INTRODUCTION*

Welcome to the April issue of our Newsletter Keeping In Touch

On the 1st March Richard Grogan of this firm presented a seminar to the Wicklow Solicitors Bar Association on "Presenting and Defending Claims before the Workplace Relations Commission and the Labour Court" and the "Taxation of Employment Law Awards and Settlements". Copies of the papers which were presented are available in the publication section of our website.

On 9th March Richard Grogan of this firm was quoted in the Irish Times, the Irish Sun and the Journal.ie where he was asked to comment on a case where an employee had been dismissed while pregnant where a decision had issued from the Workplace Relations Commission. This is not a case which this office was involved in but we were asked to comment on its contents.

For the second time in twelve months we have been successful in making submissions to the Minister for Justice and Equality on Legislation coming from her Department. The latest relates to the Civil Liability (Amendment) Bill 2017. The Minister has confirmed that an amendment will be made to the Bill so as to ensure that Periodic Payment Orders will be exempt from USC and all Social Welfare charges. The Legislation as enacted proposed to exclude these from Income Tax only. The issue of Social Welfare charges is one we raised in the March issue of our Newsletter when a copy of our letter to the Minister was attached.

We had previously made submissions in relation to the Paternity Leave Benefit Act to provide that the threat of penalisation would be included as a cause of action, which was accepted by the Minister.

We have recently written to the Minister for Jobs, Enterprise and Innovation concerning a number of significant defects in the Workplace Relations Act. We wrote to the Minister on the 13th March. We are awaiting a copy of the letter under the Freedom of Information Act before publishing same for obvious reasons.

One issue which we believe is a significant unnecessary cost and which will be a waste of Labour Court time is the fact that only the Labour Court under Section 30 of the Workplace Relations Act can require an investigation by an inspector to go into a company and obtain relevant documentation and report back. No such provision applies to an Adjudication Officer. We therefore have potentially the vista of the very first time that papers may be produced in line with such an investigation would be before the Labour Court. The Labour Court is the appellate body. The Legislation does need to be amended very quickly to give the right to request for an Adjudication Officer to request an inspector to undertake such work. In such circumstances if matters then go on appeal it would be the Labour Court dealing with matters in an Appellate function. Not in an originating function. This defect is simply due to sloppy drafting of the Act. In the recent letter we sent to the Minister we have pointed out a considerable number of issues where there is extremely sloppy drafting.

In March the new Law Society Logo for use by Solicitors came into effect. We were honoured that our contribution in working on the committee and as Richard Grogan of this office seconded the Motion at the Law Society to have a new logo for use by Solicitors was acknowledged in the Law Society Gazette.

However, we recognise there was a considerable amount of work undertaken by the Committee which was chaired by Mr. Keith Walsh who is a member of the Council of the Law Society along with significant input from other Council members and the staff of the Law Society. Mr. Ken Murphy the Director General of the Society was instrumental in moving this matter through the Society and in ensuring that the appropriate publicity relating to the new logo was put in place. It was an honour to be involved in the committee and it is particularly appreciated by this office that the Society in the March issue of the Law Society Gazette recognised our contribution.

We continue to have regular contributions to Irish Legal News. We were delighted to be asked to be a regular contributor to this publication.

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Civil Liability (Amendment) Bill 2017

On 3rd March we received a letter on behalf of the Minister for Justice and Equality in relation to a submission being made concerning the Bill. We are advised that the Tánaiste has confirmed that the matter of the Universal Social Charge or other Social Welfare Tax with respect to Periodic Payment Orders has been raised with the Department of Social Protection and has confirmed that if necessary an amendment to the Bill as initiated will be made to exempt payments from Periodic Payment Orders from such charges. We raised this issue in the March issue of our Newsletter and we are delighted that our proposal to amend the legislation has been agreed to.

We must thank the Tánaiste and Minister for Justice and Equality for responding to this matter so promptly.

Labour Court Appeal Form

For some reason the current Labour Court appeal form does not include an appeal section under the Redundancy Payment Acts against a decision of an Adjudication Officer. It does have a section relating to an appeal against a decision of the Minister.

It is possible simply to just write in the word Redundancy Payment Act claim and give the relevant reference numbers for the purposes of lodging an appeal.

Settlement Agreements

We are coming across cases where employees have been asked to sign full and final settlement agreements without the benefit of legal advice. In many cases they are not even offered or advised of the importance of obtaining legal advice. This was covered in recent decisions in the EAT.

