Welcome to the October issue of Keeping in Touch.

In early September we advertised a six months training contract in this office for those who would be interested in employment law and having an opportunity to train in our firm. We did this as we felt that having won the Employment Law Firm of the Year there was a duty on us to do something to help promote the area of employment law. We were overwhelmed with the number of applications. We are delighted to announce that Natasha Hand will be transferring her training contract from Conleth Harlow and Co. Solicitors in Roscommon to us for the last six months of her traineeship. We are delighted to welcome Natasha on board.

In September our colleague Lorraine Eagers gave birth to a baby girl named Saoirse. Both Lorraine and Saoirse are doing great. Everyone in this firm is delighted for Lorraine and wishing her the best while on Maternity Leave.

Richard Grogan of this firm will be involved in a number of training seminars over the following months. He will be speaking to the Limerick Solicitors Bar Association on 5 October, and the Donegal Solicitors Bar Association on 2 November. On 16 November Richard Grogan, of this firm, has been asked to give a specialist training course to colleagues in Cork in the Southern Law Bar Association on the entitled "Organisation of Working Time Act – Traps for Employer Representatives." Of course, the traps "will also be "tips" for employee representatives. As is usual there will be handouts in relation to legislation and case law. This firm is known for the fact that we give detailed handouts.

As is usual all speaker fees will not be paid to Richard Grogan. Instead we have asked that the speaker fees would be paid to the Solicitors Benevolent Association.

Why do we want our speaker fees paid to the Solicitors Benevolent Association? There is a simple reason. This particular charity only has the money to put food on tables. It is not there to be able to help with mortgages or other matters. Simply keeping the lights on and food on a table is as much as the charity can do. All Solicitors, can, as part of their practicing certificates make a contribution to the Association. However, anything extra helps. By the end of this year six speakers' fees will have gone not to Richard Grogan or this firm but to the Solicitors Benevolent Association. They are our favourite charity. We do ask colleagues that coming up to Christmas that if there are considering making a donation to a charity that they would consider the Solicitors Benevolent Association. We have no formal association with the Association. We just support their aims.

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Point of Law Appeals

The issue of the complexity of Point of Law appeals was recently highlighted in a case of Dunnes Stores and Mary Doyle Guidera 2018 IEHC 503 in a judgment by Mr Justice Richard Humphreys delivered on the 10th September 2018.

In this case the Labour Court issued a determination on the 30th July 2018. It was received by the appellant Dunnes Stores on the 31st July 2018 in a case under the Equality Acts, 1998.

The Appellant applied ex parte for an order under Order 106 Rule 5 of the Rules of the Superior Courts 1986 to extend the time for an appeal. Order 106 Rule 2 provides that an originating Notice of Motion should be issued within 21 days of the date on which the determination of the Labour Court was given. It can be extended on application ex parte within 6 weeks of that date. When the application came on the 10th September it was within the 6 weeks period of time. The decision points

out that there is a number of different rules. Order 106 Rule 2 refers to an appeal to the High Court on a Point of Law from a determination of the Labour Court under Section 90 (1) of the Employment Equality Act, 1998. The decision sets out all the relevant sections of the Equality Legislation, the Orders of the Superior Courts and also Section 46 of the Workplace Relations Act 2015 which provides that there can be an appeal to the High Court within 42 days of a Labour Court determination.

The difficulty in relation to this appeal time in an Equality case is that Section 83 of the Employment Equality Acts only applies to Section 44 of the 2015 Act which gives a right of appeal to the Labour Court. This is set out in Section 90 of the 1998 and not in Section 46 of the 2015 Act. The decision points out that a CPD paper by Mr Tom Mallon BL entitled "Workplace Relations Act 2015 role of the High Court" which Mr Justice Humphreys pointed out that at the time the decision was posted on the Bar Council website refers to complaints under the Employment Equality Act at paragraph 1 it goes on at paragraph 14 to refer to a 42-day time limit without any reference to the fact that a different time limit may apply under Section 90 of the Employment Equality Act 1998. Section 90 of that Act does not set out a specific time period for an appeal and therefore the High Court judge has referred to the fact that you must have recourse to the Rules of Court.
The judgment refers to various cases but it is interesting that the decision held that there was a bona fide mistake. It sets out that there is an undesirable inconsistency in drafting practices where certain enactments are scheduled in Schedule 5 of the 2015 and others are added through deeming or applying provisions. The Court pointed out that the inconsistency in statutory time limits as between different enactments is a factor.

The time was extended. What is interesting is that His Honour did point out that the Rules Committee might think it worth considering aligning the time limits in Order 106 with that in the 2015 Act so it is a uniform 42 days all around.

This is a very sensible view in our opinion. It is, however, unfortunate that, again, this indicates very poor drafting of the 2015 Act. This issue could easily have been avoided when drafting the Bill it provided that all appeals under all Acts, including claims under the Employment Equality Act, would have a 42 day time limit.

We are simply highlighting this case as an important case to highlight the issue that where a Point of Law appeal is being taken normally it is going to be 42 days but in a claim under the Employment Equality Acts it is going to be 21 days.

