Welcome to the October issue of Keeping In Touch

In the July issue we dealt with the issue of inviting employees to a disciplinary hearing. In this issue we deal with the disciplinary hearing itself.

We are covering issues such as;

A. Bogus self-employed.
B. Indirect discrimination
C. Working time and mobile workers
D. The threat to the health and Safety of workers who work long hours.
E. The increase in the National Minimum Wage
F. The Workplace Relations Act
G. Notices For Particulars
H. We have also highlighted the issue of safety on our roads and the fact that many pieces of safety equipment are subject to VAT and VRT.

In employment cases and the issue of settlement negotiations and how they should be structures is one which is constantly being raised and we are setting out our comments on a recent UK case on this point.

We are also covering issues relating to the treatment of women during pregnancy and maternity leave as a result of a UK survey. UK tax on termination payments and Judicial Review. We have also set out the new rates of pay for those in the cleaning and security industries.

In developing this Newsletter we are to some extent moving away from simply setting out recent cases and looking to develop this Newsletter to cover developing issues relevant to both employers and employees. This Newsletter does not purport to be legal advice. It is our opinion. Before acting or refraining from acting on anything contained in this Newsletter appropriate legal advice from a Solicitor should always be obtained.

We have seen a significant shift in the profile of claimants. We now see a significant increase in claims by employees who are still in employment particularly as regards Working Time claims. We see a worrying continued trend in underpayment of the National Minimum Wage where "expenses" are being used to categorise part of the wages. This is of course bargain basement tax evasion but it remains prevalent. It is especially so in the trucking industry where employees seek to exploit non-national drivers by setting out part of the "w3ages" as expenses. The monetary benefit to the employer is significant where non-national workers have a "net pay" contract of employment.

Disciplinary Hearings

In the July issue of our newsletter 'Keeping in Touch' we set out our views on how individuals should be invited to a disciplinary hearing. Setting out the invitation to a disciplinary hearing properly is often the first hurdle that the employer falls at as regards fair procedures.
The issue of a disciplinary hearing itself is the part of the disciplinary process employers are most likely to fall foul of the principles of fair procedures.

Fair procedures in the Unfair Dismissal legislation.

Section 6 (7) of the Unfair Dismissal Act as amended states that in determining whether the dismissal is fair or unfair the Tribunal of body hearing a case may have regard to
(A) the reasonableness or otherwise of the conduct of the employer in relation to the dismissal, and (b) the extend, if any, of the compliance or failure in comply with the employer in relation to the employee to the disciplinary procedures or the provisions of the Code of Practice on Disciplinary and Grievance Procedures (Industrial Relations Act 1990) (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000.
Any Tribunal will firstly look at the employer's own disciplinary procedures and then at the Code of Practice. The reason for this is that if the employer's own procedures are more extensive or place a higher bar on the employer they are the procedures which must be applied.

Are there any standard rules?

As was set out by McCracken J in Tierney -v- An Post where (1999) E.L.R. 65 it was held "there is no fixed standard of natural justice which lays down that certain specific matters must be complied with. The protection to be afforded to a person whose conduct is being investigated will vary according to the circumstances".

There are some general principles however:

1) The employee should have received details of the charges in writing and the basic fact alleged to constitute the matter which is to be dealt as a part of disciplinary process.
2) Copies of all witness statements or investigation reports or any other document which may be relied on in the investigation along with anything which the employer has or came to the employer's attention during the investigation which may be in favour of the employee must be furnished to the employee.
3) The employee should be aware of the procedures which are to be followed. This means that they should be given a copy of the company disciplinary procedure or advised in writing what procedures are going to apply. It is useful at the start of any disciplinary process that the foreseen hearing the disciplinary hearing will go through the process and answer any questions which the employee may have relating to the process.
4) The employee must be allowed to be represented. We have covered this issue in our previous guide on "Inviting an employee to a disciplinary hearing".
5) The employee should have been informed at sufficient time to enable the employee to prepare a defence.
6) At the hearing employee should be able to (a) hear the evidence against him/her, (b) challenged the evidence in cross examination if necessary, and (c) present his/her evidence.
7) The employee is entitled to natural justice. There are two fundamental principles of the natural justice which apply to any decision making which affects the employee namely:

a) The decision maker must not be a judge in his/her own calls.

b) Anyone who may be adverse the effect by a decision must have the opportunity to hear the case against him/her and the opportunity to present his/her side of the case.

What is fair?

The employer must follow any agreed disciplinary procedure in the employment contract or any collective agreement. The employer must insure that these procedures are fair. What is fair will be effectively the employer's procedures or the Code of Practice and Grievance and Disciplinary procedures whichever is more beneficial the employee. The procedures to be adopted regarding the evidence on other matters will depend on:

a) the circumstances of the case
b) the nature of the enquiry
c) the rules under which the decision maker is acting
d) the subject matter
e) the reason for the dismissal
f) the consequences of the decision for the employee, and
g) in some cases the circumstances of the particular employee may be relevant.

It is important for employers as part of any disciplinary process to consider the circumstances of the particular employee. The employee must always be given an opportunity to give forward their side of the case and any mitigating factors. For example if an employee has been employed for a number of years and suddenly start arriving late and leaving early every day or being absent from their work station for unusually long periods of time the employer may need to ascertain, as part as the disciplinary process, is there any personal reason or medical reason that this sudden change of behaviour has taken place.