In one case the document stated;

"I acknowledge that I understand the effect and implication of this agreement and confirm and agree that I have been afforded the opportunity of obtaining independent legal advice regarding the contents and effect of this agreement".

In that case the EAT held obtaining informed consent is not a matter of rushing through a number of cursory steps but a matter of making a genuine effort to enable the employee to take the necessary steps to realise what she or he is being asked to do when he or she signs the document containing a full and final settlement clause. In a relevant case before the EAT compensation was awarded and the severance clauses were not held to be full and final.

There are some minimum steps that should be done.

1. An employee's signature should always be witnessed to any agreement.
2. Any settlement agreement should set out all statutes which the employee is waiving claims in respect of.
3. The employee should be allowed a reasonable period of time to consider the agreement in advance of signing. What is reasonable will depend on the circumstances however; at a very minimum they need to be given a few days.
4. At any meeting relating to any settlement agreement the employee should be allowed bring a competent representative to the relevant meeting.
5. The employee should be advised to obtain independent legal advice in advance of signing. The best practice is the advice from the employer is often supported by a contribution towards the cost of obtaining such legal advice. A figure of €300-€500 inclusive of VAT tends to be the normal at the present time. Normally it would provide that the fee would be discharged on receipt of an invoice from the Solicitor addressed to the employee but marked payable by the employer. Generally it is best practice to not to accept or enter into an agreement until that is addressed.
6. Where employers do not do this there is a significant risk that a Tribunal may well not accept any signed document as being in full and final settlement. It must also be remembered that there

must be consideration for this. Therefore if an employee is being made redundant getting them to sign a full and final settlement agreement whereby they simply receive their redundancy and minimum notice will rarely be sufficient as there will not have been consideration granted. If you are looking to get a full and final settlement agreement signed up that will stand up then there will need to be an ex gratia element at least as this will act as a form of what is termed consideration for waiving any rights.

It would be our view that if getting a full and final settlement agreement signed up it is important to get, from the employers side legal advice as to how to deal with meeting with the employee and what form of agreement should be put in place.

(This section was published in Irish Legal News in March)

Protecting your company from employee claims

Whistleblowing is now becoming a significant issue.

It is important for employers to implement a whistleblowing policy. There should be an internal reporting system. Employees should be encouraged to use it as it allows the employer to deal with allegations swiftly and effectively. It also limits potential claims. Employees should also be made aware of their options to make disclosures outside of the organisation. Of course employers will not want to do this but it is important employers can show that they have set out full procedures. Where employers have an internal robust system it is more difficult for an employee to justify disclosures outside the organisation.

It is important any policy will set out the employer will respect the identity and confidentiality of the whistle-blower. To avoid liability whistleblowing training should be provided to managers or those likely to be in receipt of disclosures and this is to avoid claims of vicarious liability.

Employers should consider appointing a dedicated officer to deal with disclosures from employees. There should be a thorough investigation of any concerns raised by an employee. It is important the employee is kept informed of the progress of the investigation. This will not always

be possible but in most cases it will be. It is necessary to regularly review the policy. It is important to consider whether new practices need to be put in place to deal with concerns raised by whistle-blowers.

Some employers believe that matters can be dealt with by way of putting in a clause in a policy that it is not permissible to disclose matters outside the company. This is a fallacy. Any such provisions in a contract are not enforceable under the Disclosure Legislation as it applies in Ireland.

The issue of whistleblowing is becoming a significant issue within companies. While there have been a number of high profile cases the reality of matters is that if employers deal in a positive manner it is more likely that issues will be resolved internally.

Presenteeism

Presenteeism was first used to define the practice of some workers reporting to work while ill and not operating at their usual level. However, now it is intended to describe employees who are effectively consistently present in the workplace. It has the effect of sometimes actually creating illnesses for such employees.

The approach of some employers particularly in SME's is that this is great. The workers are there. They are continuing to work. They are getting extra services. This is particularly true in the case of middle and senior managers who are not being paid overtime.

It is however causing a problem. There is now nearly seen to be a requirement that employees will work late. In some professions and industries it's regarded as being "loyal" to the company. Being available to work late at night, over weekends, to take mobile calls and answer emails while on holidays is all now seen as being "loyal" and the way to "move forward" in an organisation.

In our opinion employers need to look at this very carefully. There is an issue of productivity. A tired employee is not going to be as productive as an employee who is properly rested. There is a legal requirement in the Organisation of Working Time Act for employees to

take two weeks uninterrupted leave. This means that they don't take phone calls and they don't answer emails. There is a requirement for employees to take a 35 hour rest period every weekend. Effectively, it is only one day off as it is the normal 11 hour daily rest period plus a further 24 hours.