We would echo the comments by Mr Justice Humphreys in that there needs to be an alignment of the time limits for appeals for all Employment Law cases.

Judicial Review in Employment Cases

In the case of Pierce Dillon and the Board of Management of Catholic University School 2018IECA292 a judgement was issued by Mr. Justice Hogan on 27th August. It issued relating to the issue of the challenge to the legality of a disciplinary process conducted by the school as a result of which it had been found that the applicant had been involved in inappropriate behaviour.

In this case the issue arose as to whether the matter was moot as the disciplinary sanction would have elapsed.

The Court of Appeal quoted the case of O'Donovan v. De La Salle College 2009IEHC and held that the present case was indistinguishable from that in O'Donovan. The Court set out that the rational of the O'Donovan case was that in the words of Mr. Justice Hedigan,

"*The presence of such a serious disciplinary sanction on the record of a young man in the applicant's position would inevitably have consequences for his reputation and self-esteem.*"

The Court held that these issues were not de mininus.

An interesting Judgement by Mr. Justice Birmingham in the same case did set out that judicial review proceedings should not be the norm in employment cases.

This is an important decision of the Court of Appeal particularly as there are so few decisions in employment law cases that come through.

Time limits to lodge an appeal to the Labour Court

In the case TUD1813 being a case of Pat the Baker and Conor Brennan the issue related to the submission of an appeal which was submitted out of time.

The Court set out the provisions of Section 44 of the Act of 2015 but also looked at the provisions of Section 18(h) Interpretation Act 2005 for the purposes of calculating the 42-day period. This case confirms that the time limit to lodge is not 42 days from the date of the decision but effectively 42 days including the date of the decision.

The Court in this case quoted the case of Galway and Roscommon ETB v. Josephine Kennedy UDD1624 where the Labour Court stated,

"*The Court cannot accept that a miscalculation of the due date amounts to "exceptional circumstances" as defined by Section 44(4) of the Workplace Relations Act 2015."*

The Court went on to state that,

"*While ignorance on the part of an employee of his or her statutory rights may explain a delay in submitting his or her appeal under the act it cannot excuse a delay".*

The Court held that they have no jurisdiction to hear the appeal.

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Review of WRC Decisions in this Newsletter

There will be very interesting cases, on their facts, under the Industrial Relations Acts. We do not review these in this newsletter as they are not enforceable decisions. There will be other cases which have been reported in the newspaper which make the headlines because of the amount awarded or the fact that the employer is a well-known entity or just simply because of interesting facts around that case. Some of these we will review but a lot of them will not be. In reviewing decisions of the WRC, we are generally reviewing cases where there is case law raised or where there is important principle of law set out or there are issues surrounding the case which possibly if matters had been dealt with differently by the person bringing the claim or by those defending the claim a different outcome may have arisen.

Generally speaking we will be reviewing most of the Decisions of the Labour Court except those under the Industrial Relations Acts because of the fact that they are of precedent value and binding on Adjudication Officers in the WRC.

Where Decisions of the High Court issue we do tend to cover these or important cases of the European Court of Justice.

As a boutique specialist firm, we do the very best we can to cover the important cases in employment law.

In the area of personal injuries, again our approach is to review those cases where there are important principles which those dealing with personal injury claims need to be conversant with in our opinion.

We do our best with this newsletter to keep practitioners up to date with developments. We do so admittedly to also keep ourselves up to date with developments. We continue to hope that those reading this newsletter find it useful.

Employment Equality Act Claims – Defence for an Employer

Case ADJ7944 is an extremely good example of a case where an employer can raise a Defence where harassment has occurred. In that case it was accepted that harassment had occurred. That was not in doubt. However, the approach of the employer was such that the matter was investigated. A mediator was then put in place to see could matters be resolved. The mediation did cease because the claim was coming before the WRC. However, the AO in this case helpfully pointed out that as the employer had taken proactive steps to deal with the complaint that in those circumstances the employer could rely on the defence in Section 14(2) Employment Equality Act 1977 to avoid liability where an employer receives a complaint. There are some basic steps which the employer should undertake.

1. The employer should have an appropriate anti-harassment/anti bullying policy and a Dignity in the Workplace Charter.
2. Certainly, in larger organisations there should be appropriate training. In smaller organisations, less formal training maybe sufficient.
3. If a compliant is made it should be taken seriously.
4. The grievance procedure should be applied.
5. The employee should get appropriate supports to ensure that they can present their claim properly.
6. It is advisable that the employer will have somebody to assist them in dealing with their grievance whether a fellow employee or union official.
7. If the complaint is upheld then appropriate action should be taken to protect the employee.

8. The appropriate action may include putting in training in the workplace, making sure that policies are redistributed and if necessary having an outside trainer provide appropriate updates on the law and how people should act in the workplace.

