Labour Court is more likely to affirm its reasoning if the first case referred to in this section went on appeal. But again we may be wrong and the Labour Court may in an appropriate case not follow its own decisions. However the Labour Court rarely does not follow its own decisions in our experience. In our experience the Labour Court will take a view on legislation and unless it is overturned by the High Court on appeal or by a subsequent decision of the ECJ the Labour Court will normally affirm previous decisions given by it.

What we are 100% sure of is that either ADJ2984 or ADJ7635 have been incorrectly determined. Both decisions cannot be right.

Protection of Employees (Fixed Term Work) Act/Legal Expenses

The WRC in a recent case dealt with the issue of legal costs.

It is a substantial decision and determines that the employee in this case was held to be entitled to a contract of indefinite duration and that the employer had not shown objective grounds under which a further fixed term contract could have been provided and that the employee should have been provided with a contract of indefinite duration.

What is extremely interesting however is that the AO in this case has also awarded a sum of €9,000 as compensation for the strain and

stress imposed upon the employee and also the fact that the employee had to incur substantial legal costs in protecting his rights.

This is an important decision. Certainly the issue of the legal costs in protecting employees rights is becoming a significant issue which is now being raised in various forums particularly in the WRC and the Labour Court. This is the first case, which we are aware of where the issue of costs incurred by an employee in protecting their rights has been specifically dealt with by an AO.

This office does have cases before the Labour Court were this issue is being canvassed. It will be interesting to see how matters develop in the Labour Court.

When it comes to claims which arise from Irish legislation implementing EU legislation then what is known as the Von Colson and Kamann principles apply and that does include the economic cost to an employee of protecting their rights.

European Communities Protection of Employees and Transfer of Undertaking Regulations

In ADJ7624 the AO in this case had to deal with a situation where one company the Transferor had a contract in a number of stores throughout the country. The Transferee successfully obtained the contract for a number of stores, one of which is where the employee in this case worked. The AO in this case helpfully referred to the legislation and to European case law to hold that in those circumstances the employee did transfer to the new company being the Transferee.

This is a well thought out decision. There is no doubt about that. However from reviewing decisions of the WRC we have seen decisions where the exact opposite decision has been given in very similar circumstances.

There is a considerable amount of confusion as to the law relating to when an employee transfers and when they do not.

It is possible to argue both ways.

In this case the AO went with the employee. In other cases other AO's have gone with the employer.

Unfortunately these Regulations which derive from European Law are extremely badly drafted. In addition some European case law is contradictory.

This is an area of law which is crying out for a review and a very detailed decision from the European Court of Justice as to the circumstances when there is a transfer and the circumstances when there is no transfer.

It is highly unsatisfactory at the present time that employees bringing claims to the WRC and from the employers perspective that is beginning to become a toss-up as to who is going to win depending on which AO hears the case.

This is no criticism of the AO in this particular case. We would be of the view that the AO is correct in their application of the law.

This is issue is getting so complex now that we would expect that at some stage one of these cases is going to go to the Labour Court for a definitive view from the Irish perspective and it may well be the type of case which the Labour Court might even send to Europe to the ECJ for some form of definitive ruling.

Transfer of Undertaking Regulations

In ADJ 5095D AO has issued a very interesting decision

The AO has held after quoting considerable amount of case law that in the case of a second generation contract which would apply where for example one entity had a contract. The contract is sent out for tender and a different party obtains it that in those circumstances the Transfer of Undertaking Regulations do not apply. The AO also interestingly pointed out that even where an entity agrees that the Transfer of Undertaking Regulations apply that does not mean that the said Regulations actually do apply.

Collective Redundancy Notifications

From 1 September 2017 collective redundancy notifications should now be made to the Minister for Employment Affairs and Social Protection, Aras Mhic Dhiarmada, Store Street, Dublin 1.

Statutory Instrument 361 of 2007 provides for the transfer of a number of administrative and legislative functions relating to labour affairs which were previously with the Minister for Jobs Enterprise and Innovation now go to the Minister for Employment Affairs and Social Protection previously the Department of Social Protection.

Redundancy

In ADJ4629 the AO has very helpfully set out the issue for ease of calculating the redundancy payment due to the employee and has helpfully also set out what the actual redundancy entitlement is.

One small issue we would raise in relation to the decision is that AO has stated that it is subject to the employee fulfilling current social welfare requirements in relation to PRSI contributions.