There are good health and safety reasons for this. An employee who is tired and is working excessive hours and who gets ill may well have a claim against the employer. Because now of mobile phone records and email records and particularly where the employer or senior managers are emailing or phoning employees while they are on holidays or over weekends or late at night. There is a record of excessive hours at work. If the employee has an accident it is possible to link it back to the employer. Employers also run the risk of having claims brought under the Organisation of Working Time Act. These can be expensive. They can impact on how a business operates. The argument from SME's is that because they have clients abroad in different time zones that they need workers to work at different times. There is no difficulty with that. There is no problem having a worker start at 6pm in the evening. However, there is a problem requiring an employee to be available 24/7/365.

Where you have an employee who cannot be dispensed with whether on holidays for example then there is a problem in the workplace. It means that work cannot be delegated. It means that they are not able to manage time to be away on holidays. The question the employer must ask themselves in that situation is what happens if the employee gets seriously ill and is in hospital. What is going to happen then? How will clients be dealt with? How will customer requirements be dealt with? These are questions which need to be asked.

Employers have a problem if employees feel;

1. They cannot take time off. This is where there is no backup for tasks.
2. They have been required to commit to personally attending meetings or events which may interfere with their rest periods.
3. They are constantly present because of insecurity relating to restructuring or a reduction in the workforce. That they have too heavy a workload.

Employers who allow employees to work excessive hours by being consistently present or available run serious risks of claims being brought against them.

Employer Insolvency

The Court of Appeal case of Glegola and the Minister for Social Protection, Ireland and the Attorney general is a decision of Ms Justice Finlay Geoghegan delivered on 24th February 2017 2017 IECA37.

The employer company went into Liquidation. Subsequently, the Rights Commissioner awarded compensation under the Unfair Dismissals Act, the Organisation of Working Time Act and the Payment of Wages Act amounting to some €16,818.75. Subsequently the company was struck off the register of companies.

The High Court determined that the State had failed to transpose the appropriate Directive and awarded this sum to the employee for the failure to transpose Directive 2008/94/EC which is effectively the insolvency being operated here in Ireland. However, this does not appear to be a clear and easy claim for employees to seek payments under. In the particular case the motion was brought in the High Court to restore the company to the registrar of companies. The High Court did so without the normal advertisements having to be made. The Solicitor for the Appellant wrote to the Secretary General of the Department of Social Protection seeking payment.

The Court determined that under the Directive Article 2 (1) (b) envisages a situation other than a situation where a Liquidator is appointed. Article 2 (1) (b) would require that a Court established and is satisfied that the company undertaking a business has been definitely closed down and that the available assets are insufficient to warrant the making of a winding up order or the appointment of a provisional Liquidator as an initial step to making a winding up Order. To show that the company has been definitely closed down is a requirement of certainty designed to protect the insolvency fund. It was held that the failure to transpose applies where a company is in a state of insolvency where a petition has been presented for its winding up and the appointment of a Liquidator and the Court in accordance

with Irish law Regulations and Administrative Provisions has done one of two things. Either decided to make a winding up order or appointed a Provisional Liquidator with a view to the hearing of a petition and the making of a winding up order or has made a finding or declaration that the undertaking or business of the company has definitely been closed down and that the available assets are insufficient to warrant making a winding up order or appointing a provisional Liquidator. The Court held that the requirement that a winding up order is made does not permit a person to make a claim against the Social Fund in circumstances of a deemed state of insolvency following an application and decision of the Court of the type specified in Article 2 (1) (b) of the Directive. On that basis the Court decided that the State had failed to correctly transpose the Directive.

It was held that as the State has failed to transpose the Directive by failing to provide a procedure whereby a person who is owed a debt by the employer and the company is insolvent but where no steps have been taken by the Directors to wind up voluntarily and there are no assists available in the company to satisfy the probable costs being incurred by a Liquidator to obtain the alternative type of order identified in Article 2 (1) (b) is sufficiently serious to warrant an award of damages. The amount of the loss was awarded.

This is not however a case which means that every employee of a company that has been dissolved or struck off can bring a claim. The employee will have to be in a position to show that the company has ceased operating and that there are no sufficient assets within the company. This is going to be a significant cost. There does need to be a provision introduced in Ireland in the insolvency legislation to cover situations where companies are simply dissolved or struck off and where the Directors effectively walk away.