In the case of the employee against whom a complaint is made it is important that fair procedures are applied to that person also and that would include:-

1. That they would be advised as to what the complaint is.
2. That they would have an opportunity of putting forward their defence.
3. That any policies and procedures relating to the grievance procedure or any policy that would be part of the investigation should be provided to them.
4. They should have a right of representation being either a Union official or a fellow employee.
5. If the complaint is upheld then it is necessary to consider disciplinary action and this would mean that the disciplinary process would then be commenced with a full new disciplinary hearing.
6. In such circumstances a person unrelated to the original investigation of the grievance or any appeal of a grievance outcome should be appointed to deal with any disciplinary matters.

Discrimination

In the case ADJ1021 the AO quoted a case of the Labour Court in EA1322. That is a case where the Labour Court determined that where a prima facia case is made out, the onus shifts to the respondent to prove the absence of discrimination. In that case the Court went on to state that this required the Respondent to show a complete dissonance between the gender of the complainant and the impugned act or omission alleged to constitute discrimination.

In this particular case the AO set out that the respondent had failed to show a complete dissonance between the religion of the claimant and her dismissal.

The AO quoted from that case of the Labour Court, where the Labour Court said,

"*Thus, in Wong v. Igen Limited and Another 2005 EWCA CIV142 Peter Gibson LJ, pointed out that where the Respondent fails to show that the discriminatory ground was anything other than a trivial influence in the impugned decision the compliant will be made out. In all discrimination cases the Court should be alert to the fact that the motive or reason for the impugned decision may be conscious or subconscious."*

In that case the Labour Court helpfully referred to the case of Nagaragan v. London Regional Transport 2001 UKHL48 which dealt with the issue of subconscious motivation.

Lodging Unfair Dismissal claims too early

In case ADJ-12668, the AO in this case, helpfully set out a case of Caragh Neeson -v- John O'Rourke and Sean O'Rourke Chartered Accountants UD/2049/2011 where the Tribunal found that under Section 8 (2)

"demonstrates a manifest intention by the legislature to preclude claims being lodged before the dismissal date… If the Tribunal were to look with leniency and premature claims the system could well become clogged up with claims based on the expectations that a dismissal might occur in the future which should later be withdrawn."

This case was interesting in that it was quite clear that the employee lodged a claim in advance of actually giving a resignation letter. The AO in this case held that the claim failed.

The AO in this case was dealing with this particular case. The AO was not dealing with a situation where there might be a genuine mistake as to the date of dismissal. The Bohemian Football case would be a prime example of that where the employee honestly believed that he had been dismissed on a particular date whereas in fact he had been dismissed on a later date. This case was heard in the High Court where the High Court held that the employee could not be prejudiced by putting a claim in early in such circumstances.

Other circumstances may well arise where an employee will honestly believe that they had been dismissed on a particular date even though the dismissal would be at a later date. This may be because of a P45. A P45 is not a dismissal document. It is a cessation of payment document. If you take a situation of an employee who is dismissed and is paid his or her notice in lieu of serving out a notice period, a cessation date on the P45 will be that date. The actual date of dismissal, under the Unfair Dismissal legislation will actually be when the notice period expires. There had been many cases where the EAT in the past have held, where somebody was dismissed after 11 months and 3 weeks, that because of the provision of the Minimum Notice Legislation the employee would have been entitled to Minimum Notice which would have brought them past the one-year service. The same applied in many redundancy cases to bring an employee over to two years. For those dealing with Unfair Dismissal claims, it is probably advisable that if there is any issue as to when the dismissal occurs that a claim is put in initially. The WRC can be advised that there is an issue as to what the correct termination date is and subsequently a further claim can be lodged. This is an issue we had recently. The employee was advised that he was being dismissed in May. Then there was a communication which indicated that the dismissal may in fact be taking place on the 6th June. The claims issued in May. The WRC in that letter was advised that a further set of proceedings would issue subsequently which they did after the 6th June and then the P45 arrived which put in a termination date of the 8th June. That date was covered by the relevant second claim form. In some cases, employers will put the date of termination as being the date of

finishing rather that a date when the notice period expires where the employee does not have to work out their notice. In others, the P45 will be dated when the notice period expires. If, however, there is a genuine believe that an employee has been dismissed which subsequently transpires was actually at a later date, the employee would probably have the benefit of the Bohemian Football Club case. If there is no doubt but the employee would have known the date of their dismissal, then the decision in ADJ-12668 should be the basis of any AO applying the law.

Dismissal by Reason of Redundancy

A dismissal of an employee by reason of redundancy will normally take a case out of a claim under the Unfair Dismissal Legislation. Redundancy is a defence to an Unfair Dismissal case.

However, employers need to be careful. Case ADJ13371 is a very good example of this. In this case the AO found that there was a valid redundancy. However, and this is the one employers need to be careful of, the AO also found that the procedure in relation to the redundancy was procedurally unfair. The AO in this case therefore held that this converted the process into an Unfair Dismissal and compensation on top of the redundancy payment already paid was ordered.

In Unfair Dismissal cases it is always procedures, procedures and still more procedures. Even where a redundancy is being dealt with it is absolutely imperative that employers put in place appropriate procedures.

Grounds for Dismissal

In case ADJ9133 the AO in this case set out the test as to whether the actions of an employer were reasonable in the context of disciplinary sanction.