We disagree with this as a statement as to what the law on this matter is. The legislation the Redundancy Payment Acts requires only that the employee is in insurable employment. The fact that an employer may fail to pay the contributions is irrelevant to a right of the employee to obtain redundancy.

There is some misconception about this at the present time.

The reality of matters is that an employee unless they are checking on a yearly basis all matters relating to their employment with the Revenue they have no way of knowing whether all contributions have been made. A P60 is of no benefit to an employee in that it is produced by the employer.

This sort of problem does not arise in the UK. The reason for this is that in the UK employees do not receive any personal allowances whatsoever unless they file a tax return each year. This alerts the UK

Revenue to any issues relating to non-payment of tax or social welfare contributions by UK employers. Unfortunately there is no similar provision here in Ireland. If it was done then issues such as insurable employment would become an irrelevancy in that effectively employees would have dealt with all matters by way of appropriate returns on an annual basis if there are any issues in the UK the employee becomes aware of them very quickly.

Redundancy Payment Claims in the WRC

From reading some of the decisions in relation to this issue from the WRC we believe it is important to clarify certain issues where there may be some misunderstanding by those bringing claims as to what the rights and obligations are.

Normally the time limit for bringing a claim to the WRC is six months. In the case of redundancy by virtue of Section 24 of the Redundancy Payment Act 1967 the time limit is 52 weeks from the date of redundancy which can be extended to 104 weeks.

An employee cannot seek redundancy unless the employee has made a claim for the payment by a notice in writing given to the employer. There is a form. It is not a statutory form. There is no necessity to use that form but it is the most useful method. The provisions of Section 24(1)(B) is often not recognised by employees. We have not seen any decisions recently, from the WRC where this issue has been specifically raised except in one case. In that case however the AO found that a notice in a form similar to the one which had been issued by the Department previously had been furnished.

In relation to the issue of the entitlement to redundancy the test is whether the employee was in "insurable" employment. It is irrelevant whether appropriate social welfare returns were actually made by the employer. The issue is whether the employer had an obligation to do so. From some recent decisions of the WRC some refer correctly to the fact that it is subject to the employee being in "insurable" employment. Others use other words which would tend to indicate a requirement that the social welfare contributions had been paid. That is incorrect there is no requirement that the social welfare contributions be paid.

Unfortunately redundancy is one of those complex pieces of legislation which is sometimes not fully understood.

The reason for setting out this short note in relation to same is to alert colleagues to this particular problem.

It is an interesting fact currently that while we are seeing a substantial increase in employment, on the basis of the figures of those on the live register, we are seeing in our practice and in the decisions of the WRC a significant increase in the volume of redundancy claims. These generally speaking fall into three categories.

There are the claims that go before the WRC where the employer has either failed to pay, does not have the money to pay or is contesting the redundancy. The second level of redundancies which we see and do not go before the WRC generally other than under the Industrial Relations Acts relating to voluntary severance schemes is employers restructuring and paying an enhanced redundancy over the statutory redundancy. The third ground are what we call disguised dismissals. These are cases were effectively the employer seeks to pay off the employee by purporting to structure something as a redundancy when really it is getting rid of an employee that an employer no longer wants. They are not generally speaking legitimate redundancy situations. They are more akin to dismissals but where the package put to the employer is such that the employee is disinclined other than to accept that package and accept the redundancy.

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Minimum Wage

In ADJ6964 the AO had to deal with two issues.

The one issue was the issue of the employee not being paid for an induction day. The AO held that there was no validity in this. It appears from the case that the employee was required to attend an induction day. It is our understanding, though we might be wrong that the employee would come under the provisions of Section 8(1)(b) where he carries out or performs the activities of his or work at the

employees place of employment or is required by his or her employer to be available for work. Where an employee is required to attend an induction day in our view this is working time and it is covered by the National Minimum Wage Act.

The case also covers the issue of the Tyco ruling. This is the issue of an employee who is required to travel to client premises would be entitled to be paid for that travel time. Again this argument was rejected by the AO.

It will be interesting to see whether or not this case goes on appeal.

Payment of Wages Claims/Bonus Payments

In ADJ 6952 the AO had to deal with a case where a claim was made for a non-payment of a bonus which would have accrued in 2016. The AO in this case has helpfully set out paragraph 63 of the case of Cleary and others and B&Q Ireland Limited 27ELR121 as authority for the proposition that an employer cannot effectively unilaterally reduce/take away a bonus payment.