Claims under the Wrong Act

We have been raising this in both, this issue and in previous issues, and certainly one case that jumps out is a case ADJ4346.
In this case the employee brought a claim under the Protection of Employees (Employers' Insolvency) Act 1984. The employee in this case claimed that she had not been informed that members of trade union lodged a claim for a notice period as provided for in a Collective

Redundancy situation and she claimed that this was unfair as she has been left out of the proceedings.

The employee in this case was a lay litigant.

The claim should have been brought under the European Communities Protection of Employment Regulations 2000 and not the Act of 1984 as amended.

The Adjudication Officer pointed out that case C235/10 - 3239/10 David Claes -v- Landsbanki Luxemburg SA (In Liquidation) is one where in the absence of consultation prior to termination of employment by a respondent that this constitutes breach of the regulations.

The Adjudication Officer properly found that the claim had been brought under the wrong Act. The employee was a lay litigant in this case. The employer was in liquidation. The reality of matters is that a lay litigant seeing a claim which related to employers insolvency where the employer is in liquidation is one where the lay litigant may reasonably have regarded this as the correct claim to bring. It is not.

Unfortunately, there is no provision for legal aid. There is no advisory section in the WRC which will assist employees who are lay litigants bringing claims in identifying the proper claim to bring. This is an unfortunate case.

The absolute reality of matters now appears to be that employees bringing claims do need to obtain legal advice. Yes there is a cost in this. However, the number of claims that are being seen to be dismissed because the employee has brought a claim under the wrong Act is quite frightening.

Some of these problems could be resolved if the claim form was easier and did not require Acts to be identified but rather the claims to be identified.

Incorrect Claims being made

In ADJ4224 the Adjudication Officer in this case pointed out that an employee had brought claims which were brought it appears under

the Terms of Employment (Information) Act and should in fact have been brought in respect of the Organisation of Working Time Act and Payment of Wages Act for holiday pay and outstanding wages. The Adjudication Officer pointed out that because the claims had been brought under a specific piece of legislation that the Adjudication Officer could not entertain the case.

This is a specific problem with the current claim form. There is no requirement under any of the Acts that an employee must present a claim under a specific Act. However, the WRC in their wisdom have determined that to bring a claim the employee must tick a particular box saying they are bringing it under a particular piece of legislation. There is no requirement for this to be done. We had pointed this out previously. The employee could simply have sent in a letter to the Director General setting out a complaint to say that he had not received a proper contract, that he had not been paid his holiday pay and that he had outstanding wages. All of which would then have had to be processed by the WRC in the appropriate manner as legitimate claims.

The WRC in setting out the claim form are making it exceedingly difficult for non-represented individuals to bring claims.

The system was designed to be one where anybody could bring a claim. We are consistently seeing cases being dismissed because they are being brought under the wrong Act. There needs to be a simplified version of a claim form which allows people to set out the claims they are bringing.

Contracts of Employment bite employers

In case ADJ-3726 the Adjudication Officer had to deal with an issue where a contract had been issued, as claimed by the employer, in "error".

The Adjudication Officer rightly found that the Contract of Employment issued by the employer is binding in law on the employer and that the wages outlined in that contract are properly payable. It is important that employers have proper Contract of Employment put in place.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Pregnancy Related Unfair Dismissal Claim

In case ADJ-2336 the employee in this case was not offered training which had originally been part of the process when she was taken on when she advised her employer she was pregnant. As a result of this the employee resigned and claimed Constructive Dismissal. Her Constructive Dismissal claim was upheld but compensation of only €2,000 was awarded because of the fact that the employee had not been seeking work on an active basis.

This claim was brought under the Unfair Dismissal Acts.

We were very surprised the employee in these circumstances would have brought a claim under the Unfair Dismissal Acts when a claim could have been brought under the Employment Equality Act where there is no requirement to minimise loss. It is not clear from the decision whether the employee was represented or not.

What is clear is that where an employee is dismissed because she was pregnant or it was related to the pregnancy there is serious issues relating to an ability of an employee to obtain further work. In those circumstances it is normally more advisable for the employee to bring a claim under the Employment Equality Legislation. While the burden of proof is on the employee to show that the dismissal was due to her pregnancy the test for a Constructive Dismissal claim is much higher than it will actually be for an Employment Equality claim and the issue of minimising loss would not be relevant.

Pregnancy Related Dismissal – Equality Claim

In Case ADJ1004 the Adjudication Officer in this case found that the employee had been dismissed very shortly after she notified the employer that she was pregnant. In the particular circumstances of this case an award of 12 months wages being equivalent of €30,000 was awarded. The employer in this case was a seafood restaurant contended that the employee had not been dismissed because of the fact that she was pregnant. They claimed that they had not previously dismissed people who were pregnant and claimed that the dismissal

was due to performance. The interesting aspect of this case is that the Adjudication Officer took a lot of cognisance of the fact that the dismissal took place very shortly after the employee advised the employer that she was pregnant.