The AO referred to the case of Allied Irish Banks v. Purcell 2012, 23ELR189 where reference was made to the case of British Leyland UK Limited v. Swift and the statement of Lord Denning MR where it was stated,

"*The correct test is, was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness within which one employer might reasonably take one view and, another quite reasonably take a different view".*

However, it is important that there is a proper investigation. This was clearly set out in ADJ11390 where the AO in this case quoted the case of Bank of Scotland v. Lindsay UKEAT/0506/09/DM which held,

"*An adequate investigation has to be assessed by the standards that would be objectively expected of a reasonable employer as per J Sainsbury Plc v. Hitt 2003 ICR111".*

Illegal Acts of an Employee outside of the Workplace

This issue arose in case ADJ8638 where the AO helpfully quoted the case of Crowe v. An Post UD1153/2014 where it was held,

"*The employer has to demonstrate that it has a legitimate interest in the crime committed to the extent that the misconduct is disruptive to the business, employee relations or affects the reputation of the company. The test has the out of work conduct of the employee impacted adversely, or is capable of impacting adversely, on the employers business? If it has then the employer has a right to institute disciplinary procedures."*

It is helpful that the AO in this case has set out this particular case.

Economic Loss in Unfair Dismissal Cases

In case ADJ10883 the employee in this case was receiving disability benefit. Accordingly, there was no economic loss. In those circumstances the AO rightly held that the compensation is calculated in accordance with Section 7(1)(c) which limits the maximum compensation to four weeks wages

Constructive Dismissal

In case ADJ-10369, the AO in this case had to deal with a claim of Constructive Dismissal.

In this case the AO has helpfully set out the law.

The AO quoted the case "Dismissal Law in Ireland" by the late Dr Mary Redmond at page 340 where it is stated:

"There is something of a mirror image between Constructive Dismissal and ordinary dismissal. Just as an employer for reasons of fairness and actual justice must go through disciplinary procedures before dismissing, so to an employee should invoke the employer's grievance procedure in an effort to resolve his grievance. The duty is an imperative in employee resignations. Where grievance procedures exist, they should be followed. Conway -v- Ulster Bank Limited. In Conway, the EAT considered that the Claimant did not act reasonably in resigning without first having substantially utilised a grievance procedure to attempt to remedy her complaints."

The AO quoted the case of Berber -v- Dunnes Stores 2009 ELR 61 where it was stated:

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged

objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it."

The AO in this case stated that the critical issue is the behaviour of the employer although the employee's behaviour must also be considered. The AO pointed out that the reference to the employer's conduct is taken to mean something that is so intolerable as to justify the Complainant's resignation and something that represents a repudiation of the contract of employment. In relation to the employee's behaviour, the AO pointed out this normally refers to the efforts that the Complainant made to bring the matter to the employer's attention and to have it remedied by means of the grievance machinery. The AO pointed out that it was fatal that the employee had not followed the recognised process of having her grievance evaluated.

In case ADJ-13084, the AO in that case held that the employee was obliged to avail of the grievance procedure to be able to sustain a Constructive Dismissal claim. In general, we would agree fully with the approach set out in these cases. The general rule is that before an employee can bring a Constructive Dismissal claim they must have used the internal grievance procedure and even there is no grievance procedure they should have raised their grievance with their employer so as to give the employer an opportunity to avail of it.

Even then the employee must be able to show that the actions of the employer are so intolerable as to justify the employee resigning.

There may be times when the actions of the employer go beyond being intolerable and become abhorrent. There may be times where the employee because of the actions of the employer being so bad that they can resign without going through the grievance procedure but they will be an absolute minority of cases.

From reviewing decisions of the WRC, it is quite evident in relation to Constructive Dismissal cases, that the number of complaints which are won by employees are extremely limited. The main reason these cases

are lost is because the employee has not gone through the grievance procedure.

Before any employee considers resigning, they should obtain legal advice. They need to understand and check out whether the actions of the employer will be judged to be so intolerable as to allow them to resign. They need make sure that they comply fully with the internal grievance procedures. Invariably this does not happen. They resign. Then they go to get legal advice. Then they often find themselves in a position that an experienced Employment Law Solicitor will advise them that their chances of winning the case are minimal. This may even be in cases where if they had used the procedures and if the employer had not rectified matters that the employee would have had a good Constructive Dismissal claim. The fact that the employee may believe that the employer would have done nothing anyway if a grievance had been raised, is not sufficient. Unfortunately, Constructive Dismissal claims are ones where employees are invariably losing the case not because they do not have a good case but because they have failed to follow the procedures which would have enabled them to win their case.

This is an issue, when we raise it with clients, they find difficult to accept. However, in the case ADJ-9414 reinforce this as there is a number of cases which were quoted by the AO in that case. In that case the AO states that the burden of proof is a very high one and it is on the Claimant employee. The employee must be able to show that the resignation was not voluntary. The case of Western Excavating ECC Limited -v- Sharp was quoted. In that case it was stated:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat herself as discharged from any further performance."

