Welcome to "Keeping In Touch" – November 2014

Introduction

Welcome to the fourth edition in 2014 of our newsletter "Keeping In Touch".

Our newsletter for the past two years has been produced on a quarterly basis. Due to a significant rise in the amount of employment law particularly as regards the complexity of some cases, the legal principles which are being dealt with, the practical matters which both employers and employees need to be aware of and their representatives we have decided to move our newsletter from being a quarterly to be being a bi-monthly publication.

It also means that more of our information will be more up to date and hopefully more relevant.

We hope the new format is helpful and informative to you.

Do Employees have to raise a grievance before bringing an employment case?

In the case of Stobart (Ireland) Driver Services Limited and Keith Carroll [2013] IHC581 is interesting in that this issue was specifically addressed by the President of the High Court. The President held that in a case under the Safety Health and Welfare at Work Act 2005 for an employee to bring a claim that they had been penalised that it was not a mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made.

While the facts of the case in itself are interesting, this aspect of the case may not immediately be considered important, however, in our view it is.

In many employment cases an argument is made that, as regards a breach of for example, the Organisation of Working Time Act that prior to a complaint having been made no grievance had issued from the employee.

In the Safety Health and Welfare at Work Legislation there is no requirement for an employee to utilise a grievance procedure to make a complaint. Equally in other employment cases the legislation does not provide a requirement that a grievance had to be made before a complaint issued.

In the submissions which were sent to the Minister in relation to the new Workplace Relations Bill there were arguments raised that before an employee could bring a claim they would have to utilise a grievance procedure. These submissions were rejected by the Minister when drafting the legislation.

It would be our view that the requirement to raise a grievance prior to bringing a claim is not a relevant factor in determining the claim or in determining whether a breach of any legislation occurred or in determining the level of compensation.

Many grievance procedures do not give a huge amount of comfort to employees making a grievance. To be fair others do. If an employer is seeking to have employees raise issues internally in the first instance then the employer must put in place procedures which encourage grievances to be made internally. The procedures must encourage employees to raise concerns. The employees must be made aware that raising a grievance will not be seen as a negative. Employees must be assured that the grievance will be dealt with fairly. They must know that their grievance will be fairly investigated. They will have an opportunity to state their case, that the decision making process will be independent, that the decision maker will do so impartially and that they will have a right of appeal.

They must also know that they will not be penalised or victimised or marginalised, in any way, if they bring a grievance to their employer. Many HR Professionals provide excellent advice to employers and excellent policies and procedures relating to dealing with grievances and have a very fair and transparent system for doing so. However, having procedures in place which encourage employees to raise grievances internally and which have the confidence from the employees that these would be dealt with fairly requires an investment in time in communicating company procedures and policies to employees.

The new workplace legislation is going to bring into place mediation similar to that currently operated by the Equality Tribunal. This will give employers every opportunity to engage before any hearing in a mediation process to resolve complaints.

It is going to be interesting to see the level of uptake on mediation and the level of matters being resolved at mediation once the new system is in operation. However, in the meantime possibly the fallacy that there are some legal requirement for employees to bring a grievance before bringing a claim needs to be debunked.

There is nothing to stop an employer once they receive a claim putting the grievance procedure into play. The question which should also be asked is why the employee did not feel comfortable using the internal system.

In Constructive Dismissal claims it would appear employees should use the internal grievance procedures, normally.

Judge Bronagh O'Hanlon allows papers to be served via LinkedIn

In the past Judge Peart allowed for an Order to be served using the social media site Facebook. Now Judge Bronagh O'Hanlon for the first time that a High Court Judge has approved an order to allow a liquidator to serve a person connected with a liquidated firm with papers through a LinkedIn site.

The application was to serve the papers through LinkedIn page by sending them a message with the details of the case and a link to the URL. The request to have the notice served through LinkedIn was granted by Judge O'Hanlon once she was satisfied that the account was active. The technology on sites such as LinkedIn now indicates to users if a message has been seen and read. This means that proof is available that the document has been delivered.

The use of Social media for service of documentation where it is not possible to serve it by fax, registered post or certificate of posting is likely to become more common.

Constructive Dismissal – Recent Developments

The case of Ana Maria Gonzalez Garretas and Childvision UD 511/2013 being a very considered opinion of the EAT confirms that for an employee to claim constructive dismissal there is a heavy onus of proof needed to show that the resignation was reasonable and justified in all the circumstances. In this case the Tribunal was not satisfied that the employee had done enough to exhaust local remedies before her employment ended.

Constructive Dismissal is a difficult hurdle for employees to overcome.

The case of Catriona Dwan and Development Project Limited UD1983/2011 was another case of constructive dismissal. This is a case where the employee was successful.

The Tribunal as part of the determination held;

"These difficulties had been permitted to fester by management over a significant period of time and whilst many of these issues taken alone, were certainly minor in nature, the cumulative effect of poor communication, misinterpretation and a failure to listen by management led to a situation where one employee, the claimant, suffered stress as a result of the saga which was allowed to continue for a lengthily period, firstly by management, and more importantly, by the Board, whom in the opinion of the Tribunal did very little, over a lengthy period of time, whilst the issues that were before them for consideration and supposed action".

The Tribunal went on to hold;

"In falls in these types of cases for the Respondent to act in a fair and appropriate manner with due expedience and take active decisions to deal with inter personal work related situations as they come before them".

The Tribunal went on to hold;

"The Tribunal finds that due to a total loss of faith in her employers, and a consequential illness it was reasonable for the claimant in all the circumstances to leave her employment".

This case highlights the importance of employers where there are complaints to deal with them in a fair and reasonable way. Where an employee has raised a grievance it is important that the employer applies at a very minimum the Code of Practice on Grievance and Disciplinary Procedures set out by the Labour Relations Commission.

It is a matter for an employer to take proactive steps. In this case the EAT held it is not a matter for the employee to set out what the employee would want from mediation.