What is interesting in this case is that this is one of these classic cases where the employee had less than 12 months service. There is a mistaken belief, in our opinion, that many employers believe that because an employee has less than 12 months service they do not have the protection of any employment law legislation when it comes to dismissal. This is absolutely incorrect both under the Equality Legislation in respect of which this claim was brought and under the Unfair Dismissal Legislation. There is no service requirement for an employee to bring a claim that they were dismissed because they were pregnant. Effectively the employee can bring a claim if they are dismissed on their first day of work. In addition they can in fact bring a claim if they had been not given the employment because of the fact that they were pregnant. It is a sad fact that a considerable number of pregnancy related dismissal claims going at the present time. It is unusual that these claim actually come on for hearing. The vast majority of these are settled.

When these cases do come on for hearing it is important where these cases are found in favour of the employee that compensation is set at a level which significantly indicates the fact that dismissing pregnant women is completely and utterly indefensible. This decision in setting compensation at the level that it has is a clear message to employers that they should not dismiss pregnant women because they are pregnant. The reality of matters is that a vast majority of employers would never dream of doing so but there is a small minority who still regard pregnant employees as a burden to be dispensed with as soon as possible.

Unfair Dismissal and Redundancy

In ADJ-1579 the Adjudication Officer has rightly pointed out that Redundancy is a defence to a claim for Unfair Dismissal. Of course the Redundancy must be a legitimate Redundancy but it is a full defence to an Unfair Dismissal claim. In this case the employer wished

to carry out the work in a different way and that is a legitimate issue for Redundancy.

Redundancy Decisions

In ADJ1200 the Adjudication Officer in this case found in favour of the employee. There is a lengthy decision. Previously before the EAT the decision at the end would set out the start date, finishing date, date of birth which is necessary for the Department, The rate of pay in any periods of lay off. It is possible to glean information as regards the start date, finishing date and the rate of pay from the decision however it is not set out in the easy to follow format that the EAT previously used. We have raised this issue in previous issues of this newsletter and really there is a strong argument for the old format to be used in setting matters out at the end of the decision for ease of use particularly via the Department of Social protection.

Redundancy Payment Acts

In case ADJ-4676 the Adjudication Officer in this case in line with some other decision very helpfully sets out the decision very much in line with the ways that the EAT set out decisions. Namely, it sets out the date of birth, a commencement date, date of notification of termination, a termination date and the gross weekly wage. The format in ADJ-4676 must be commended as a very useful format

Annual Bonuses

In case ADJ-3207 the Adjudication Officer had to deal with an issue of an Annual Bonus. The employee in this case relied on the High Court case in Cleary -v- B&Q Ireland Limited 2016. This case was a very much a mixture of law and fact but the Adjudication Officer found that there was a bonus payable. The case highlights, and it needs to be highlighted, the importance of bonus provisions in contracts being very carefully drafted.

Constructive Dismissal and Economic Loss

In case ADJ2171 the Adjudication Officer had to deal with both these issues.

In relation to the issue of constructive dismissal the Adjudication Officer quoted the case of Berber –v- Dunnes Stores [2009] E.L.R. 61 where the Supreme Court stated;

"The conduct that the employer complained off 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".

In relation to the issue of economic loss the employee in this case did obtain a job subsequently but had a lower rate of pay but in addition had to incur additional travelling expenses of some €228 a month for public transport for the new employment which costs she would not have incurred in the previous employment.

The Adjudication Officer dealt with a claim where the employee had resigned in September 2015. The case was heard on 14th February 2017. The Adjudication Officer noted that the employee had succeeded in getting new employment in Mid November 2015. The Adjudication Officer found that the loss of income amounted to €6,526 per annum. In addition, the employee lost two months wages amounting to €3,840. She also lost other benefits which had a value of €3,140 per annum. From the decision it appears that the loss amounted to some €23,172. The amount awarded was €26,500. It would therefore appear that the Adjudication Officer would also have taken into account the increased cost of public transport to her new employment. This certainly would not be unreasonable as it would be an economic loss and directly related to the loss of the employment. The case is interesting in that effectively the Adjudication Officer has awarded the full 2 years loss of earnings being the maximum allowed.