This is called the contract test. If this is not proven then the AO must consider the reasonableness test. This test is that:

"The employer conducts himself or is unfair so unreasonably that the employee cannot fairly be expected to put up with it any longer, then the employee is justified in leaving."

The AO in this case set out that there was a general obligation on the employee to exhaust the company's internal procedures as set out in the case of McCormack -v- Dunnes Stores UD1421/2008 where it was said:

"The notion places a high burden of proof on an employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her grievance with his or her employers. The employee would need to demonstrate that the employer's conduct was so unreasonable as to make the continuation of the employment with the particular employer intolerable."

The AO in this case also pointed out that the importance of exhausting the internal grievance procedure was also highlighted in the case of Terminal 4 Solutions Limited -v- Rahman UD898/2011 where it was stated:

"Furthermore, it is incumbent on any employee to utilise all internal remedies made available to her unless she can show that the said remedies are unfair."
In all of these cases the employee lost.

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Transfer of Undertaking Regulations – A Trap for the Unwary

Case ADJ12743 is a timely reminder for those thinking of issuing proceedings where there has been a transfer under the Transfer of Undertakings Regulations, to make sure that the claim is made against

the transferee. By this we mean the person who has acquired the undertaking.

In this case the employee brought a claim against the transferor. The claim was rejected because it was brought against the wrong entity. Regulation 3 of our Regulations provide that the claim is brought against the new owner.

I think it is important that we would set out what we mean by this in plain English.

While it is not covered in this case I think it is important that we would give examples of claims that go against the new owner of the business rather than the old owner even though the claims would have arisen while the employee was employed by the old owner of the business. Take a situation where an undertaking being a business transfers on the 1st of September under the Transfer of Undertaking Regulations.

Let us take a situation where the activity of Company A has transferred to Company B. Company A, for example provided cleaning and security services for a particular company. Company A lost the contract and the contract moved over to Company B. The employees of Company A transferred to Company B and would continue to work on the premises as before. Let us assume that there is an employee who claims that on 1st July 2018 they were subject to sexual harassment. Let us take another employee who claims on 2nd July 2018 they did not get their holiday pay paid in advance. Let us take it that a number of employees on the 2nd October are complaining about the fact that they were not advised in relation to the proposed transfer by the old employer Company A. In all of those situations you might consider that the claim would be brought against company A. The claim must be brought against Company B. Our legislations states that even though Company B might say that they knew nothing about these matters and that they did nothing wrong they are still responsible for all the breaches and the claim must be brought against the new employer being Company B not against Company A. This may sound strange. It may well be. However,

it is the law. When acting for an entity acquiring a business where the Regulations apply, proper due diligence is required for the acquiring entity.

Published Irish Legal News, 20th September.

Holiday Pay

In DWT1823 being a case of Halal Quality Meats Limited and A. Meflah the employee contended that he had not been granted annual leave or public holidays during the period from January 2014 to September 2016 nor was he compensated in Lieu when he left. It appears that subsequent to him leaving he did receive the holiday and public holiday payments.

The Court held that it was not disputed that there was a breach of the Act and that there was a delay in payment of monies due when the employment ceased. An award of €3,300 was made.

While it is not set out in the Decision as the claim issued in November 2016 the employee would have been limited in respect of his claim from November 2016 back to May 2016 and as he finished work in September 2016 would have covered a period of just 5 months.

This case sets out the attitude of the Labour Court to situations where holiday pay and public holidays due are not paid particularly when an employment ceases.

Truck Drivers

In case RTD 182 being a case of Mark Lonergan Transport Limited and William Houston the Labour Court had to deal with a case under what is known as SI36 of 2012.

The employee in this case gave evidence that the digital tachograph he was assigned to drive defaulted to "rest" when the motor idled or was turned off but the battery was engaged. The employee contended that the normal practice is that the tachograph defaults to other work rather than rest. While it is not stated in the case there would have been many cases before the Labour Court where it would have been contended and accepted that the tachograph defaults to other work rather than rest in such circumstances although the Labour Court would have been well aware of same.

The defence was given by an individual who was an expert in the analysis of tachograph records but that analysis was done without reviewing the particular vehicle. The Labour Court set out the relevant provisions relating to the issue of the maintaining of records and the issue of excessive hours of work. The Labour Court in this case gave the employer an opportunity to have the tachograph checked but this was not done. The Labour Court examined the tachograph records submitted by the respondent. Again, it is not set out in the decision but it is a well-known fact that within the industry and those who represent in cases involving drivers that the Labour Court is well able to read tachograph records and understands the nuances of those records to a significant extent. In this case an award of €2500 was made.

What is however interesting is that the Court in this case stated,

"*The importance of properly rested drivers of heavy good vehicles cannot be over stated. Drivers are entitled to a work environment in which their health and safety is protected so as to ensure that the quality of their lives is not compromised by excess work demands that undermine it over time. Furthermore drivers, other road users and the general public are put at grave risk of injury and indeed death where accidents happen as a result of driver fatigue. It is to protect against such consequences that the European Union has enacted these regulations. Breaches of the regulations therefore cannot be treated lightly.*"

The Court found that there were breaches of the Regulations. The Court also found that the employee did not notify the employer of the difficulties he was experiencing with the tachograph. The Court pointed out that the complainant was somewhat responsible for the production of the inaccurate records and would appear that this was taken into account.