The two cases show that there is a consistency in approach by the EAT. The employee must communicate a grievance to the employer. The employee must attempt to process the grievance internally. The employee must be proactive in attempting to get matters resolved internally. If the employer does not reciprocate then in those circumstances the employee may be justified in resigning and seeking compensation for Unfair Dismissal on the basis of Constructive Dismissal. Claims for Constructive Dismissal were relatively rare at one stage. They are now becoming more prevalent. The question must be asked why. It is our belief that many employers, at the present time, due to economic circumstances are operating at full stretch. Many are effectively in a situation where they are short staffed.

The requirements and profitability of the business may be such that they cannot afford extra staff currently. This places immense stress on other employees. This creates the potential for interpersonal disputes, stress in the workplace and grievances. Where an employer is operating at full stretch they need to be able to make the time to communicate with employees. If grievances are received they need to be in a position to deal with them.

We anticipate that there will be a significant rise in Constructive Dismissal cases over the next 12 months. Unless and until businesses become more profitable and can take on additional staff, as there is an increase in economic activity, the potential for grievances will rise where employees feel overworked or placed in a stressful situation. It is not a defence to an Unfair Dismissal claim that the employer was busy or expected the employees to do extra work and was not in a position to take on additional staff. Employers need to be aware of the potential of these claims and to act accordingly to protect themselves.

Can a Director bring an Unfair Dismissal claim?

The case of Colm Butterly and Patrick Butterly & Sons Limited (in Receivership) UD148/2013 is an interesting case on this point.

The EAT held that the claimant could not bring an Unfair Dismissal claim as her was a Director. In this case the EAT held that the claimant was the owner of the whole of the shareholding in the company.

They held that he had full control over the company in relation to all matters including the hiring and firing of staff and he was not subject to any other persons' control within the company.

The EAT held that one of the essential tests in deciding if a person is an employee or not is the "the control test" i.e. "can he be told what to do and when to do it".

The EAT held that this test has always remained an essential part of defining whether a person is an employee or not. They pointed out that this test is still important although with the increasing expertise of employees its importance has been somewhat blurred. They held that it is still and essential element of any contract of employment.

In this case the EAT held that during the claimants period of control of the company he was the sole authority in the company.

The EAT held it could be argued that when a receiver was appointed to the office of the company that the claimant was no longer in control of the company and then became an employee.

While the EAT did not address this issue in fully, they held that in the circumstances of this case he would not have had the requisite service for the purposes of the legislation to entitle the claimant to bring a claim. The EAT made an important distinction between a receiver appointed over the assets of the company rather than the company itself.

This case does not mean that an individual who is a director cannot bring an Unfair Dismissal claim. It will depend on the circumstances. It will depend whether the director is under the control of anybody else.

The case does highlight the importance of checking the actual status of an individual, who is a Director, as to whether or not they are effectively employees or whether they control the company.

Settlement Agreements with ex gratia payments may rule out subsequent employment claims

In the case of Mairead Browne –v- AA Ireland UD 191/2013 the EAT held that it did not have jurisdiction to hear a claim for Unfair Dismissal where the claimant had signed a disclaimer.

This is not a carte blanche opportunity for employers.

In this case the claimant had been advised by her Union Representative.

The employee contended that she had told her Union Representative that she had to take this or she would get nothing. The claimant contended that she was under financial pressure at the time and felt that's he had no alternative but to accept it. Legal advice had not been obtained.

The EAT held that the claimant had an adequate opportunity to consider the terms and the consequences of accepting it.

These cases are all going to turn on their own particular circumstances. Saying this, it is very useful to include a clause in any settlement document relating to redundancy where there is to be an ex gratia payment that the employee has had an opportunity to obtain independent legal advice. Many employers now provide that the employer will provide a fee up to a set figure of somewhere between €300-€500 exclusive of VAT to enable the employee to obtain legal advice which will be discharged by the employer on receipt of an invoice from the Solicitor acting for the employee. Because employers are in a dominant position including such a provision and giving the employee adequate time to get legal advice will significantly strengthen any claim by an employer than an employee is estopped from subsequently bringing any claim against the employer.

In the case of employees it is a salutary lesson that simply signing to get some monies, even when they are in financial difficulties, may result in them not being able to bring, subsequently, a claim for Unfair Dismissal or any other employment claim.

EAT RULES ON SETTLEMENT AGREEMENT NOT A BAR TO BRINGING A REDUNDANCY CLAIM

In the case of Joan Healy and Michael Healy and Bia Ganbreise Teoranta RP493/2012, the case concerned two individuals. Both had brought proceedings in the Circuit Court for non-payment of wages. This was settled. A settlement agreement was entered into. The settlement agreement included,

"Clause 7, The employee agrees that the terms of the agreement provide a full and final settlement of the proceedings and all any claims that he/she may have or may have against the company and/or the employer and/or any of their respective group of companies, officers and/or employees agents and shareholders howsoever arising including, without limitation, arising out of or in connection with the employment of the employee of the company and/or the employer and/or any of their respective group companies and the employee hereby fully and finally releases all such entities from all or any such claims, whether in statute or common law in tort, in equity or otherwise howsoever arising"

Clause 13 of the agreement stated,

"This agreement shall ensure to the benefit of and be binding upon the respective parties hereto and their respective personal representatives and successors"

The EAT pointed out that in the case of Hurley –v- The Royal Yacht Club [1997] ELR225 Buckley J in the Circuit Court considered a waiver clause in an agreement in the context of the Unfair Dismissals Acts and having concluded that there much be informed consent to such a waiver later in his judgment set out what this requires.

"I am satisfied that the applicant was entitled to be advised of his entitlements under the employment protection legislation and that any agreement or compromise should have listed the various Acts which were applicable or at least made clear that they have been taken into account by the employee. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in this case, would have been legal advice. In the absence of such advice I find the agreement to be void".