Constructive Dismissal

In case ADJ-2854 the Adjudication Officer in this case has taken some time to set out the law relating to what a claim for Constructive Dismissal is and the burden of proof on the complainant. The Adjudication Officer helpfully pointed out the case of Fitzgerald -v- Pat

Baker 1999 ELR 227 and quoted extensively from that decision. This is a very useful decision for colleagues to read when considering the issue of Constructive Dismissal.
Unfortunately Constructive Dismissal has a very high bar on employees to prove.

Case ADJ-2068 is a further example of employees bringing Constructive Dismissal cases where they have not exhausted the internal grievance procedures.
It is becoming quite evident and common that cases are being dismissed for Constructive Dismissal where the employee has not sought to exhaust the internal grievance procedures.
There will of course be cases where it is reasonable that the employee does not fully exhaust the internal grievance procedures but they are the exception rather than the rule. The action of the employer would need to be very substantial to warrant such an approach.
This case is a further timely reminder that employees need to utilise the grievance procedures before they resign.

The issue of constructive dismissal is one that is consistently coming before the WRC.

In ADJ4306 the Adjudication Officer in this case very helpfully set out the test to be applied and then applied these to the facts of the particular case. It is useful that the decisions of the WRC are setting out the law in some detail and this is one of those decisions which it is easy to follow as regards both the law and its application in practice.

Holiday and Public Holiday Pay

In ADJ-5582 the Adjudication Officer set out the provisions of Statutory Instrument 475/1997. This Statutory Instrument relates to the calculation of Public Holiday and Annual Leave and Public Holidays entitlements. It was common case that the employee received in a normal week an unsocial hour premium and a Sunday premium. However, these were not taken into account in calculating Holiday and Public Holidays. The Adjudication Officer found that these should have been taken into account in calculating these entitlements.

This is a very important restatement of the law by the WRC.

It is an issue which is often overlooked by some employers. It is useful that this decision has issued to remind employer of this requirement in calculating Public Holidays and Annual Leave.

Employers must also take into account that commission payments earned in the previous 13 weeks, in relation to Annual Leave must also be taken into account. This would be the average. It can therefore be an important issue for employers to determine when these payments are to be made as it can have a significant impact on Holiday Pay. For example if an employee received a commission payment of €13,000 on the 1st January 2017 and went on holidays for the first two weeks in August that €13,000 would not need to be taken into account in calculating his or her Annual Leave entitlement for the Leave Year 2017/2018 but would have to be taken into account for the 8% rule in the Leave Year 2016/2017. If however the payment had been paid on the 1st June then effectively there would have been an additional €2,000 which would have to paid as a Holiday Pay because there would have been an average over that 13 weeks, prior to going on holidays, of an additional €1,000 per week. Structuring commission payments is important. There is a method by which employers can completely avoid having to take these payments into account but it does involve some rewriting of commission and particularly bonus payment documentation. However it can be done.

Holidays and Sick Leave

In case ADJ-3608 the case involved an employee who became ill while he was on holidays.

The Adjudication Officer quoted case C-350/06 being the Schultz - Hoff case where the Court of Justice ruled that there was a right to be paid Annual Leave under Article 7 of the Directive while an employee was on long term Sick Leave. The case of C-227/08 was also quoted which confirms that an employer cannot require an employee to take their Annual Leave when they are off work sick. The case of C-78/11 was also quoted which ruled that a worker was entitled to be paid Annual Leave which coincides with a period of Sick Leave at a later date irrespective at the point at which the incapacity for work arose.

The Adjudication Officer referred to Section 19 (2) of the Act which confirmed that a day should not be regarded as a day's Annual Leave if the employee concerned was ill on the day and furnishes the employer with a certificate of a medical practitioner and in such circumstances it will not be regarded as a day of Annual Leave.

Compensation was awarded in this case.

Sunday Premium - OWTA

In Case ADJ2012 the Adjudication Officer had to look at the issue of a Sunday premium payment. The employee in this case was paid €9.15 per hour and would work 6.5 hours on a Sunday.

The Adjudication Officer in this case importantly determined that the Von Colson and Kamann Case and Land Nordrheim – Westfahlem case applied and that the Adjudication Officer under Section 27 (3) (c) of the Organisation of Working Time Act 1997 was required to direct the employer to pay compensation of such amount as is equitable. The Adjudication Officer also found that he was required to follow the Von Colson and Kamann Case 1984 ECR1891 when considering the award of compensation in this case awarded a sum of €1,500 for this particular breach.