What is reasonable?

Any Tribunal will judge the fairness of the procedures from the stand point of what the employer could reasonably have been expected to do.

A Tribunal may not substitute their own decision for that of the employer. It is not a matter for the Tribunal to ask themselves what they themselves would have done in a similar situation. It is to determine whether the employer was reasonable in the circumstances. If a Tribunal determines that even though an employer may have not dismissed the employee but that it was reasonable that the employer did so then the actions of the employer will be reasonable. There is a band of reasonable behaviour.

This is why it is so important in any disciplinary hearing that everything is recorded and that the reason for any disciplinary action whether it is a warning or a dismissal is recorded and the reason why it was recorded. It is useful for the employer to record whether is a dismissal why dismissal was decided upon rather than for example a final written warning. A Tribunal will invariably take note of what was written and recorded at the time rather than afterwards.

What should happen once the disciplinary hearing finishes?

Once the disciplinary hearing finishes the employee should be furnish with a copy of the notes of the disciplinary hearing. They should be given an opportunity to review the notes. They should be given an opportunity to make any comments on the notes or correction that they believe should be made. This does not mean that those corrections have to be made but they must be given the opportunity of making them.

Some employers seek to have the notes read over immediately after the meeting and to get the employee to sign same. It is far better practice that the employee is given a copy of the notes. They should preferably be given at the end of the meeting. The employee should then be furnished by letter, and by this we mean recorded delivery, with the full copy of the notes along with the letter confirming their right to make any comments in relation to the notes giving the time limit for this to be done. The employee should also be given the opportunity to make any observations in relation to any matters which occurred during the disciplinary process. They should be given a reasonable period of time to respond. A period of 5 to 7 days is not unreasonable.

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Fair procedures in different types of organisations.

The procedures which any Tribunal would expect to be applied are not standard. What is expected in a small company where an employer may have four or five employees and what is expected in a company with over a hundred employees will vary. What is expected of small employer who may not have a HR facility as oppose to a large organisation which would be expected to have appropriate HR specialities will to the large extent determine how Tribunals will require disciplinary hearings to be held. A small employer with four or five employees where the employer is the sole shareholder or owner of the business may not enable a situation where a person totally unfamiliar and completely independent from the investigation is going to hear the disciplinary hearing. In such small organisations the employer must act in an impartial and objective manner as is reasonably possible. In larger organisations with a number of senior managers to would be expected that a senior manager not part of the process would hear the case.

Saying is the basic principle which must be applied at all times is that fair procedures will always be applied.

How can an employer protect themselves?

1. Before any disciplinary action is commenced whether by way of an invitation to a disciplinary hearing or starting a disciplinary hearing appropriate advice from an employment lawyer or a HR Professional who understands this area of law should always be obtained.
2. There is an old saying “act in haste, repent at ease” and it is very relevant in disciplinary matters. No disciplinary process should be commenced and no disciplinary action should ever be taken by an employer without having given themselves 24 hours minimum to think about what should be done. Reacting to some form of misconduct by an employee rather than thinking about it before reacting often lands employers in an Unfair Dismissal claim which they lose because fair procedures where not applied.

3. At all stages employees must be given all evidence against them and must be given a right to challenge the evidence.
4. The employee must at stages be given a right to be represented and a right to defend themselves and to challenge any evidence against them.
5. Whether the employee will be entitled to legal representation or not will depend on the particular circumstances of the particular disciplinary matter that is being considered. If dismissal is a possible outcome of any disciplinary process then an employer must seriously consider allowing the employee an opportunity to be legally represented. At a very minimum the employee must be allowed to be represented by a fellow employee or Trade Union representative. In a small employment the employer may reasonable consider that the employee might be entitled to bring a friend as the employee may find it difficult to get a fellow employee to represent them.
6. No action should be taken of the disciplinary nature until such time as an employee has been able to respond of the notes of the disciplinary hearing and put forward any further defence or other mitigating factors which they want the employer take into account.

Failing to Follow Fair Procedures

Where an employer fails to follow fair procedures Tribunal in Ireland to date have tended to hold that the dismissal is unfair. Of course even where no fair procedures were applied the Tribunals have consistently looked at the actions of the employee as to whether they have contributed to the dismissal. There have been cases where the Tribunal has held because of the action of the employee, even though the procedures were unfair, that the employee had contributed 100% to their own dismissal.
It should however be remembered that the Tribunal can direct that the employee is reengaged or reinstated or can award up to two years wages and this is a huge liability for an employer who unfairly dismisses an employee.

Employer invariably lose Unfair Dismissal cases and end up paying compensation not because the employee should not have been dismissed but because fair procedures were not applied.

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What is the Benefit of Applying Fair Procedures

The benefit of applying fair procedures is that even if a Tribunal determines that while fair procedures were applied if the Tribunal had been hearing matters they would have applied a lesser penalty than dismissal. The Tribunal must look to see whether the action of the employer in the circumstances was reasonable. This does not mean that they would have agreed with that form of action taken by the employer but whether it was "reasonable". If they determine that it was reasonable and the employer followed fair procedures then the employee is not entitled to compensation. Even if the employee in an Unfair Dismissal case can show that they did nothing wrong or that they had a valid and legitimate excuse for what was done if the employer can show that fair procedures were applied and that all matters put before then were reasonably taken account of or even that the employee did not put forward this particular defence having been given every opportunity to do so the employer may still end up in a situation where the Tribunal will hold that the dismissal was fair.