It is important that drivers of vehicles if there is a problem with the tachograph that the issue is raised with the employer.

Claims by Drivers under SI36 of 2012

In case ADJ12702 the AO in this case set out the Regulations in particular Regulation 5(1) which sets out that a driver shall not work more than 60 hours in a week or an average of 48 hours in a reference period. The AO has confirmed that working time is not solely confined to time driving but it may include time in the yard, off-loading or loading. The AO in this case also set out that there is an obligation on employers to maintain records.

The employer in this case contended that the employee had not used the grievance procedure to process any problem. The AO has, in our view, correctly set out that to say the employee did not complain is insufficient to meet the requirement on the employer to ensure that the time limits are not exceeded.

In this case which related to excess of working hours the AO awarded €5,000.

The reference to this case is ADJ12702.

Protection of Employees (Fixed Term Work) Act 2003

In the case of the National Museum of Ireland and Lorna Barnes the Labour Court in this case held that as a decision in relation to the status of the employee had been brought under the Organisation of Working Time Act the definition under the Organisation of Working Time Act and the Act of 2003 are identical. The Court in this case found that it had been decided in 2012 that the complainant was not an employee for the purposes of the Organisation of Working Time Act and therefore it was not open to the Labour Court to revisit that interpretation under this Act as that matter had been dealt with.

On that basis the Court held that the complainant was not an employee.

Payment of Wages Claims – Are they Gross or Net Payments?

In case ADJ10231 the AO in this case awarded a gross loss of earnings.

We would have to disagree with this. Section 6 of the Payment of Wages Act 1991 in Section 6(1)(a) sets out that it is the net amount of wages after making any lawful deduction which an AO can award.

There is of course a further anomaly due to the tax legislation. The tax legislation deems that net payment to actually be a gross payment and is therefore then again subject to tax.

This may sound extremely strange. It probably is but we are dealing with legislation which does not take account of tax laws and the tax laws do not take account of the Payment of Wages Act.

In our opinion on the strict reading of the legislation the AO can only award the net loss. Interestingly the employer in that case does not have to pay the tax or the USC or employer PRSI over to the Revenue or social welfare. When the net payment is then being paid, the employer must

tax same and remit the tax on it to Revenue and social welfare respectively.

This may sound unfair. It may well be. However, the law is the law and this has been passed by the Oireachtas, in their wisdom.

Deduction of Wages

In case ADJ12874 the AO in this case has helpfully set out the position regarding claims for non-payment of wages.

The AO set out the case of the Labour Court in Foroige v. Kieran O Connell PWD178 where the Labour Court stated,

"*In Dunnes Stores (Cornellscourt) v. Lacey and another 2005 IEHC417 unreported, Finnegan P, The High Court found that in determining claims under the legislation, the central consideration is whether or not the remuneration in question was properly payable to the claimant… Subsection (6)(A) of Section 5 of the Act provides, in effect, that where the total amount of wages properly payable to an employee, is not paid, the deficiency or non-payment is to be regarded as a deduction".*

Contracts of Employment

In ADJ14397 the AO in this case helpfully set out the provisions of Section 3. The issue was whether it was necessary for the provisions of a bonus to be set out in a document to comply with the provisions of Section 3 of the Terms of Employment (Information) Act 1994. The AO in this case held that it was not necessary to set out the bonus scheme.

What will be necessary to set out will depend on the facts of the case. In case C-350/99 the EC Court of Justice held that there was an obligation to notify employees concerned of

"*all the aspects of the contract of employment relationship which are, by virtue of their nature, essential elements".*

The Courts set out that the provisions set out in Article 2(2) of the directive were not an exhaustive list of all the essential elements that must be set out.

We are simply mentioning this as simply because something is not set out in the Act does not mean that it need not be included. In the case before the European Court of Justice, referred to previously, in that case it was held that there was an obligation to notify the employee of their requirement to work overtime.

It will be interesting to see how the jurisprudence relating to this issue develops particularly when the new legislation comes into effect.

Statement Setting out Terms and Conditions of Employment – Section 3 Terms of Employment (Information Act). 1994

In ADJ14694 the AO in this case went through the contract of employment. The AO found that there were defects in the document and ordered the employer to rectify same. This is a very useful approach by the AO.

There is however a difficulty. The AO could have issued a Decision setting out how the contract would be deemed to be amended in which case it would have been effectively enforceable as a term set out under Section 3 of the Act. Where an AO directs that an employer should do something as regards providing an amended contract (statement) under Section 3 of the Act being the correct terminology, the reality of matters is that there appears to be no provision to seek implementation of same.

It would therefore appear that if an AO determines that a contract should be altered or amended that it would be best if the AO was to

actually set out how any such statement would be deemed to be so altered.