The AO in this case directed that the bonus for 2016 be paid.

Sunday Premium

In ADJ7898 the AO had to deal with a situation where a claim was made by an employee for a Sunday premium. The case is interesting. The employer contended that the claim would be limited to the period of six months prior to the date of the claim having being submitted. The AO in this case held that despite the fact that the case of C&F Tooling Limited DWT1525 was quoted that the Labour Court had not determined that the claim was limited to six months. The AO awarded compensation on the basis of the economic loss for the 12 month period.

There is no evidence from the case that any application was made to extend time.

We would be of the view that a claim for a Sunday premium is limited to the relevant reference period of six months prior to the date of lodging the complaint. Saying this the AO correctly pointed out that the Labour Court in the C&F Tooling case had pointed out that the compensation had to be fair and equitable. The AO was absolutely right in stating this. In looking at any breach it would be our view that AO can look at what the basis of matters were throughout the employment in setting out what the compensation would be. It would be our view that the AO can only compensate for the economic loss of the six month period prior to the claim being lodged. However in setting compensation for the breach the AO can set a figure that is fair and reasonable taking account of the level of the breach and the length that the breach has been on going.

The employer in this case had argued that the payment to the employee was in excess of the National Minimum Wage and that amount was a premium. This was an argument which regularly arises. The AO in this case looked at the fact that other employees who were on the same rate of pay did not have to work Sundays and therefore held that the additional payment could not be deemed to cover a Sunday premium. We do not believe that the AO needed to go that far. The Labour Court has consistently said in relation to the issue of a Sunday premium that the element of the Sunday premium must be specifically referable in the contract and must be specifically referable. There is a very good reason for this. A Sunday premium for example, is excluded when determining what the National Minimum Wage payment is. Equally unless an employee knows what the Sunday premium is there is no way of anybody determining what it is. The argument that the employee is paid in excess of the national minimum wage is not an argument that anything above that is a premium. We would be of the view that the Labour Courts approach is correct and that if something is to be paid as a premium it must be clearly specified in the contact so that anybody looking at it can say this element is wages and this element is the Sunday premium.

For employers who are drafting contacts it is also preferable to specify what element of any pay is a premium. A premium to work on a Sunday should be clearly set out. In setting the premium it is a matter for the AO or the Labour Court on appeal to set a premium that is fair and reasonable. Currently the Labour Court appears to be awarding in and around 30% as a Sunday premium. In some cases before AO's

premiums of up to 50% have been awarded. In setting the premium it is a matter to look at the industry as a whole as to what the premium would be within the industry. The WRC and the Labour Court has specific expertise in this area.

Appeals to the Labour Court

In the case of Morehampton Foods Limited and Dean Gibbons DWT1720 is a very interesting decision by the Labour Court. The Labour Court in this case was met with an argument by the employee through his representative that there had effectively been an extension of time as the employee had not appealed that element of the decision that in those circumstances the Labour Court was limited to dealing with the substantive issues. The Labour Court in reviewing matters made a determination that the AO had made no decision in relation to the issue of an extension of time but that the issue had been raised. In addition the Labour Court gave a very detailed overview of the law setting out that in such circumstance this was a De Nova hearing and that all matters effectively were subject of a De Nova hearing.

This is an important decision by the Court. Effectively once a matter is appealed by either party everything is back on the table as a De Nova hearing. Therefore what happened in the WRC to a certain extent is irrelevant as regards for example the decision itself, the weight that would have been given to any evidence and in particular any award or compensation awarded. Therefore for example if an employee appeals a case on quantum the employer is entitled to deal with the substantive issue as to whether there was any breach or not or to defend the case on that basis. Equally if an employer appeals and the employee does not the issue as to what compensation was awarded and whether the employee was happy with same is an absolute and total irrelevance to the Labour Court hearing as it is a matter for the Labour Court to determine the compensation if they reject the employers appeal. It is not simply a matter of the Labour Court affirming the decision of an AO, in such circumstances it is a matter for the Labour Court to then set the compensation.

This decision of the Labour Court is an extremely important decision in setting out the issue of the jurisdiction of the Labour Court. There has been some discussion as to what the extent of what an appeal is, this matter appears to put the issue to bed once and for all.

It is a decision which is a very well reasoned decision. There is a considerable amount of law quoted by the Labour Court and it is one of those cases that those interested in the jurisprudence of the Labour Court would need to review and be aware of, particularly from a practical aspect in bringing or defending appeals.