What is interesting about this case is that the Adjudication Officer has confirmed that the Von Colson and Kamann principles in setting compensation. This would be in line with a decision of the High Court concerning a company Fitzpatrick and Hanley where Mr. Justice Birmingham confirmed that the Von Colson and Kamann case applied to Organisation of Working Time cases.

Payment of Wages – Non Payment of Wages

The Labour Court in the case of KPS Colour Print Limited and Maurycy Klatt PWD174 is a case where the Labour Court very helpfully has set out the relevant provisions of the legislation in a very

clear and precise way. In this case the employee, as found by the Court, was not paid wages. The decision is particularly useful for practitioners in the Court having taken the time to set out the legislation in significant detail. This is one thing you will find with the Labour Court is that they are consistent in setting out the legislation at length.

This approach by the Court is very helpful particularly as legislation is often amended and it is often not possible to find the legislation in the amended format.

Payment of Wages Claim

In ADJ-1101 being the case of a primary school teacher against a private primary school this is a case where the employee claimed unpaid wages of over €7,000 on the basis of unpaid increments. The employer acknowledged that these increments had not been paid and were due but claimed an inability to pay. The Adjudication Officer in this case rightly pointed out that an inability to pay is not a defence to a claim under the Payment of Wages Act.

It is interesting to note that there a number of claims coming through for non-payment of wages of quite substantial amounts.

There is a provision in Section 6 of the Payment of Wages Act which does allow an Adjudication Officer not only to award the economic loss but in fact a week's wage for any week in which there is an underpayment. This provision of the Payment of Wages Act is not being used and we would suspect this because of the fact that is not being claimed. The provisions of Section 5 must be read in conjunction with Section 6 and when they are it is clear that there is provision for effectively a penalty element on an employer for failing to pay the correct wages.

Wages and Sick Pay

In Case ADJ4396 an issue arose in relation to whether an employee could claim under the Payment of Wages Act in respect of sick pay. The union in this case pointed out that the definition in Section 5 of

the 1991 Payment of Wages Act defined wages as including any holiday, sick or maternity pay.

The issue in this case related to whether there had been a deduction of an entitlement in the employees contract to sick pay. The Adjudication Officer found that there was. This case is important both for setting out the law but equally important for reminding employers and employees that a contractual right to sick pay is one that an employee can claim under the Payment of Wages Act if it is not paid as an unlawful deduction.

Fixed Term Work Act Cases

In ADJ2292 the Adjudication Officer had to consider a case where an employee had been effectively demoted down to a previous grade. The employee brought a claim under the Protection of Employee Fixed Term Work Act. The Adjudication Officer rightly pointed out the case of Louth County Council –v- Paul Kelly FTD1320 where the Labour Court considered the position of an Engineer who had been seconded to various projects. In that case the Labour Court held;

"In order to come within the ambit of the Act a complainant must have the status of a fixed term worker. The Court interprets this to mean that a complainant's employment must be coterminous with the expiry of a fixed term or fixed purpose contract of employment. A complainant who reverts to their substantive grade and whose employment continues at the end of a fixed term assignment does not enjoy the protection of the Act".

In this case the complainant was at no point a fixed term worker within the meaning of the Act. At all times he had a contract of indefinitive duration as an Executive Engineer. At the time he had applied for and was appointed to temporary assignments and was remunerated accordingly. However, at all times he continued to hold a contract of indefinitive duration and his employment status was never at risk while on temporary assignment. The Adjudication Officer also quoted the case of Frobel College of Education –v- Marie Rafferty FTD144. The Adjudication Officer held that the employee was not able to bring a claim under the Fixed Term Work Act.

One of the effects of this Act has rarely been considered in that it is very possible to actually have demotions with little or no recourse.

Take a situation where a person is engaged at the age of 25 as a junior manager. If the employer rather than promoting the employee simply temporarily assigns the employee to senior roles up to and including a Chief Executive Officer the employer at any stage can revert the individual back to their original role with no repercussions under the Fixed Term Work Act even if the person has been performing the more senior role for many years.

This is clearly a defect in the legislation. The defect is there and at some stage it is going to be used by employers to circumvent other employment rights.

Protection of Employees (Part Time Work) Act 2001

In the case of Bruscar Bhearna Teo trading as Barna Recycling and Carmel Leydon under PTD171 the Labour Court had to consider a decision to dismiss on grounds of redundancy. The Adjudication Officer in the case had decided that dismissal by way of Redundancy can be justified on objective grounds and found that the complaint was not well founded.

The case is interesting in that the Court sets out the law under Section 9 and Section 15 of the Act in some detail and goes through the legislation.