Workplace Relations Commission Decisions

Recently we have observed, some decisions from the WRC, where an award is made in favour of the complainant but is not specified in a monetary sum. For example, we have seen cases where it is stated that the employee would be paid a certain number of days public holidays due. No monetary sum is inserted. This is just one example that we have seen. We have a concern about this. The reason for this is that such a decision would not be enforceable. Even if in the body of the decision there is a statement as to what the employees average weekly wage was. It would be necessary in any Decision to set out the amount of the award.

In some redundancy claims we had been seeing a situation where Decisions issued similar to the way the EAT used to set out matters, namely with a start date, finishing date, date of birth, a weekly rate of pay and any provision relating to lay off periods.

We are now seeing Decisions where this method is being used in others however, while the factual information is set out in the body of the Decision the Decision itself simply states that redundancy would be paid. Again, there is an issue with whether this is enforceable.

It is far better, in our opinion, if redundancy claims are set out in the way that the EAT used to set them out. Equally where a monetary sum is being provided for example for underpaid holidays or wages or any other matter that again these would be set out not by reference to a number of days or weeks but rather by way of monetary sum.

In fact, the calculation of the monetary sum can often be the most complex matter.

We are simply raising this at this stage, to avoid situations where appeals may need to be brought to the Labour Court which would be completely unnecessary.

We also need to be positive about the way some of the Decisions are being set out. It is very useful where some AO's set out the compensation that is being awarded for a particular breach and then advise as to what that is equivalent to. This is useful for understanding the level of compensation that will be granted in real terms. While the monetary figures may be of interest to those writing articles in newspapers for those in practice knowing that the level of compensation based on a person's salary helps certainty in getting settlement. If, for example, for a particular breach, representatives know that the value of that will be between say 26 weeks and 52 weeks or between 52 weeks and 104 weeks then at least it gives a broad outline as to where the value of cases where AO's do give that break down it is a significant help in understanding the approach of the WRC to compensation.

In giving a commentary we do try to set out the positives and not just the negatives.

Claims to the WRC

As part of our newsletter we do review a considerable number of cases which go to the WRC.

There is an interesting issue which is not really being highlighted, namely the number of cases that do not proceed for hearing. There is a significant number of cases where the employee does not appear but the employer does. The case is then dismissed. However, there is a similar number if not more of cases where neither the employee nor the employer appears. That does somewhat indicate that at times settlements will have been reached between the employer and the employee but that the WRC will not have been advised or when a

hearing date is allocated if the case has already been settled nobody advises them of same.

Where hearing dates are lost it means that the opportunity for others to have their cases dealt with are also lost.

We do encourage settlements. We believe that this is always the best way forward for both employers and employees, it is possible. However, there is a significant problem if cases are going to be allocated and nobody turns up. Some system is going to have to be designed to deal with same. Possibly an issue of call over dates would assist in clarifying matters. It is however, worrying that so many hearing dates are being lost.

Wrong Claims being Made

Case ADJ13180 is a prime example of an employee bringing the wrong claim. The case was one where the employee brought the claim herself. The employee claimed payment for hours in excess of the standard working week of 36.25 hours.

The employer contended that her salary of €55,000 reflected the requirement to work extra hours to meet the deadlines associated with her role and referred to the contract. The AO in this case held that it was not unreasonable to work the extra hours and that this was set out clearly in the employee's contract of employment.

The employee lost.

However, this is a case which was brought under the Payment of Wages Act. Unless there is a provision for overtime to be paid in a contract of employment it is difficult to understand how an employee can claim where they are on a salary an overtime payment where it is not set out. If an employee is being paid on an hourly basis they would be entitled to be paid for the hours they have worked but not at any enhanced rate

unless they are covered by a Sectoral Employment Order. However, if an employee is required to work overtime because of issues which arise then in those circumstances if the employee has brought a claim under Section 17 of the Organisation of Working Time Act, she would have been entitled to claim compensation for the fact that she would not have received 24 hours' notice of the requirement to work overtime.

Section 25 Intoxicating Liquor Act 2003

There still appears to be an issue that claims are being brought under the Equal Status Act of failing to provide a person with refreshment in a public house that this would be brought in the Equal Status Act. Such claims cannot be brought under the Equal Status Act. They must be brought under the Intoxicating Liquor Act in the District Court. If a person is refused access to premises on one of the restricted grounds then in those circumstances it is under the Equal Status Act. If a person is refused to be served with refreshment in a public house then in those circumstances it must be brought under the Intoxicating Liquor Act. The first is brought in the WRC and the second is brought in the District Court.

This issue arose recently in case ADJ8223.

Diplomatic Immunity

This is an issue which comes up every now and again and was dealt with in case ADJ8370.

The issue of Sovereign immunity, is defined as a legal doctrine by which a Sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. Diplomatic immunity is defined as the privilege of exemption from certain laws and taxes granted to diplomats in the State where they are working.