Appeals to the Labour Court/Time Limits

In PWD 1722 being a case involving Blanchardstown Area Partnership Company Limited and Lorraine Cummins. The issue arose relating to whether an appeal had been lodged in time. The Appeal should have been delivered by the 8th June. It appears that the document was sent by registered post on 7th June but it was received by the Labour Court only on 9th June.

The Labour Court in this case has set out a review of the legislation relating to the issue of exceptional circumstances and the issue of the unreliability of the postal service. The Labour Court held that no exceptional circumstances arose as to prevent the lodging of an appeal within 42 days of the date of the decision. There is no necessity for an appeal to be sent to the Labour Court by registered post. While it is not in the decision there are many ways in which this could have been dealt with. The appeal could have been faxed to the Labour Court. It is possible that the appeal could have actually have been emailed to the Labour Court. The Labour Court does not like getting emailed appeals but it could have been on the basis that there would have been a covering letter saying we are sending this by post, we are sending you an email for the purposes of stopping the time running.

The other issue in relation to this is that the idea of lodging the appeal as late as 41 days after the decision really raises questions. If there is an issue about an appeal the appeal documentation should be completed as soon as practicable and should be submitted. Where there is an issue of the time limit running out it would be our view that you send it by fax email and post.

Difficulties Where the Employer has Disappeared

In ADJ6740 the case involved a solicitor against a solicitors practice. The solicitor brought a claim under Minimum Notice and Redundancy legislation. The solicitor who had run the practice and had been struck off by the Law Society. The solicitor made redundant had no address for this other individual.

The AO held that in those circumstances the AO could do nothing for this person as regards their claim for redundancy or minimum notice as the WRC were unable to serve the proceedings on the relevant solicitor and that it was a matter for the person bringing the claim to be able to ascertain the address of the employer for the purposes of serving proceedings.

The reality of this is that this unfortunate individual is not going to receive their redundancy.

While this involved a solicitor there are many cases where this type of situation arises.

If this matter was before the Courts there is an alternative form of service, namely by publication in a newspaper. There are methods of alternative service.

There is no such procedures in the WRC. This is a significant defect in the legislation.

Normally this problem comes from reviewing cases, in the WRC arises for individuals who are lower paid and often in lower category jobs than the employee in this particular case.

We were promised a world class service. You might presume there would have been a method whereby a person could be served with proceedings or a notification process where they had gone to ground or had left.

It is particularly unfortunate that you have situations arising where people lose their right to redundancy simply because they cannot get to serve a set of proceedings on a former employer.

This is a defect in the legislation. It should be addressed. Will it be addressed? We very much doubt it. However, all may not be lost. While this related to redundancy, if the claim related to any entitlement where a person acquires those rights under European Legislation one of the guiding principles of same is that a person must have an effective remedy and one that would be similar to that would apply if they were going before a Court. That would mean that because cases are before the WRC if the case involved a case under the Organisation of Working Time Act a claim could be brought against the State for failing to effectively implement the Directive. It is when a claim like that is actually taken that we might see action.

However, the liability is out there. We are very clearly putting it on record that this is a potential claim against the State. We know that those in the WRC see our newsletter so they are on notice. We hope that this defect will be addressed. Unfortunately there is a considerable number of defects in the legislation which are now outstanding for over two years and nothing has been done to rectify the vast majority of them.

Construction Workers

It has been announced that Mr. Pat Breen TD, Minister of State for the Department of Jobs Enterprise and Innovation will be issuing a Sectoral Employment Order for the construction industry. This will provide a rate of €17.04 per hour for a category 1 workers being a worker with more than 1 years experience working in the sector. Skilled workers will receive €18.36 per hour. Craft workers will receive €18.93 per hour. Apprentices will receive depending on the year of their apprenticeship between 33.3% of the craft rate and 90% of the craft rate in the fourth year. A new entrant worker will receive €13.77 per hour. The Minister has announced that the appropriate process would be put in place to make the Order once the Oireachtas returns. Sectoral employment orders are legally binding.