Conclusion

Employers invariably lose Unfair Dismissal cases because fair procedures were not followed.

Why does this happen?

In our experience this happens because legal/HR/IR advice from experienced professionals was not obtained before the dismissal procedure was put in place and/or in a worst case scenario before the dismissal took effect.

Employers lose Unfair Dismissal cases because they do not have a disciplinary procedure, or the disciplinary procedure is defective, and in many cases not following their own dismissal procedures and/or the Code of Practice on Grievance and Disciplinary Procedures. This is why appropriate specialist advice is required.

For an employee who was earning €25,000 per annum an Unfair Dismissal claim against the employer can cost them up to €50,000 in wages. Even if they do not ultimately end up with such an award if the employer has to defend a case in a Tribunal they have a much better chance of winning the case if they got appropriate advice in advance of commencing any disciplinary procedures. Defending cases involves getting professional advisors. That costs. If the employer is a company and an award is made of over €10,000 if it is not paid up firstly the employer can end up after the 1st of October in a situation where failure to pay will be an offence in itself and secondly the employee can bring an application to wind up the company. In the case of an individual if the award is over €7000 the employee can apply to have the employer declared bankrupt. That can be the end of the employers business. If the employer holds out until the proceedings issue to wind up the company or to make them bankrupt they not only have to pay the compensation but the Court fees to the employees' lawyers for having brought the claim to that length.

Employers should always be aware that in Unfair Dismissal cases employees invariably win the issue as to whether the dismissal was fair or unfair on procedures. The conduct of the employee then only relates to the level of compensation which must be paid.

Long Working Hours – A Threat to The Health and Safety of Workers

Long working hours are more likely to lead to a stroke. Long working hours can result in higher coronary risks in those who work 55 hours per week or more.

A recent study which was undertaking shows that people who work long hours have a much higher risk of a stroke. They have slightly higher risk of a coronary heart disease than those working a standard week. The research was recently published in the lancet and involved more than 600,000 people.

For those who work 55 hours or more a week they have a one third greater risk of stroke compared with those who work a standard week. There is a 13% increase in the risk of coronary heart disease.

The effect of this is that those working 55 or more a week compared with those putting in the normal 35 to 40 hours a week have a higher risk of hospitalisation or death even after accounting for risk factors including age, sex, and socio economic status.

While the report is aimed at health professionals who should be made aware that working long hours are associated with a significant potential risk to health and safety. This message is also relevant to employers. In addition it is also significantly relevant to those of us involved in Employment Law.

Our working time legislation provides for a maximum working week of 48 hours. The EU Directive 2003/88/EC of the 4th November 2003 sets out that specific working conditions may have detrimental effects on the safety and health of workers. In addition the Directive sets out that the organisation of work according to certain patterns must take account of the general principals of adapting work to the workforce.

Clearly in cases involving a breach of the Organisation of Working Time Act where excessive hours of work are being worked and Adjudicator or the Labour Court should take account of the potential detrimental effect on the worker. This detrimental effect can only arise in the future. However, our employment legislation, which is based on EU legislation provides that the Adjudicator or the Labour Court must in setting compensation take account of these matters and must set the compensation at a level likely to be persuasive of an employer going forward being compliant with the legislation.

It will be interesting to see how arguments relating to this will develop.

This issue is due to be litigated upon as part of a Working Time case before the Labour Court shortly by this firm.

Are Settlement Negotiations "Subject to Contract"?

There has been a recent case in the UK of Bieber and others –v- Teathers Limited.

In the case the issue was whether an agreement had in fact been reached on settlement terms discussed via email. The Court found that there was nothing within the Defendants offers to render it incapable of immediate acceptance. It had not contemplated any further negotiations required to be undertaken if the terms proposed were accepted by the Claimant. The Court found that the parties had reached a final and binding agreement via email exchanges which ended with "noted with thanks".

While a consent order remained to be agreed this was viewed by the Court as not being of substance in the particular context other than the form of words necessary to carry it into effect the agreement already reached.

In entering into discussions it is important for both commercial entities and for legal practitioners when proposing or accepting settlement offers to be mindful of the necessity to use the words "Subject to Contract". It is important to caveat negotiation proposals before a formal agreement is reached.

While solicitors will regularly use without prejudice on correspondence it is not as regular on emails.

Equality Decision in Relation to Documentation in an Employees Own Language

In a case of Halcyon Contract Cleaners Limited and an employee Zydrina Mikoliuniene DEC-E2015/036 is a case where the employee contended that she received contractual documentation in English only which put her at a disadvantage given her poor command of English.

The Director in his case referred to Section 8 of the Act and in particular, Section 8(6) and Section 8(7). In this case which this office represented the employee on we argued that the employees poor command of English put her at a materially different situation than a notional Irish comparator and that to treat the same amounted to indirect discrimination. It was contended that the employer ought to have given the employee documentation in a language she could understand.

It is clear that the employee did not at any stage inform the employer that she had difficulty understanding the documentation.