The EAT pointed out that this statement of law was applied by Smyth J in the High Court Case of Sunday Newspapers Limited –v- Kinsella and Brady [2008] ELR53

In the case before the EAT the Appellants, being the employees, were legally represented in the negotiations in the Circuit Court.

The EAT considered the Decision of Smyth J in Sunday Newspapers Limited –v- Kinsella and Brady referred to above and by Kenny J in Minister for Labour –v- O Connor and Another unreported High Court 6 March 1973. The EAT stated that they considered that the appropriate approach is to examine what was discussed during the course of the negotiations leading up to the agreement. It was not contested that the unpaid wages of the employees was the only issue discussed and the negotiations leading to the settlement of the Circuit Court case. The EAT went on therefore to conclude that the Appellants were entitled to redundancy.

The EAT helpfully considered the provisions of Section 51 of the Redundancy Payments Acts 1967-2007. Section 51 provides,

"Any provision in an agreement (whether a contract of employment or not), shall be void insofar as it purports to exclude or limit the operation of any provision of this Act"

The EAT helpfully pointed out that it is well established that statutory provisions in employment protection legislation prohibiting the contracting out of statutory protections such as Section 51 of the Redundancy Payment Acts does not preclude severance agreements or compromises of claims. The EAT pointed out that this was so held in the case of Talbot –v- Minister for Labour Unreported High Court Barron J, 12 December 1984, Sunday Newspapers Limited –v- Kinsella and Brady [2008] ELR 53 and the Minister for Labour –v- O Connor Unreported High Court Kenny J 6 March 1973.

This case importantly sets out that it is advisable in settlement agreements that the claims that are being settled should be clearly set out. Alternatively it would appear that it is sufficient that it covers all claims and that it is clear between the parties by way of correspondence or otherwise as to what those claims are.

It is however still better practice to list off all potential claims which effectively means listing off all Employment Law Acts. Where an employee is not represented it would appear, following this Decision that it is important that the employee is advised of the importance of getting legal advice in the absence of legal advice a settlement agreement may not be binding particularly on an employee.

This Decision of the EAT is an important Decision. It is very well structured and set out. The particular division of the EAT must be congratulated for the amount of work undertaken by them. It is also clear that the Solicitors in this case clearly put a considerable amount of work into the presentation and the defence of the claim.

Service for bringing an Unfair Dismissal claim

In the case of Alana Miley and Up To My Eyes UD1498/2012 the EAT had to consider the issue of whether an employee had the relevant service to bring a claim.

While this case had a lot of attention in the newspapers on 22 September last an interesting aspect of the case is the issue of what service an employee needs to obtain the twelve months to be able to bring a claim. In this case the claimant commenced in May 2011 working approximately 6 hours a week. This increased to 20 hours in July 2011.

The Tribunal found that the claimant was an employee from at the latest 13th June 2011.

The EAT held that because she was on a series of contracts to provide receptionist services which then grew into a full time contract that the Tribunal had jurisdiction to hear the claim as it was agreed that her employment was terminated on 15th June 2012.

The case highlights the fact that despite the fact that an employee may initially be on a limited number of hours per week this is the effective commencement date not when the job becomes a full time position.

Some employers may fail to recognise this. This is an important decision from the EAT which clarifies the law on this point.

Unfair Dismissal cases before the Employment Appeals Tribunal.

The case of Janis Mooney and Oxigen Environmental UD1525/2012 dealt with the issue of an employee who was dismissed.

It was alleged that the employee used bad language during phone conversations with colleagues and had a flirtatious manner with her colleagues.

The claimant was given notice of a meeting. The claimant was not told the purpose of the meeting. At the meeting audio recordings of some of her phone conversations were played back. The employee contends that she appealed the dismissal which took place on the day. The employer contested this.

The EAT held that there is no doubt that the claimant verbally expressed herself at work with expletives. The Tribunal however held that an employer is obliged to apply fair procedures and act reasonably when sanctioning an employee. In this case the claimant had an unblemished record.

There was no evidence of any investigation or a suspension in the matter. The Tribunal held that the notice and nature of the meeting was too short and brief. An award of €12,500 was made.

This case highlights what this office has been saying for some time that procedures are important.

In the case of Caroline Wrenn and Tesco Ireland this case involved a case where the employee was dismissed. The reference is UD320/2012.

The employer had a sick leave policy which allowed for eight weeks paid leave. However after six months period had elapsed if the employee was not fit to return to work and was unable to provide a likely return date the employer had a contractual provision that they may move to dismiss the employee. At the end of the six months absence the company doctor found that the employee was not fit to return to work. The employee contended that she was unfit to return to work due to another illness that the company doctor did not consider. The employee was given an opportunity to submit a second medical opinion. After a number of weeks and several meetings the employee failed to provide such an opinion. The decision was taken to dismiss. The dismissal was appealed but was upheld. At that stage the claimant was still unable to provide a return to work date.

In this case the Tribunal determined there was a breach of procedures in that the dismissal letter was issued too soon. However, the Tribunal held that the company rectified that error by a number of extensions of time to allow for proper grievance procedures to be followed. The employee, the Tribunal decided, failed to furnish the employer with a medical certificate certifying a return to work date. The Tribunal held that the claimant was not unfairly dismissed.

Again, this case highlights the importance of procedures. It also highlights the importance of employees cooperating with an investigation.

In Claire Merity and Declan Doyle and Eamonn Garvey practicing as DCA Accountants UD814/2003 the case concerned the dismissal of an employee during her maternity leave.

The Tribunal held that when considering and deciding on a redundancy issue an employer is obliged to focus on the job and role subject to that redundancy as distinct from the person holding the job and role. This is well settled law. There is no doubt about that. The Tribunal was critical of the employer meeting the employee while she was on maternity leave.

The manner in meeting her was informal. The respondent acknowledged that the employee was not notified of the subject matter of the meeting. There was a clear dispute as to what happened at that meeting.