The AO pointed out that there is a number of cases being Governor of Canada v. The Employment Appeals Tribunal and Brian Burke 1992 2I.R.485 Buthelezy v. Coy Dlamini and Another and the Republic of South Africa DEC/E2016106 and Greene v. Government of United States of America UD289/2014MN106-201

The Respondent submitted that the test laid down in Governor of Canada by McCarthy J. adopting the dicta of Lord Willberforce in Congero del Partido 1982 AC244 at 267 is that it must decide,

"*Whether the relevant Acts upon which the claim is based should, in that context, be considered within an area of activity, trading or commercial, or otherwise of a private law character… or whether it should be considered as having been done outside that area and within the sphere of Government or Sovereign activity."*

The AO pointed out that the questions are:-

1. Is the category public or private?
2. Is the contract of employment or service or the commercial purposes of the embassy?
3. Do the facts of the matter bring it within the exception set out in the Vienna Convention?

The AO pointed out that in the Governor of Canada case the complainant was a chauffeur.

Mr. Justice Flaherty in that case stated was it an activity –

"Truly touches the actual business or policy of the foreign government then immunity shall still apply."

The Court believed that work of a chauffeur was brought within the scope of the immunity as the element of trust and confidentiality that it reposed in the driver of an embassy car created a bond that had the effect of involving in the employing governments public business and

interests. In the Buthelzi case the AO found that a domestic assistant and child minder was private rather than public in her contract and was not for commercial purposes of the foreign mission. In Greene v. Government of the United States of America the complainant was a security guard and this was held to touch on the actual business and policy of the US Government in light of the reliance trust and confidence placed on him in his role as a security guard.

In this case the AO held that there can be little argument that the provision of education to citizens falls within the definition of the actual business and policy of a government when it is delivered in a third country. The AO held that the AO had no jurisdiction to hear the case.

The issue of Sovereign immunity is an interesting area. It is developing. It is helpful that a Decision like this has been given.

Rights to a fair trial at risk when individuals appear in Court without a lawyer.

In Irish Legal News recently an issue arose relating to a research from the University of Ulster which has found that individuals' rights to a fair trial can be in danger if they go to Court without legal representation. The research explored the experience of those who take or defend civil and family cases without legal representation. The research identified a significant lack of public information and advice on the practical, procedural and legal issues relating to Court proceedings. The researchers worked with the Northern Ireland Human Rights Commission to try an innovative "procedural advice" clinic for individuals.

"Procedural advice" is neutral advice or information that helps a person think through their options and decide for themselves the best approach to their case. This is different from legal advice which looks at the merit of a person's case and suggest the legal strategy. The research indicated that people who represent themselves in Court can

be disadvantaged on a number of levels that there are serious implications for their rights to a fair hearing.

The issue of legal representation is a significant issue in Employment Law cases. We regularly review WRC decisions and decisions of the Labour Court, particularly as regards cases that are brought by individuals who are not represented. It is clear to us from our reviewing of cases that very often employees bring the claim against the wrong entity. In Transfer of Undertaking cases invariably it is against the transferee rather than the transferor that the claim will be brought. It should be the other way around. Employees will bring claims against a business name. In cases where an employee is engaged by an employment agency and is dismissed the claim will be brought against the employment agency when in fact it should be brought against the ultimate end user of the services. These are simple examples of cases where employees are losing. In addition, we are seeing cases where legal arguments which could have been put forward on behalf of employees have not been put forward.

Of course, the WRC AO's and the Labour Court will assist an employee. However, they are not there to make out the employees' case. The appropriate questions can be asked to help the employee set out their claim but it is an utter matter for either to make sure that the correct claim is made against the correct entity. This indicates to us that if a review was undertaken, particularly of the WRC, that it would appear to us that any such research would indicate that employees who represent themselves have a far greater risk of not getting a decision in their favour. In addition, employers or employees who represent themselves in hearings where the other side is represented by a Solicitor or Barrister run the difficulty of having to deal with what can be very complex legal issues.

In Ireland, between Acts, Statutory Instruments, Regulations and Directives, there are some 700 pieces of legislation which in one way or another impact on claims before the WRC. There are different definitions of who is an "employee" in various pieces of legislation. There are even different definitions of who is an "employer" in various pieces

of legislation. We have contradictory definitions of what is working time, for example, in cases under the National Minimum Wage Act, as oppose to the Organisation of Working Time Act. For example, a truck driver bringing a claim under the Organisation of Working Time Act/S.I. 36 of 2012 as amended, will be met in the claim about excessive hours, that a period of availability does not count as working time under either the Act or the Regulations. However, in bringing a claim under the National Minimum Wage Act, a period of availability is included under the National Minimum Wage Act in calculating working time under that Act.

The reality of matters is that anybody bringing a claim to the WRC or the Labour Court does need the services of a Solicitor or Barrister who is trained in Employment Law. Those who do not have such representation are at a risk. The wrong entity will be sued, or the claims will be brought under the wrong Act or that potential claims which they have will not be identified and will therefore not be brought.

One of the issues which we have in the WRC and the Labour Court is that there is no provision for legal aid. This puts employees and smaller employers at a significant disadvantage if they are not in a position to pay for legal representation.

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