The Tribunal determined that the employer engaged a large number of foreign workers without having any translated employment contracts and health and safety information available and leaving it to individual employees to take action to obtain translations. The Tribunal took into account that the employee had to bring the employer to the Rights Commissioner relating to holiday pay and thereafter to the Labour Court for enforcement and that when an Equality claim was lodged and a request for information was sent in the form EE2 this was not reply to. The Tribunal quoted the case of a Respondent and a worker EED024 when the Labour Court stated,

"The Court is also satisfied on a balance of probabilities the treatment of the worker by the manager and the almost complete/non implementation of relevant legislation, was due to the fact that it regarded the worker as someone of different nationality who would not have the capability to stand on her legal rights and by its actions…it discriminated against her on grounds of nationality".

The Tribunal also referred to the case of Campbell Catering Limited and Rasaq EED048 where the Court stated,

"It is clear that many non national workers encounter special difficulties in employment arising from lack of knowledge concerning statutory and contractual employment rights together with differences of languages and culture".

And the Tribunal went on to point out that the Court went on to say that applying the same procedural rules to foreign workers as applied to Irish workers could in itself amount to discrimination.

While this case has been reported in some cases as one of failing to keep documentation in a language likely to be understood the decision was that the respondent discriminated in its failure in its duty to care for her as a foreign employee.

As a matter of principle it would appear that where an employer has a large number of non Irish nationals particularly those who have limited English that the employer should ensure that documentation is put in a language likely to be understood by the employee. While some employers will contend that this will create an additional cost for employers and while it was not referred to specifically in the Decision by the Equality Tribunal it should be noted that under health and safety legislation there is a requirement to have health and safety documentation in a language likely to be understood by the employee and that this is a statutory right. Failure to do so can result in a prosecution against an employer.

It is advisable where an employer is engaging particularly a large number of non Irish nationals that documentation will be in their language. As regards health and safety documentation this makes common sense as an accident in the work place caused by an employee not being able to understand a health and safety statement can be a significant cost to an employer.

This case turns on its particular circumstances but it does turn on the circumstances relating to the knowledge of the employee being able to comprehend the documentation.

European Case Opens the Door for Easier Indirect Discrimination Claims

The case of Chez Razpredelenie Bulgaria has held that EU law permits individuals who are not part of a protected group but who share the disadvantages of the protected group to bring discriminations cases. Our Equality Legislation does not permit individuals to bring indirect discrimination claims because of their association with a disadvantaged protected group. Rather the individual must share the protected characteristics of the group itself, for example race or disability. The new Court of Justice decision has changed this. The Courts and Tribunals in Ireland are obliged to interpret Statutory Provisions in line with European Law.

An example might be a man with caring responsibility who challenges an employers flexible working policy. Generally Tribunals have regarded women as being detrimentally impacted by onerous flexible working policies. As men are not part of that protected group it has been difficult to challenge in such an example. However this recent case may give new hope to such employees.

UK Study Shows Treatment of Women During Pregnancy and Maternity Deteriorating

In a survey of 3,254 mothers with a child under 2 in the UK 11% of women reported being edged out of work or being treated so poorly on their return from Maternity Leave that they had to leave their jobs. If this was replicated across the UK some 54,000 women could be losing their jobs each year. This study was undertaken by the Equality and Human Rights Commission in the UK.

Despite 84% of employers stating that they assisted pregnant workers and those on maternity leave and that this was in the interests of their organisation just 66% of mothers felt their employers supported them willingly during pregnancy and when they returned to work.

10% of females were discouraged from attending antenatal appointments by their employer. 9% faced worse treatment by their employer when they returned to the workplace.

When mothers where allowed to work flexible hours more than half of their career suffered as a consequence. 29% stated that they received fewer work opportunities. 15% felt they were given more junior tasks than previously.

The UK is extremely good at carrying out these type of surveys. Unfortunately there is no survey here in Ireland to assess this issue. However, it is not unreasonable to assume similar attitudes apply here in Ireland.

There is a currently a war for talent. Employers who do not value female employees are doing their business no good at all. Hopefully a similar study might be undertaken here in Ireland and that appropriate action will be taken to protect female workers.

Working Time and Mobile Workers

There has been an ongoing issue as to whether the organisation of Working Time Act or SI 36 of 2012 applies. New Statutory Instrument SI number 342 of 2015 has now removed the provisions of Sections 11, 12, 13, 15 and 16 from the Organisation of Working Time Act. It also removes the requirement to maintain records. However, in respect of mobile workers there is still an obligation to maintain a record of having provided a document which complies with the Terms of Employment (Information) Act and any order or Regulation made under that Act which relates to the employee. The particulars relating to Annual Leave and the Pay thereto and the records under Section 17 in relation to Notification of Hours of Work.

These Regulations issued on the 31st of July 2015. They do, however, create the issue as to whether prior to the 31st of July the employee would have been entitled to bring proceedings under both SI 36 of 2012 as amended and the Organisation of Working Time Act. The Labour Court ruled some time ago that because of the fact that SI 36 of 2012 have been brought in it was to be presumed that therefore the provisions of Sections 11, 12, 13, 15 and 16 would not apply. If that was the position then it would not have been necessary for the Minister to make the Regulations which he has made. This matter has been litigated upon before the Labour Court in five recent cases involving this office where decisions are awaited.