This highlights the importance of records of meetings being taken and notes exchanges with the employee having an opportunity to comment on those notes. What was without a doubt is that the employee accepted a statutory redundancy payment and her employment ceased. The Tribunal in this case held that the proposed nature and subject of the meeting should have been relayed to the employee prior to the employer meeting with her or upon her return to work. The Tribunal held that it was not satisfied that the role and functions the employee held as manager were not undertaken by another colleague subsequent to her permanent departure from the respondent employer. The Tribunal held that that in itself renders the purported redundancy unfair as it was neither impersonal nor objective. The EAT awarded the employee €43,941.67 but reduced this by the amount of the statutory redundancy paid leaving a net award of €33,765.67 as compensation under the Unfair Dismissal Legislation.

This case is interesting in that it again highlights the importance of procedures. By procedure's we mean that employees are notified of what the meeting is about. They are given sufficient time to prepare for it. They are given a right or representation, they have an opportunity for a fair hearing and in the case of a purported redundancy have the option to put forward proposals and alternatives. The second aspect of the case which is interesting is the tax treatment of such an award.

Normally a Redundancy payment is exempt from tax. An award under the Unfair Dismissal Legislation is not. It is subject to the statutory exemptions. Our lecture note in the publication section of our website headed "The Taxation of Employment Awards and Settlements" details the tax treatment. What is clear however is that the full sum of €43,941.67 is taxable subject to the normal exemptions being €10,165, plus €765 for each complete year of service and potentially liable to the employee claiming the additional €10,000 threshold exemption subject to applying for same.

The difficulty with Unfair Dismissal awards is that an Employment Appeals Tribunal is obliged to award net loss of earnings only. For tax purposes the net earning is actually treated as a gross amount and is therefore subject to tax. This is an anomaly in our Employment legislation.

Employers – Be wary of Internships

In this short article we are not dealing with JobBridge. Internships under the JobBridge Scheme being the National Internship Scheme being an intern who is taking place in a scheme where the intern is specifically considered not to be an employee. There is therefore no legal uncertainty as regards their status.

Internships are relatively new in Ireland. They appear particularly popular in the IT industry.

Other service companies such as Solicitors, Accountants and others are beginning to use interns. It is seen as a way for individuals to gain relevant work experience and to increase their ability to obtain employment.

The concept of an internship is regulated in countries such as the United Kingdom and the United States. There is no legislation in Ireland governing internships. Therefore there is no legislation to ensure a minimum rights or obligations of the parties except the JobBridge Scheme.

The question which a business must ask itself is whether or not the intern is an employee? The normal answer which will be given is an emphatic "NO". However, that may not be the position.

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In Irish law there is no legal definition of an intern. A person is either an employee or they are not an employee. Any business considering taking on an intern should be aware that there is a risk that an intern could be deemed to be an employee for Employment Law purposes. In such circumstances the intern would be entitled to the full legal rights as an employee would be afforded. These rights would include the entitlement to be paid the National Minimum Wage.

They would be entitled to rest and break periods. There would be a maximum number of hours that they could work. They would have to obtain Annual Leave and be paid for it. They would be entitled to be paid for Public Holidays. When the internship finished they would be entitled to minimum notice. If the internship exceeded 12 months they may have a claim for Unfair Dismissal. They will also have the full protection of Employment Equality legislation as regards claims for discrimination and sexual harassment.

Whether a person will be treated as an employee will, before any Tribunal or Court very much depend on what type of work they do. If the intern is simply there to shadow another employee, they have no duties, they are simply being trained. They follow around the other employee. They may do some ancillary minor work such as photocopying a few documents that are needed for a meeting.

They might even type up an agenda but invariably they will simply be shadowing the employee or employees they are assigned to. In such circumstances the intern is less likely to be categorised as an employee.

If however the intern is doing real work, if they are working on a project, if they are given jobs to do, if they are there to effectively work they are more likely to be deemed to be an employee.

In dealing with this issue maybe it is necessary to look at it from the point of viewing a practical example. Let us say there is a coffee shop who takes on two interns. The first intern simply follows behind an employee who serves coffee and food. They follow behind them. They see how it is done. They however never carry trays or rarely do so. They don't serve at the tables. They are just shown how to be a waiter or waitress.

It is unlikely that they would be categorised as an employee. If the "internship" involves the individual actually serving at tables, making the coffee, cleaning up, preparing the premises for customers during the day and effectively to all extensive purposes actually working there then it is likely that they will be categorised as an employee.

The defence which will usually be raised by employers is that the intern signed an agreement saying that they were an intern. There is a long list of precedents in Ireland where the Courts have held the fact that an individual may be stated in a contract to be a particular status such as self-employed does not make them so. The Courts have consistently held that it is a matter for the Court or a Tribunal to investigate what the actual status of the individual is. This office has considerable concerns about internships which are not under the JobBridge Scheme. Employers considering using the scheme need to be extremely careful.

A claim under the National Minimum Wage Act by an individual who has been an intern for six months will be under that piece of legislation alone will be a little over €6,700. Taking a claim for Holiday Pay, Public Holidays and Minimum Notice and the figure starts to rise substantially.

We would also advise employers who are considering taking on an intern that they should check their insurance as regards employer and occupier liability as it applies to an intern.

It would be our view that claims under Employment Law for non JobBridge interns are likely to rise. Unfortunately some internships are nothing more than a method to obtain "free labour".

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Organisation of Working Time Act and the Data Protection Act

A judgement of the EU Court of Justice on 30th May 2013 confirmed that Article 2 (a) of Directive 95/46/EC of 24th October 1995 must be interpreted as meaning that a record of working time such as that at issue in the main proceedings which indicates, in relation to each worker, the time when working hours begin and then aswell as the corresponding breaks and intervals is included within the concept of personal data within the meaning of that provision.

On –call time maybe working time.

In a UK EAT case of Truslobe and another –v- Scottish Ambulance Service UK EAT /0053/13/JW the claimants were ambulance paramedics. The claimant sometimes worked on-call night shift duties away from their home base station. On such occasion they were required to take accommodation within a three mile radius of the ambulance station. This is where they were to park the ambulance.