Labour Affairs and Labour Law (Transfer of Departmental Administration and Administerial) Functions Order 2017 Statutory Instrument 361 2017

This new Statutory Instrument transfers certain matters from the Department of Jobs Enterprise and Innovation to the Minister for Employment and Social Protection. The schedule to the statutory instrument sets out the relevant Acts. This includes for example the Terms of Employment (Information) Act, Organisation of Working Time Act and the National Minimum Wage Act 2000 to name just 3. There is a total of 10 which are transferred. The Unfair Dismissal legislation is also transferred apart from Section 8(C)(1). The Workplace Relations Act 2015 transfers as regards to Section 20 as it relates to codes of practice in relation employment enactments specified in the schedule. Also the Protection of Employees and Transfer of Undertaking Regulations SI131 of 2003 transfers.

This is an interesting development. We previously argued, when the Workplace Relations Act 2015 was going through the Oireachtas, that the National Minimum Wage Act should have input from the Revenue. It is now effectively being transferred to the Department of Social Protection. This is equally relevant and applicable as a very positive move. You may wonder why this would be said. Issues are constantly arising in relation to the National Minimum Wage as to whether a particular matter is or is not wages. The Department of Social Protection would have significant expertise in determining what element of any person's wages was actually wages for the National Minimum Wage Act. For example anything which is subject to tax and USC is applicable but not for example expenses. Effectively the Department of Social Protection will be looking at what we would call the left hand side of the wage slip rather than the right hand side of the wage slip. It is not how much money is actually received the employee but how much of it is taxable and subject to the social welfare code.

As matters are now currently we have a situation where some legislation will be dealt with by the Department of Employment and Social Protection and others by the Department of Jobs Enterprise and Innovation. This is somewhat worrying that there would be two different departments involved particularly if there are issues relating

to definitions of who are employers or employees for the purposes of various pieces of legislation.

There is therefore benefits for this transfer but at the same time certain drawbacks. Overall we would however think that this is a very positive move.

Diversity in the Workplace

Statutory Instrument 360 of 2017 in Regulation 6 provides that large companies will now have to have a diversity policy and will have to set out how that diversity policy applies and how it was applied in the relevant financial year. The Statutory Instrument will apply to any financial year commencing after the 1st August 2017.

Gender Pay Gap

It was announced that the gender pay gap consultation would take place. Submissions have to be in by the 4th October. We have previously written to the Minister for Justice about this issue. We have set out a very simple submission effectively we are saying that you take the UK legislations as they are reduce the size to companies which have more than 50 employees and proceed effectively with regulations which are very similar to those in the UK. It is beyond us why there needs to be a consultation for something that has been around for years and it is well known how it needs to be tackled. It is dealt with by way of reporting. Our letter to the Gender Pay Gap Consultation 2017 is attached.

Private & Confidential
Gender Pay Gap Consultation 2017
Gender Equality Division
Second Floor Bishops Square
Richmond Hill
Dublin 2

14 September 2017

RG/LW/RIC2/1

Richard Grogan

Dear Sirs,

We have previously written to the Minister for Justice and Equality relating to the issue of gender pay gap reporting.

You deal with the issue of gender pay gap by having appropriate reporting structures. It would be our view that you would take the UK regulations which are well drafted. You would amend those to provide that they would apply to companies of more than 50 workers. You would give a reasonable lead in time for the commencement of reporting. Effectively we would be of the view that this would be for financial years beginning on say 1 January 2019. The reason for this is to give a reasonable lead in period of time. We appreciate that it will take some time even to take the UK regulations amend them and get them through the Oireachtas.

The issue of gender pay gap reporting is necessary to avoid discrimination in the workplace. We had previously written to the Minister about this issue and we feel that it is a very simple and basic right that there would be reporting and that it is not going to be rocket science to put the appropriate procedures in place as there is a good template in place in the UK which can be simply taken and adapted for the Irish marketplace.

Yours sincerely,

_____

Richard Grogan
Richard Grogan & Associates
Solicitors
9 Herbert Place
Dublin 2

Is your Parental Leave Policy Gender Neutral

There are two ways in which an employer can provide parental leave. The first is the simplest by simply providing that an employee shall receive their rights in accordance with Irish legislation and then setting that out.

Some more proactive employers seek to have a more liberal parental leave policy. In designing such a policy it is important that it is gender neutral and does not discriminate.

The first step in having a more proactive parental leave policy is to first of all provide that employees shall at a very minimum receive their statutory rights.