Cleaning and Security Industries

The rates of pay for hose in the cleaning and security industries have been increased.
The new rate if pay for cleaners increases to €9.75 up to 44 hours. The first 4 hours of overtime will be at time and a half. Any further hours are at double time. For Sunday work all hours are at double time.

The new rate for the Security Industry is €10.75 up to 48 hours with anything over 48 hours at time and one half.

Workplace Relations Act – Vesting day

On 1 October the new Workplace Relations Act came into effect. A new claim form issued from Workplace Relations Customer Services.

Where any case is appealed after 1 October from a Rights Commissioner all appeals now will go to the Labour Court.

There will be no right to make a direct referral in an Unfair Dismissal claim to the EAT or in an equality claim to the Equality Tribunal.

In cases where a decision issued prior to 1 October but the appeal is not lodged prior to 1 October then all appeals go to the Labour Court. It is believed that the new Adjudicators will until the backlog in the Equality Tribunal has been dealt with deal with Equality cases and with Unfair Dismissal cases. There is a considerable backlog in the Equality Tribunal but this is reducing significantly.

The Labour Court has had a new division and two new Deputy Chairman appointed. With the new Act coming into operation on 1 October this is not the end of the process. This is merely the end of the beginning. We now have the issue of making sure that going forward the new procedures are more effective, more efficient, less costly and quicker. This will be a challenge for the institutions themselves, the support staff, and those who use the services particularly professional advisors, Trade Unions and employer representative bodies. It is important, in our view, that everybody works together to make the new process a world class service.

There are things which were promised which are not there as yet. For example, we do not have a comprehensive website setting out detailed Guides on the legislation. Many of the Guides currently available are out of date. The website with the cases is difficult to navigate. These are work in progress. However it is, in our view, important that this work continues and that sufficient resources are provided both to the Labour Court and to the Adjudicator services to ensure that cases are dealt with in a speedy and efficient manner.
There are huge challenges for all of us who work in this area of law. We do congratulate the Minister on bringing matters forward this far. We encourage the Minister, through his Department, to continue this work.

Workplace Relations Act

In August there was a significant issue raised relating to how the new procedures would apply in practice.

One issue which arose is the ongoing discussion as to whether proceedings are going to issue for cases at first instance to be heard in public.

This office has been seen as supportive of the new procedures brought into place by the Minister. Saying this we have always recognised the argument that cases should be heard in public.

The counter argument is that there has been many cases before the Rights Commissioner Service were this issue has never been raised. In saying this it is less usual that significant Unfair Dismissal claims are heard before them. While significant claims have been the majority are heard before the EAT. The EAT is a public forum.

In the more significant cases the issue of cross examination is often important. It can equally be important in smaller cases. The new system will not provide for cross examination at first instance. In cases where cross examination is believed to be necessary it is effectively going to mean that cases are going to go on appeal. The Labour Court has been resourced on the basis that a similar number of appeals from those before the LRC as it currently is, will only go on appeal to the Labour Court. Personally we are not of the opinion that that will happen. We would be of the opinion that a far higher percentage of cases are going to go on appeal. Hopefully we will be wrong. If we are not then the Labour Court will not have sufficient resources to deal with all the claims.

There are many claims which are simply matters of fact where evidence isn't required. For example a claim whether a person received a contract which complied with Section 3 of the Terms of Employment (information) Act is a matter of fact. Either the documents complied with the Act or they did not. Claims under the Organisation of Working Time Act should in principle be dealt with on the basis of records and only where records are not in the statutory form should the issue of evidence be necessary. However in Unfair Dismissal cases in particular the issue of evidence is we would accept important. As compensation in an Unfair Dismissal case is based on minimising loss the employee bringing the claim is required to show that they minimised their loss. Equally the process relating to the dismissal itself is often one where evidence is going to have to be produced.

As of the time that this publication is being made public we do not know what the new procedures are going to be. This is going to be extremely important to ensure that fair procedures are applied. At the present time the issue of the procedures and what is expected of an employer or employee are not set out except in the most general of terms. The number of cases which are adjourned because documentation is not available for hearings before the LRC is significant particularly relating to claims under the Organisation of Working Time Act and any legislation relating to equivalent rates of pay for example for part-time workers. On many occasions before the LRC quite significant documentation can be produced which requires the case to be adjourned to enable the documentation to be reviewed.

In the Labour Court documentation is lodged in advance and the Court has an opportunity of reviewing the documentation and reading it in advance of the hearing. It is the policy of the Labour Court to read everything that comes in in advance of a hearing. It does make sense going forward that submissions would be lodged in sufficient time to enable them to be exchanged so that appropriate replies can be made. It also enables the Adjudicator hearing the case to review the documentation in advance. Many Rights Commissioner cases currently have significant time spent in submissions being read out giving back ground information relating to the employee or the employer. There is no reason why this needs to be read out where the Adjudicator could read that in advance so that hearing time would be maximised to the issues to be dealt with.

We look forward to seeing the new regulations being made. It is important that these would be fair to both employers and employees and set out the general principals which those bringing and defending claims must comply with.

We do anticipate that there will be a number of Judicial Reviews of the new system. This is to be expected. We do not believe that anybody involved in the process whether they advocated for or against the changes or are currently for or against the new legislation anticipated anything else. The new legislation is significant in how it amends the current structures. It is going to take some time to be bedded down.