They were required to meet a target time of three minutes within which to respond to a call. The claimants claimed that time spent on call counted as working time and so they were entitled to rest periods according to the Working Time Regulations.

The Employment Tribunal in the UK dismissed their claim. The UK Employment Tribunal decided that the claimants in this case were not confined to unspecific location and therefore were at rest during the periods they spent on call. The case was appealed to the UK EAT.

The UK EAT allowed the appeal. The UK EAT held that it was clear that the time of the claimants was not their own while on duty. They held that the central question as whether the employees were on the facts required to be present at a place determined by their employer. They held that they had to be where they were within narrow limits. They could not be at home.

Therefore they could not enjoy the quality of rest that they were entitled to under the UK Working Time Regulations which are similar to ours. In Particular the UK EAT looked at the case of Landeshaupsadet Kiel –v- Jaever [2004] ICR 1528.

This case may well be interesting for the principles which it sets out.

The reasoning is a reasonable approach to the issue of rest periods.

Overtime

An interesting decision of the Labour Court issued on 21st August 2014. The case involved Dublin City Council and a worker under reference CD-14-185.

In that case the Court held that there is an established distinguishing feature between regular and rostered overtime and ad hoc overtime. The Court held that where overtime is mandatory or contractual it becomes, in effect, the workers normal working hours and should be compensated for if this continued. Where overtime is not mandatory it is voluntary to both parties in the sense that the employee is not obliged to work the overtime and the employer is not obliged to provide it. The Court pointed out that the Court has consistently held that in such cases compensation is not payable.
While the Court has not addressed the issue of the Payment of Wages Act it would appear from the wording of the Payment of Wages Acts that it may be possible to bring claim under that Act on the basis that it is a deduction and seek payment.

Holidays should be holidays

On 17th September 2014 an interesting article appeared in the papers relating to the issue of employees coming back from holidays stressed.

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It is now becoming common place that employees will have their laptop or mobile phone with them on holidays. They may be called by their employer. They are receiving emails. They are effectively often being required to deal with work related issues while they are on holidays.

For employers who allow this to happen employers are putting themselves in a situation of having claims against them. The very basis of holidays and by this we mean the 20 days statutory leave provisions is that employees are given a complete rest from work. The provisions of the Organisation of Working Time Act provide that an employee must receive as part of the 20 days two weeks uninterrupted leave. The word "uninterrupted" means that. It means uninterrupted. The idea of 24/7/365 availability of employees is a new concept. Mobile phones and laptops have created a mobile work environment. It has also created a situation where employees are unable to leave the workplace. The workplace follows them.

For employers to determine whether or not they have a workplace that encourages people to take a proper holiday then there are some questions which should be asked.

1. Would it be ok for the employee going on holiday to turn off their mobile for the entire period of their holiday?
2. Would it be acceptable that the employee ignored telephone calls from clients of the office while on holidays?
3. Would employees be encouraged to leave the laptop in the office when they go on holidays?
4. Would the employer encourage employees that even if they bring the laptop with them on holidays that they do not open their email and certainly don't reply to it?
5. Would those who work with an employee, who is going on holidays, be instructed not to phone the employee on his / her mobile or send emails to them?

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If the answer to any of these questions is "no" then the question must be asked is the employee actually getting a holiday and does the employer encourage employees to take holidays.

This issue of 24/7/365 availability is one that is going to be dealt with at some stage and it is going to have to be addressed as to what the rules are on holidays. The rules are clear. It just appears they are being fudged at the present time.

Zero Hour Contracts – Update on UK Legislation – Anti avoidance

In the Autumn edition of our newsletter Keeping In Touch we set out an article dealing with exclusivity clauses in zero hour contracts.

These clauses are controversial because they seek to prevent workers on a zero hour contract from working elsewhere. This is so even though the employee may have no guarantee as to the amount of work which will be provided to them. In the UK the planned exclusivity ban will be brought into place through the Small Business Enterprise and Employment Bill. We understand that a new Section 27A will be inserted into the Employment Rights Act 1996 in the UK. This will make exclusivity clauses in zero hour contracts unenforceable. A further section 27B will give the power to the Secretary of State to provide anti avoidance measures.

The Lawyers are already working on avoiding this exclusivity ban. The proposed ban will cover contracts where there is no certainty that work will be provided. One proposal which is being put forward is that some employers could consider trying to avoid the ban by giving a worker a contract which provides a certain number but very limited amount of work.

This could be as little as one or two hours a week. In the UK the Government is putting in place a consultation which will seek views on the ways to tackle avoidance of exclusivity bans. Once this consultation is completed the UK Government will consider the responses and will then decide how best to implement the new legislation.

This is a very positive approach by the UK Government to zero hour contracts. It is likely that the consultation process, although it is not set out anywhere, will consider when it will be appropriate to use a zero hour contract, how to promote clarity and probably methods as to how avoid employers being able to avoid the new legislation.

In Ireland as of yet these exclusivity clauses are perfectly legal. They can be used. There have been proposals to look at the issue of zero hour contracts. It will be interesting to see how the process develops in the UK and whether the work undertaken by the UK Government might be adopted here in Ireland.

Safety Health and Welfare at Work Act

The issue of reinstatement is often a thorny issue in cases. In the case of Stobart (Ireland) Driver Services Limited and Keith Carroll being a Decision of the High Court on 20th December 2013 this issue arose.

The High Court held in relation to a claim under the Safety Health and Welfare at Work Act that as under Section 28 (3) (b) of the Act of 2005 the remedies available include "require[ing] the employer to take a specific course of action", this can be interpreted to include reinstatement.

In the case in question the claimant alleged he was penalised under Section 27 for a complaint made persuant to Section 13 of the Act of 2005. It was not submitted that he was unfairly dismissed but that he was penalised due to a complaint made persuant to the Act of 2005 and that this resulted in penalisation by way of dismissal as per Section 27 of the Act of 2005.