Employees who have given birth are of course entitled to maternity leave. There is no obligation to pay for same. However, some employers decide to do so. There can be no discrimination element in respect of same even though a woman will always be the person who can claim maternity leave. There are some provisions where a male can claim a portion of the maternity leave and it is important to specify, if you are giving paid maternity leave that in those circumstances a male employee would obtain the same paid leave for any of the maternity leave outstanding. A very sad but simple example is a case where a woman might die in which case the father of the child would be entitled to maternity leave.

In specifying paid maternity leave this can include a statutory period of time or can also include the additional maternity leave provisions.

Any additional rights to leave particularly paid leave must be applied equally between male and female employees and this would include such matters as family leave and school holiday leave.

In order to create a gender neutral leave policy for parents which cannot be subject to challenge on the basis of gender, employers should consider providing the same benefit to new parents where both of them would be entitled to claim a particular leave entitlement.

Ryanair Designated Activity Company Case C-168/16 C-169/16

There have been quite a lot of comments about this case. The case is very interesting but there are some particularly useful issues which will relate to the jurisdiction to hear claims.

The ECJ held that the "place where the employee habitually carries out his work" within the meaning of article 19(2) (a) of Regulation EC No. 44/2001 which relates to the jurisdiction and recognition of enforcement of judgements in civil and commercial matters cannot be equated with that of "homebase" within the meaning of annex 111 of Council Regulation 3922/91 as amended. However, the concept of "Homebase" as held by the ECJ constitutes nevertheless a significant indicium for the purposes of determining the place where he employee habitually carries out his or her work.

The decision is interesting in that all it is really saying is that a Court or Tribunal has to look at where the work is habitually carried out.

In this case the Court took account of the fact that the employees were returning to a location in Belgium every evening and commencing work from there. They rejected the argument that work on the aeroplane was registered in Ireland would be the place of work.

The case revolved around the issue that Belgium employment law was more beneficial that the Irish law.

This case opens up an interesting discussion topic. Say for example, a company specifies that the homebase being Ireland would be the jurisdiction for hearing the cases and the employee would be subject to Irish law but the employee works in a location where Irish law is not as beneficial would an employer in that case be able to challenge the right of the employee to bring a claim in Ireland. We would doubt it.

The whole issue of the jurisdiction of various jurisdictions to hear cases is going to become a lot more important in Ireland post Brexit. This case brings a certain amount of clarity however; probably more clarity is going to be needed as this relates to particular regulations and in particular the aviation industry.

BREXIT and Employment Law

The issue of Brexit is an issue which is going to have a significant impact going forward on this island which needs to be addressed now.

We have many employees who are employed by an entity which is either in the Republic of Ireland or in Northern Ireland but who work in the other jurisdiction. Which jurisdiction is going to govern them going forward? Take an employee who is engaged by a company based in Belfast who is working in Dundalk. The employee working in Dundalk may reside in the Republic. A co-worker may actually reside in Northern Ireland and may travel down to Dundalk every day. How are they going to be dealt with? Will UK legislation once Brexit happens apply to them or will it be Irish legislation set here in the Republic. Will they be covered by UK law or will they have the benefit of EU law. This is a practical issue which needs to be addressed.

We then have the issue of companies becoming insolvent. Currently where a company becomes insolvent payment comes out of the Social Fund. A similar fund applies in the UK. What is going to happen in respect of a company which is based in Northern Ireland or in England where the workers work here in Ireland and the company goes into liquidation? Will the workers who are here in Ireland be entitled to claim under the Irish Social Fund?

The European Court of Justice has recently issued a decision which we have covered in previous issues of our newsletter which has effectively set out the rules relating to how employees will be determined to have employment rights. That will be of significant benefit. However, that raises the question, how are these rights to be enforced. Again you have a situation of a company which is based in England. The workers work here in Ireland. They are engaged here in Ireland. How will they be able to enforce their claims particularly if the entity that is here in Ireland is only registered as a branch. What happens if there are insufficient assets here in Ireland but there are more than sufficient assets in England. How will they be able to enforce their claims.

What is going to happen where there are employees who work in for example Dublin or Cork or Galway for 3 days a week and work in London for 2 days a week. What happens to those individuals. These are issues which are relevant to employees. They are also relevant to employers.

There are significant issues relating to this whole process where clarity is going to be needed for the purposes of clarifying the issues for both employers and employees. This is an issue which needs to be addressed sooner rather than later.

The recent ECJ ruling involving Ryanair gives some further certainty as regards workers within the EU with employers being in a different country within the EU. However it does not address the issue of workers or employers being based one in the EU and one outside.