We all expect challenges. Hopefully they will be minimal and hopefully they will have a minimal disruption on the new system.

Notice for Particulars

An interesting case arose recently in the case of Tony Keogh and another Plaintiff and Byrne Wallace Solicitors Defendants [2015] IEHC452

In this case the Court considered the issue of Notices for Particulars.

The Court at paragraph 26 stated, refer to civil procedures in the Superior Courts Delany and McGrath third addition Round Hall at paragraph 5-89,

"The general principle is that particulars will be ordered if they are necessary to clarify the issues so that the party requesting them can know the case he has to meet or if there is a danger that he may be taken by surprise at the trial of the action. An Order compelling a party to reply to a Notice for Particulars will be refused where the Court is satisfied that the party seeking the particulars knows the broad outline of the case that it will have to meet. Neither will particulars be ordered of the evidence on which a party will rely on trial. The Courts enjoy a broad discretion in deciding whether to order particulars and as acknowledged by Murnaghan J. in Caulfield v. George Bell & Co. Ltd. the exercise of that discretion will often depend on "a view of fairness or convenience which is essentially a matter of degree"".

The Court went onto quote the case of Mahon v. Celbridge Spinning Company Limited [1967] I.R.1 where Fitzgerald J. stated,

"The whole purpose of a pleading, being it a Statement of Claim, Defence or Reply is to define the issues between the parties, to confine the evidence at the trial to the matters relevant to those issues and to ensure that the trial may proceed to Judgement without either party being taken at a disadvantage by the introduction of matters not fairly to be ascertained from the pleadings. In other words a party should know in advance, in broad outline, the case he will have to meet at the trial".

The Court went on to quote the case of Quinn Insurance Limited and Others v. Tribune Newspapers PLC and Others [2009] IEHC229 where it was stated,

"There is no doubt whatsoever that a party is entitled to know the nature of the case being made against them. However, the role of particulars is not to require a party to furnish details particulars of specific aspects of the case. It is sufficient that the issues between the parties should be adequately defined and that the parties should know in broad outline what is going to be said at the trial of the action…"

In that case the Court went on to refer to further extracts from it and stated,

"…However, a party is only entitled to know the broad outline of the case that he/she will have to meet. Parties are not entitled to know the evidence that will be given against them in advance of the hearing…"

In the discussion and conclusion at paragraph 33 the Court stated,

"However, it seems to me that the Defendants are correct in arguing that what the Plaintiffs are attempting to do here is to compel them to provide what would be, in effect, witness statements without the benefit of the witness being able to put his or her answers in context. The Plaintiff knows what the Defence in the case is and has been given everything they have been asked for in Discovery relevant to that Defence. It is neither necessary nor desirable, that on top of that Discovery and on top of the answers already given to the particulars raised, the Defendant should be ordered to give in advance an analysis of the evidence upon which they will rely".

This Decision of the Courts is very relevant at to what constitutes fair procedures. While this case related to issues before the Courts there is an issue as to whether it would also apply going forward as to Adjudicators and in the Labour Court. Certainly an employer who has a claim against him is entitled to know in broad outlines the claim that is going to be made. However it would equally appear that an employee bringing a claim is entitled to know the broad outline of the Defence and to have in their possession in advance of the hearing, copies of all documentation by way of records which the employer would intend to rely upon.

In a Working Time case this would mean all Working Time Records in an Unfair Dismissal case any notes of meetings or correspondence or witness statements taken as part of the disciplinary process.

It would not mean however in a Working Time Case that an employee would be entitled to know what the employers witnesses are going to say but would need to know in broad outline the Defence that the employer is going to put forward. For example if the employer is going to put forward a Defence that other workers with whom the employee worked always took their breaks at the relevant times and that the employee in question took his breaks at the same time this should be disclosed in advance so that the employee can bring whatever witnesses he or she needs to counteract same. In an Unfair Dismissal claim one would expect that most of the documentation would be by way of notes that were taken but this does not mean that for example the Decision maker would need to give particulars in advance as to why dismissal rather than a warning was decided upon.

There are many cases where before Tribunals issues such as whether or not an individual received a contract which complied with Section 3 of the Terms of Employment (Information) Act. Very often the employee will simply say they didn't receive such a document. The employer will say that the document complied. It seems reasonable that the employee would need to set out how the employee says that the document did not comply with the statutory provisions. Equally it would appear reasonable that the employer would be required to set out the document to furnish it in advance. If the employee does not have a copy of it so that the employee can comment on same.

We would anticipate that the issue of what information needs to be furnished and how it needs to be furnished is going to be an issue which is going to have to be addressed by the Labour Court going forward. In many Working Time cases at the present time and claims under the National Minimum Wage Act adjournments are being granted because documentation or calculations have not been produced. In the National Minimum Wage Act the burden of proof is on the employer to show compliance and that requires calculations to be prepared sometimes on a weekly basis. In a Working Time case cases are often being adjourned because the Working Time records are not produced.

The issue in relation to fair procedures is whether if an employer has Working Time records whether the employee is entitled to same in advance of the hearing or whether the employer can decide not to produce the documentation.

In the Courts there is a system for obtaining documentation by Discovery. Before the Labour Court as it currently is constituted there is not. However, going forward there is an opportunity for an Adjudicator or the Labour Court to send in an investigator.