The Act at Section 27 (2) (a) notes that penalisation can be "suspension, layoff or dismissal (including a dismissal within the meaning of the Unfair Dismissal Acts 1977 to 2001) or the threat of suspension, layoff or dismissal".

The High Court held that it includes dismissal under the Unfair Dismissal Acts but does not in any way limit it to dismissal under that Act. The High Court pointed out that the effect of Council Directive 89/391 EEC and Directive 91/3a3/EEC set down procedures to improve the safety of workers and their rights.

The President of the High Court held that there is no mandatory requirement that a grievance procedure be followed for a complaint to have been deemed to have been made.

Pay for Women – an outdated inequality

In August 2014 the Guardian newspaper reported that senior female managers in the United Kingdom earn only three quarters of the salary of their male colleagues. This is despite the fact that the Equal Pay Act in the UK outlawed inequitable pay between men and women more than 40 years ago. There is no reason to believe that a similar situation does not arise in Ireland. A study by the Chartered Management Institute in the UK found that the salary gap between men and women increases as they age and get moved up the professional ladder.

Female executives were also found to earn significantly lower bonuses than men. We are now in the 21st century. There is no reason why male and females should not receive equal pay. There are very few equal pay claims by senior female executives but possibly there should be. There is however an issue that companies need to look at their pay for female executives and to consider are their female executives getting the same pay treatment and bonus treatment as male colleagues.

We believe that this type of report that issues should not be issuing. We have long since gone past having, in law, a workplace which is other than respectful of individuals. Of course there will be times when a particular company will not be in compliance with equality law. However, it is incredible to believe that there is the potential that 75% of female executives have potential equality claims against their employer.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

A problem with equal pay awards under the Employment Equality Legislation

A particular problem which arises in equal pay cases, which are won, is that the decision will invariably be that a particular individual did not receive equal pay on one of the protected grounds. More usually it will be either on the race ground or the gender ground. You might think that if such an award is made that the award will dictate the amount of the underpayment. The difficulty is that doesn't happen.

The person who obtained the decision then has to go and do their own calculation as to what the difference in pay amounts to. This is not too difficult where you have individuals who are on a salary on the same grade. The problem really arises where you have employees on an hourly rate of pay. You may know what the difference in the hourly rate of pay is but invariably the employee will not have all the information on exactly how many hours they worked.

You might think that this can be extracted from a P60. If the employee's rate of pay does not vary then that would apply. If however the employee receives different rates of pay for example for Sunday work or a shift allowance or some other allowance which is taxable without access to all the time sheets and employment records it can be a difficulty job for the employee to actually work out how much the equal pay claim is worth in euros.

In some cases it is necessary to make a request under the Data Protection Act to get all the documentation. There is then the job of putting in place the mathematical calculation.

There is an argument that where an award of equal pay is to be awarded that the deciding officer will on the basis of the information produced by an employer give a monetary amount.

There is also the issue in a number of decided cases by the Equality Tribunal that where an equal pay claim is brought under the Employment Equality Legislation that the employee simply receives the difference in pay rather than a compensatory amount in addition.

There is an argument that where an award of equal pay is to be awarded that the issue of a compensatory sum which will be designed to deter an employer going forward applying such a practice in the future would be considered.

Disability Discrimination – examples of reasonable accommodation in employment

There was an excellent article in personnel today in September where 10 examples of UK cases of reasonable adjustment in employment, which would be similar to reasonable accommodation in Ireland, were pointed out. Some of the examples given are very interesting.

1. Relocating

   In Keane –v- United Lincolnshire Hospital Trust NHS Trust it was held that the NHS Trust discriminated against a deaf applicant for a position when it failed to consider reallocating telephone work.

2. In Environment Agency –v- Donnelly the UK EAT held that an employer's refusal to allocate a parking space near the workplace of a disabled employee was a breach of a duty to make reasonable adjustment. The employer's suggestion that the employee should arrive earlier at work to ensure a convenient parking space was held to be wrongly placing the responsibility on the employee.

3. In West –v- Louis Trading as Squires Model and Craft Tools the failure to provide an employee with a stool where the employee had undergone a hip operation so that the employee could sit on the stool behind the shop counter to ease her pain was held to be discrimination.

4. In George –v- H&M Bottomley Limited it was held that where an employer failed to make reasonable adjustment of providing a van with power assisted steering that it had available so that a sales representative with arthritis could continue to drive was held to be discrimination.

5. In Brooks –v- The Secretary of State for Work and Pensions it was held that where an employee with depression who could not cope with significant direct dealing with the public should have been offered a job in a non-public facing role which was available.

6. In Woodhead –v- Halifax plc a diabetic employee who was not provided with regular breaks as necessitated by her condition was found to have been unlawfully discriminated against.

7. In CABE-v- Goodwin in the case of a disabled employee it was held by the Court of Appeal that the duty to make reasonable adjustments may extend to permitting additional or alternative representation at performance review meetings or disciplinary hearing by someone outside the prescribed categories for example a support worker or family member experienced in managing the workers disability.

8. In Horler –v- Chief Constable of South Wales Police the employment Tribunal in the UK concluded that the most obvious reasonable adjustment would have been retaining an injured Police Officer in a camera room operator role to which he had been moved at least until the post was no longer in existence. At that point the police force would have been in a position to review the officer's job. As the police force had not considered taking these steps it had failed to make reasonable adjustments.

The article was an excellent article looking at the issue of the active duty on employers to make reasonable adjustments to accommodate the needs of disabled employees. There is a duty on employers to use reasonable accommodation so that a disabled person would not be at a substantial disadvantage in comparison with individuals who are not disabled.

It may well be that with changing working patterns, people requiring to work longer, that the issue of reasonable accommodation is going to become a more significant issue for employers.