The Court found the Respondent company decided to discontinue part time work and replace it with full time work and advised the employee. When she objected and raised her rights under the Act that the company sought to change the nature of the job in order to retrospectively justify the decision. The Court held there was no objective justification for that decision and no real thought went into it until the objections were raised. In this case the Court awarded a sum of €26,000. The case is a timely reminder that when reorganisation of the work force is being undertaken it is vitally important that particular rights of employees under various pieces of legislation are properly considered.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

National Minimum Wage Act

In case ADJ-3921 the Adjudication Officer had to deal with a case where an employee was taken on and was not paid for a period of time when they were working at a till in a supermarket. The Adjudication Officer found that the National Minimum Wage have not been paid and awarded compensation at the relevant National Minimum Wage rate for the relevant period when the employee was not being paid. The Adjudication Officer pointed out there are such matters as internships and training where the overriding issue is observing and learning. The Adjudication Officer found in this case that this was not the position as the person was actually working at the till.

However it must be kept in mind that in relation to the National Minimum Wage Act the legislation is very clear in our opinion. A person who is on an internship is still a person covered by the National Minimum Wage and is liable to be paid the National Minimum Wage. Where a person is under a training contract then there are specific legislative provisions which must be complied with to claim the training exemption. There is no criticism of the Adjudication Officer in this decision as we believe the Adjudication Officer was simply pointing out that there are situations where the National Minimum Wage Act will not apply where there is a training scheme in place. However the provisions for excluding somebody from the National Minimum Wage Act are very limited. Therefore for example taking somebody on to train somebody will not mean that the person is not liable to be paid the National Minimum Wage unless very specific provisions are met.

Employers seeking to have somebody for training need to obtain specific legal advice from a Solicitor as otherwise payment under the Act may still be due.

National Minimum Wage Act

In the case of Freshcut Food Services Limited and Dimitrij Karpenko being reference MWD171 this is case where the Contract of

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Employment effectively provided for 12 hour days 6 days a week where after the rest breaks provided for in the contract it would have worked out at a 66 hour week. This office brought the claim on behalf of the employee. The claim was based on Section 8 of the National Minimum Wage Act and in particular Section 8 (1) (a) being the hours of work of the employee as determined in accordance with his or her contract or the total number of hours worked under (b). In this case this office argued that the contract provided for 66 hours. The Court in our view correctly found that the Complainant worked approximately 33.47 hours in the relevant reference period. The employee who was represented by Peninsula Business Services (Ireland) Limited contended that the employee was only entitled to be paid for the hours he actually worked. The Court found in favour of the Respondent company. This case has been appealed on a Point of Law to the High Court and is one which will turn on the interpretation of the legislation. A hearing date before October is not expected.

Safety Health and Welfare at Work Act 2005 – Penalisation

In case ADJ1715 the Adjudication Officer helpfully quoted the law on this issue as set out in the case of O Neill –v- Toni and Guy Blackrock Limited [2010] 21 ELR1 where the Labour Court identified that the;

"Detriment giving rise to the complaint must have occurred because of or in retaliation of the complainant having committed a protected act.

The Adjudication Officer also quoted the case of AN Garda Siochana – v- Delahunt [2014] 25 ELR 130 where the Labour Court held that;

"The act or omission of the employer to which a claim of penalisation is grounded must amount to a detriment in the claimant's terms and conditions of employment and an action that merely has the potential to lead to such a result is not sufficient".

Delay

In case Fitzeros Catering Limited and Catherine Darling RPD172 the Labour Court has very clearly set out the law relating to the issue concerning an extension of time. The Labour Court as is their usual

practice has set out the considerable amount of case law on this matter. The Labour Court held in the circumstances of this case that they could not identify any justifiable basis for an extension of time. The Labour Court helpfully quoted the case of O'Dwyer -v- Swords Risk Services Limited 2014 25 ELR123 which was followed by Costello J's decision in O'Donnell -v- Dún Laoghaire Cooperation 1991 ILRM 301, Minister for Finance -v- CPSU and others 2007 18 ELR 36.
There is a very comprehensive overview of the case law in this case.

Time Limits

In case ADJ-3744 the Adjudication Officer among other things had to deal with the issue of time limits for bringing a claim under the Transfer of Undertaking Regulations. The transfer occurred in or around the 1st May 2015. After the transfer in or around August 2015 the claimants working hours were unilaterally altered. Complaint issued in May 2016. The Adjudication Officer found that the claim was out of time and had no jurisdiction to investigate the complaint. One issue with the Transfer of Undertaking Regulations is where the transfer is not fully notified to the employee the time still runs against the employee.

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