One issue which has not been canvassed to any great extent but which probably will be going forward is that where an employee does not receive the Working Time records, for example in a Working Time case or has not been furnished with the Working Time records in a National Minimum Wage claim that the employee could consider requesting from the Labour Court a witness summons addressed to the Secretary of the company or in the case of an unincorporated entity the owner of that entity all the Working Time records in their possession. In some cases now requests under the Data Protection Act are made. Subsequently in a case before a Rights Commissioner or the Labour Court records are produced which were not furnished as part of the Data Protection request. In those circumstances it seems reasonable that firstly the employee should be given an opportunity to make a complaint to the Date Protection Commissioner to ascertain whether all documentation has been furnished and secondly to request a witness summons to get the Secretary of the company or the owner of the business to bring every piece of documentation that they have to the Court.

It is reasonable to assume that such applications are likely to be utilised unless some procedure is put in place going forward to enable employees to actually get access to records as these records are invariably records which the employee needs to process their claims.

Increase in the National Minimum Wage

At the end of July it was announced that the National Minimum Wage will rise by .50 cent per hour to €9.15. This increase is not likely to take effect until the 1st of January.

The reason for same is because of the tax implications of an increase applying immediately.

At the present time employees pay PRSI on the following rates,

- 0% on earnings up to €352 per week
- 4% on earnings where the earnings exceed €352 per week

Employers PRSI is applied at 8.5% on earnings up to €356 per week and 10.75% on the entire earnings where the earnings exceed €356 per week.

There are some funny anomalies.

If an employee was to have their wages increased to €352.01 per week they receive an addition .1 per week. This actually means that they will be subject to additional PRSI of €14.08 leaving the employee €14.07 worse off. In the case of an employer the additional PRSI amounts to €8.01 to give the employee just .1 cent per week extra gross.

As the legislation currently stands there are some very funny anomalies.

If the National Minimum Wage had been increased not to €9.15 but to €9.10 per hour and there was no change in the National Minimum Wage the cost to the employee would be that they would lose €70.81 per week on the basis of them working a 39 hour week. The additional cost to the employer would be €90.17. Where the employee receives €9.15 being a 15% increase they actually are worse off by €0.85 per week with it costing the employer €151.70 per week extra.

Because of the way the tax system works an employee on €9.02 per hour and an employee on €9.55 per hour would actually take home the same weekly wage working a 39 hour week. There is a slight difference of a little less than €10 per annum.

There is an argument that this is a crazy system. Of course the Government is going to change the PRSI/USC rates in the next budget to take account of the increase in the national minimum wage. However the examples that have been given above show that if an employer was to further increase the wages then the same sort of problem is going to arise for those employers who seek to pay at a higher rate going forward. It is an absolutely crazy situation that if an employer increases the wages of an employee who is a national minimum wage employee today to €9.15 the employee will be worse off where they work 39 hours per week.

In looking at the issue of tax as social security charges on income it is important that going forward the system is structured in a way that it does not become economically unviable for employers to increase wages for employees because of the detrimental effect of the PRSI and USC rates that have to be paid and the employees social welfare contributions. It is illogical that an employee on €9.02 per hour who's wages will be increased from €8.65 to that rate will make a net gain of €548.95 per annum whereas a co-worker who's wages were increased to €9.55 per hour would only gain €558.88 per annum.

There is an argument that the 0% on earnings up to a particular figure should apply to all workers with a rate then applying to anything in excess of that. Similarly that employers PRSI would be applied at a particular rate up the national minimum wage rates on a 39 hour week and that it would be only on the balance of the higher rates would apply.

The current tax system as it applies effectively encourages employers not to increase wages. There is a disincentive for employees to receive an increase because in such circumstances they may well be worse off. That should never happen.

We would see quite a lot of what would appear to be "structuring" to not to exceed the €356 per week. This runs from the outright tax evasion scheme of paying part of the salary in wages and not putting it through the system to the slightly more sophisticated where the employee receives subsistence. Subsistence payments are not taxable. In addition because the tax is calculated on a weekly basis where payments are made and at the end of the year the higher rates of tax may only apply to that particular week.

The issue of the PRSI anomaly has been around for some time. But luckily this issue has been brought to light by the Low Pay Commission. Hopefully in the forthcoming budget this anomaly situation will be properly addressed.

Bogus Self-Employment

It has been reported that State Authorities have expressed concerns as evidence of bogus self-employment and contracting work may be depriving the Government of tax revenue and workers of sick pay and other protections.

Joint investigations have uncovered almost 200 cases in the construction industry alone in the last year. The reality of the current working environment is that there has been a blurring of the lines between the lines of employee and self-employed in a range of other sectors. This is particularly to be seen in the areas of IT, Media and Consultancy.

There are clearly many workers who are genuinely operating in a self employed capacity. Saying this there is a significant number of individuals who are dependent on or subordinate to a single employer in the same manner as employees but who for various reasons are classified as self employed workers. The most recent OECD report has indicated that about 2% of the workforce or about 38,000 workers are classified as economically dependent self-employed.

The test for determining who is or who is not a self employed person is not set out in statute. There is a very useful Revenue Guide which the Courts tend to refer to.