Injunctions in Employment cases

The case of Kevin Rogers and An Post 2014 No. 3750P being a decision of the President of the High Court delivered on 25th July 2014 is important for the conclusion that was set out. The High Court restated that it is necessary to approach the application by reference to the principles identified by Laffoy J in Jacob –v- Irish Amateur Rowing Union Limited [2008] 4 I.R. 731 where it was held;

"Interlocutory relief is granted to the applicant where what he complains of is continuing and is causing him harm or injury which may be irreparable in the sense that it may not be possible to compensate him fairly or properly by an award of damages. Such relief is given because a period must necessarily elapse before the action can come for trial and for the purpose of keeping matters in statu quo until the hearing. The application for an interlocutory injunction is often treated by the parties as the trial of the action.

When that happens the rights of the parties are finally determined on the interlocutory motion. In case of rights are disputed and challenged and where a significant period must elapse before the trial, the Court must exercise its discretion (to grant interlocutory relief) with due regard to certain well established principle).

The President quoted further;

"with those considerations in mind, I do not think that in cases such as the present, whatever the strengths on either side, where the decision on an interlocutory application where an injunction will effectively dispose of the claim, the Court can legitimately, nor is it bound, to apply the Cyanamid guidelines, which, as I have already said, I think are based on the proposition that there will be a proper trial at a later stage when the rights of the parties will be determined.

It may well be that it is the same ultimate consideration which the Court has in mind namely the question of whether it is likely to do an injustice. Where a plaintiff brings an action for an injunction, I think that it is, in general, an injustice to grant one at the interlocutory stage if this effectively precludes the defendant from an opportunity of having his rights determined in a full trial. There may be cases where the plaintiffs evidence is so strong that to refuse an injunction and to allow the case to go through to trial would be an unnecessary waste of time and expense and indeed to an overwhelming injustice to the plaintiff but those cases, in my judgement, be exceptional."

In this case the President held that he did not believe that this was a case that was likely to go to trial at the instance of the plaintiff if he was granted the substantive relief that the plaintiff sought in the action at the interlocutory stage and held that it was not appropriate in this case as a means of maintaining the status "pending such trial".

Transfer of Undertaking Regulations

There were two interesting cases under these regulations involving Cavan Industrial Cleaning Services Limited and Dangoole Germanaviciene and others TU29-TU36-2013 and Billy Bligh and others and Stobart Ireland Driver Services Limited TU 29/2011 and others.

In the first case the EAT restated the Suzen –v- Zehnacker Gebaudereanigung GnbH Krankenhauaaervice which covers the provision where no assets transfer. The Rights Commissioner had already held that assets had already transferred. The company appealed. The Employment Appeals Tribunal determined that there had been no assets transferred and therefore upset the decision of the Rights Commissioner.

In the second case the argument again was in relation to the transfer of assets. In that case the company contended that there had been no transfer of any assets. In this case the EAT held that the passing of a contract from one company to another company was a transfer of an undertaking in that an economic entity passed from one company to another within the meaning of the transfer of undertaking directive. The EAT held that there was no requirement for the transferor or the transferee to own the undertaking and no need for a contractual link between the transfer and the transferee.

These cases identify, as we have set out, in our Autumn Edition of our newsletter, the difficulties for both employers and employees to determine whether the Transfer of Undertaking Regulations apply. In both cases the decision of the Rights Commissioners was overturned. In the first case it was overturned in favour of the entity which had been held by the Rights Commissioner to be the transferee. In the second case the decision was overturned in favour of the employees who had originally lost before the Rights Commissioner. The cases show the difficulties which any Tribunal, employer or employee has, in determining whether a transfer has occurred were tangible assets do not transfer.

Tax treatment of married, separated and divorced persons

Revenue Ebrief 76-14 issued in September. The income tax and capital gains tax manual has been updated to consolidate the material in relation to income taxation of married, separated and divorced persons. It includes taxation in the year of marriage. The basis of assessment for married couples, non-residence of one or both spouses, taxation in the year of death and taxation and maintenance payments. Similar material in relation to civil partnerships is also available. The relevant references are part 44.01.01 and part 44a.01.01.

The Revenue manuals are very useful particularly for giving worked examples of the tax treatment. The Revenue have helpfully set out the issue in relation to what happens in the year of marriage. It gives an example of one spouse earning €48,000 and the other spouse earning €24,000 having got married on 10th July. The difference between going under single assessment and joint assessment is nearly €900 in the difference. It shows that the parties are better off if they go for joint assessment.

This is a very useful publication by the Revenue and is easy to understand.

There is nothing to stop a married couple even at this stage of the year opting for joint assessment. You may find out that a substantial tax refund is due. This is particularly so where one spouse is at the higher rate of tax and the other spouse is not using up their full entitlements at the lower rates of tax.

Revenue's tax/allowance for long service awards

The issue of long service awards "LSA" is sometimes overlooked by employer's as an opportunity to recognise an employee for their service to their employer.

Generally employers are entitled to make a small benefit tax relief gift to employee's each year. The annual tax allowance applies to gifts or vouchers up to a value of €250. This benefit cannot be in cash. The tax relief on long service awards LSA is separate. It is in addition to the small benefit tax relief.

Employees with long service are allowed a tax free tangible gift up to a maximum of €50 for each year of service starting at 20 years of service and every 5 years thereafter.

Therefore an employee with 20 years' service can receive a benefit of up to €1,000. An employee with 35 years' service can receive an award up to €1,750.

The Revenue website addresses this issue. It provides where awards are made to directors or other employees as testimonials to mark long service, such awards are normally taxable. Where however an award takes the form of tangible articles of reasonable cost tax should be charged provided:

1. The cost to the employee does not exceed a certain level for each year of service with effect from 1st of January 2002, an article may be taken to be of reasonable cost for the purposes of this concession where the cost to the employer does not exceed €50 for each year of service.

2. The award is in respect of a period of service of not less than 20 years.

3. No similar award has been made to the recipient within the previous 5 years.

The definition of tangible articles refers to awards given in the form of other than vouchers, bonds or cash. Unlike the annual tax allowance where vouchers are allowed vouchers are not allowed in the cases of long service awards. A long service award which would qualify would be an item like a gold watch, a piece of jewellery, a set of golf clubs or virtually anything that is a tangible article. It is possible under the current rules to give an employee a benefit every 5 years after they have served the employer for 20 years. Therefore an employee will receive the benefit now of up to €1,000 after 20 years' service can receive a tangible asset valued up to €1,250 after 25 years and a further €1,500 after 30 years rising to €1,700 after 35 years.

While the allowance may not seem generous it is still a tangible benefit. Where an employee is on the top rate of tax who receives a benefit of up to €1,000 the real benefit to that person is equivalent to a figure in excess of €2,000 in salary. The annual tax allowance and the long service award allowance are benefits which employers sometimes fail to take advantage of as a method of recognizing employees.

Budget 2015

Budget 2015 was introduced by the Minister for Finance on 15 of October last

Our overview of the budget looks at the budget from the perspective of an employer and an employee. We look at the implications for business in their relationship with employees.

Income Tax

The marginal rate of income tax has been reduced from 41% to 40%. While this is good news, however, USC rates have been changed to the effect that high earning PAYE and self-employed individuals will continue to be subject to marginal rates of 52% and 55% respectfully. While the reduction of the Income Tax rates is to be welcomed the failure to address the significantly higher marginal rates of tax for higher earning individuals will not be an incentive for particularly employer's to grow businesses.

Thresholds of USC

The lower rate of USC has been increased from €10,036 to €12,012. The revised rates of USC will be as follows. Rates of USC for self-employed individuals earning an excess of €100,000 increased from 10% to 11%

€0 - €12,012	@ 1.5%
€12, 0132 - €17,576	@ 3.5%
€17,577 - €70,044	@ 7%
€70,044 - €100,000	@ 8%
PAYE income in excess of €100,000	@ 8%

Thresholds for paying Income Tax

The marginal rate will increase by €1,000 for a single person and €2,000 for a married couple with two incomes.

There is an extension of the exemption from the 7% rate of USC for medical card holders whose aggregate income does not exceed €60,000 will now pay a maximum rate of 3.5% USC.

There will be income tax relief as standard rate of income tax 20% in respect to water charges up to a cap of €500.

The effect of Budget 2015 is certainly to increase take home pay for lower earners. Little has been done for higher earners. For the self-employed, who are the job creators in Ireland, the increased charges and lack of any real benefits was a missed opportunity.

Compulsory Motor Insurance Extension

On 4 September 2014 the European Court of Justice ruled that compulsory motor insurance must cover any accident caused in the course of the use of the vehicle within the normal function of that vehicle. The effect of this ruling is that the location of the accident is irrelevant. This ECJ ruling arose out of a case where a Slovenian National was injured when knocked from a ladder by a reversing tractor and trailer in a farm yard. Compensation was refused on the basis that the accident occurred in a private place. The ECJ has held, despite opposition from the Irish Government among others, that insurance for a vehicle cannot be confined to journeys on a public road.

The Department of Transport will be examining the implications of the judgement. It is likely that this judgement is going to increase the cost of motor insurance in Ireland.

Be Careful when getting advice

We are now seeing entities describing themselves as “Legal Advisors” or as “Advocats” or “Advokats” or “Employment Law Practitioners”. Phases such as “Accident Claim Handlers”, “Accident Claim Consultants” and even “Accident Claim Lawyers” and other similar terms are being used. Sometimes these terms are used to attempt to convey the idea that the individual is “legally qualified”. Unless the word “Solicitor” or “Barrister” is used the person, persons or entity are not qualified and regulated legal practitioners. Anybody can call themselves a “legal practitioner” but only Solicitors and Barristers are regulated by a professional body.

Only a qualified Solicitor or Barrister can use the term Solicitor or Barrister. A Solicitor must have a practicing certificate issued annually.

Our advice is always use a Solicitor regulated by the Law Society of Ireland for advice or assistance in employment or accident cases.

Conclusion

What have we been up to and what are we going to be up to.

In the Autumn 2014 edition of the Parchment being the newsletter of the Dublin Solicitors Bar Association there is an article by Richard Grogan on common traps for both employers and employees and their representatives in bringing and defending claims.

This article is available to download from the Publications section of our website.

On 28th November next Richard Grogan will be presenting a paper to the Southern Law Association and the Employment Law Association of Ireland joint conference in Cork in bringing and defending Organisation of Working Time claims.

Richard will be presenting a detailed paper not only dealing with the Irish law but also UK and EU decisions in this area. The paper will be available on our website sometime after 28th November.

The information section of our website contains a number of Guides on employment law. We have also a number of guides in the area of personal injury law. In some cases there is an overlap between personal injury law and employment law. We are finding where there are accident cases involving failure to comply with Health and Safety legislation this often also translates into failure to comply with other pieces of Health and Safety legislation such as in the Organisation of Working Time Act, working excessive hours, not getting proper rest and break periods, not being provided with proper holidays. All of these these can be a cause of subsequent accidents in the workplace. We are finding it unfortunate that in a significant number of cases which we are involves in that there are claims not only for personal injury but for breach of employment law rights particularly in the area of the Organisation of Working Time Act. Unfortunately some employers do not recognise that the Organisation of Working Time Act is a piece of Health and Safety legislation. This is despite the fact that the Labour Court on numerous occasions have stated that it is. This has been stated by the European Court of Justice as well.

Finally, we do hope that you find our new format useful. We are committed to producing our newsletter on a bi monthly basis now. We hope the information contained is relevant. We hope that the comments which we make on various pieces of legislation and cases are thought provoking. We hope you will regard this as a useful publication.

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This newsletter does not purport to provide legal advice. Before acting or refraining from acting on anything contained in our newsletter legal advice from a Solicitor regulated by the Law Society of Ireland should always be obtained.

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