It must always be remembered that there are legitimate self employed individuals working in many industries. Saying this in the area of unskilled or lower skilled workers it is hard to see how they can be classified as self employed.

The very basis of being self employed is that an individual can earn more money by being more efficient, doing the work in a quicker way and can refuse assignments.

In employment cases where a claim is brought and the individual against whom the claim is brought claims that the individual is a self employed contractor and that is rejected the Tribunals in Ireland do not then preclude the employer from then defending the case on the basis that the individual is an employee.

There is no penalty for an employer for failing to properly categorise an individual as an employee other than the payment of the tax and social security which would have been payable together with interest and penalties.

Where individuals are placed in the category of self-employed they lose their entitlement to many protections such as social welfare, holiday pay, and a variety of employment rights. Genuine self employed individuals accept this situation. It is however, reprehensible where this is foisted on vulnerable individuals.

We are certainly coming across cases where employers are attempting to move employees from being employees to self employed contractors with those individuals have very little understanding as to what they are in fact entering into.

There have been criticisms that there is no legislation in Ireland which specifies the position as to who is and who is not an employee. There have been calls for such legislation. We would not be of the view or opinion that this is the way to go. It is far better that the Courts and Tribunals have flexibility in determining the situation on a case by case basis depending on the particular circumstances of the relevant arrangement between the parties that would believe that it is virtually impossible to fully legislate for who is or who is not an employee as different factors will be relevant to different industries.

Agency Workers

In the UK case of Coles –v- Ministry of Defence UK EAT/0403/14 the UK EAT upheld a Tribunal decision that Regulation 13 (1) of their 2010 Regulations which provide that agency workers have a right during assignment to be informed of any relevant vacant posts in the hirer only applies to the right to be informed. It does not put the agency worker on an equal footing with a permanent employee to be considered for the post.

This is quite an interesting decision.

The UK EAT noted that the Temporary Workers Directive (2008) / 104/EC only stipulates that equal treatment extends to basic working and employment conditions such as working hours and pay so is limited in scope. There is no general right for temporary workers to be treated no less favourably than permanent workers in any other situation. It will be interesting to see if this case has any application here in Ireland.

Safety on our Roads – It Should not be a Taxing Matter

It is a sad fact that VAT, VRT increases the cost of safety.

The issue of driver fatigue is a significant issue in accidents. The Road Safety Authority is raising the awareness of the role of fatigue and the effect it has in accidents. They are promoting safety.

New technology is becoming more widely available in cars which alert drivers if it detects erratic behaviour. This is a major safety aid. These of course cost money. They are standard in some prestige vehicles. Often they are part of a special package in the upper price reaches.

One of the reasons is that they are subject to VAT and VRT. This increases prices.

Lets put it very clearly. A safety aid to help assist avoid accidents is taxed by the Government. The effect is that only better off drivers can afford to benefit from it. The same goes for a number of other safety devices. To have them in lower priced vehicles would affect the price. They are therefore reserved for the higher-trim models.

The fact that these items might be placed into lower priced cars does not mean that it would result in fatigue related fatalities ceasing. However, it may assist in reducing the number of accidents and deaths on the roads.

Safety items in vehicles should not be taxed.

UK TAX on Termination Payments

In the UK a termination payment up to stg £30,000 is exempt. Over Stg£30,000 the full amount is taxable unless other reliefs apply.

One of the difficulties in the UK is that any reward for service such as a bonus or additional holiday pay or holiday pay entitlements is subject to income tax and UK Social Security in full as earnings even when it is a termination payment.

In the UK the issue is extremely complex. There is a proposal to remove the distinction between contractual and non contractual payments to simplify matters. In the UK there is a proposal in a recent paper to reduce the exemption to stg£6000 after two years with an extra stg£1000 for each additional year of service. Clearly this is less than the current exemption.

The UK Government is also considering introducing exemptions for payments for unfair or wrongful dismissal and payments in connection with discrimination but only via an award.

There is a fear in the UK that if the new proposals are brought into play that there will be a significant increase in the cost of employers funding termination payments. We will have to see how matters develop.

Judicial Review

A new Statutory Instrument number 345 of 2015 has been put in place. It precludes a judge being named as a respondent or notice party in the type of the Judicial Review Proceedings in respect of a judges decision. This does not apply where it is grounded on an allegation of Mala Fides which would deprive the judge of immunity from suit. It requires that the party of parties to the original

proceedings being named as respondent or respondents and to enable a court in Judicial Review Proceedings to direct production to it of the records of the court proceedings which the Judicial Review Proceedings relate. All parties of course will have to be served including the judge of the court concerned.

In employment cases these new rules would not appear to apply in cases involving Judicial Review of an Adjudicator going forward or the Labour Court.

Well Charging Orders

The Circuit Court Rules (In Actions for Possession and Well-Charging Relief) 2015 Statutory Instrument number 346 of 2015 set out the new rules to set out the information to be included in the revised form of Civil Bill and the expanded form of Grounding Affidavit. These would apply in proceedings for possession or well-charging relief and for applications under the Land and Conveyancing Law Reform Act 2009 for an order authorising sale under Section 100 (3). It also provides for the information to be furnished by a defendant on an application for an adjournment or other relief under Section 101 (1).

It can be anticipated that this is going to be used a lot more regularly for substantial debts.