Keeping in Touch - August 2018

Welcome to the August edition of our newsletter Keeping in Touch.

As a firm we would like to thank those colleagues who continue to refer clients to us. We are very pleased that colleagues have this level of confidence in us and trust us to refer their clients to us. We are also delighted that we are now beginning to assist some firms as their "correspondent law firm". In jointly dealing with issues which they have with representing clients of theirs and where for one reason or another it is important for them to maintain contact with our client in relation to the particular issue where we would be advising. We are delighted to cooperate with other firms in providing the service to their clients. In some cases we will be interfacing with their client in others we will simply be advising them and they do the interaction with their own clients.

For those interested in Employment Law, we would say that Employment Law is very collegiate. It is one of those areas of law where colleagues regularly meet and discuss issues. It is equally one of those areas where colleagues are prepared to take a phone call from another colleague to assist them. Unlike other areas of law, Employment Law has over 730 pieces of legislation between Acts, Statutory Instruments, Regulations and Directives to deal with. We have different definitions of whom an employee is in various Acts and in various cases we can have a situation where two different companies can be sued under different pieces of legislation with each of them claim to be the employer even though they may have no relationship to each other. Because of the complexity of Employment Law colleagues are happy to speak to each other and assist each other as what you give you will always get back. For those who are interested in Employment Law we would strongly advise that you would go to the Dublin Solicitors Bar Association Seminars on

Employment Law and that you would look to join such organisations as the Employment Law Association of Ireland. These are opportunities not only to attend really excellent lectures but also to meet those involved in Employment Law and have an opportunity to discuss issues with them. This firm has never refused to assist a colleague who has phoned us to discuss an Employment Law issue or if to discuss a particular Section of an Act as to how it would apply or argues in relation to a particular case. Equally, no colleague who deals regularly with Employment Law has ever refused to reciprocate with us. Employment Law is one of those few areas of law where colleagues seek to help each other. We would strongly encourage those who are interested in Employment Law to look at it as a career. It is our view that in coming years the Employment Law is going to become even more important. Even those who look at the issue of Commercial Law can actually be involved in Employment Law as the issue on the European Communities Protection of Employees on Transfer of Undertaking Regulations is an integral piece of Employment Legislation which has huge ramifications for commercial transactions. At the present time there is a huge volume of Employment Law. There are huge opportunities for those who want to get involved and we would encourage younger Solicitors coming into the profession to look on Employment Law as an area of expertise where they can develop and have a career in.

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Out and About in July

In July an article by Richard Grogan of this firm was published in The Parchment being the publication of the Dublin Solicitors Bar Association dealing with Redundancy. The title is "Redundancy - Traps for Employers - Tips for Employees". The article deals with the issue of time limit where in particular the employee claims redundancy and the employer does not furnish a counter notice where the employee has been on lay off.

We were delighted to be asked to make a submission to the Low Pay Commission in relation to the National Minimum Wage (Protection of Employee Tips) Bill, 2017. We covered this Bill in the July issue of our newsletter. When asked to review the Bill, we looked at any potential amendments that could be made and identified potential, in our view, that certain employers could utilise one particular scheme to avoid paying tips to employees directly and instead use the tips towards the pay thereby reducing the amount the employer actually has to pay. The effect would be that the employees do not get the tips unless the value of the tips exceeds their wages. This is simply a view that we had and we made a submission to the Low Pay Commission with proposed amendments to the Bill. We issued a second amendment which would clarify issues whether an employer, receiving a service charge, intended to use the service charge towards discharging their liability to their staff by way of wages or whether it would distributed in addition to wages.

In respect of the Gender Pay Gap Information Bill, some of our submissions were accepted as regards the Heads of the Bill particularly as regards the reporting being on the basis of job categories not just across the entire company.

On Monday, 16th July Richard Grogan was quoted extensively in an article in The Times Ireland Edition headed "Zero-hours ban won't work, top employment lawyer claims". We were particularly pleased to note our award as Employment Law Firm of the Year 2018 from Irish Law Awards was mentioned.

On Wednesday, 18th July Richard Grogan was quoted in an article in the Dublin Inquirer entitled "Should there be a crackdown on adverts for unpaid internships".

On 25th July Richard Grogan was interviewed on The Last Word on Today FM on the issue of unpaid internships and our pro bono representation initiative.

On 27th July Richard Grogan was quoted in an article in Fora.ie by Conor McMahon on the issue of the Employment (Miscellaneous Provisions) Bill 2017 which Richard Grogan has significant concerns as to whether the Bill will be effective. This is due to poor drafting.

Pro bono initiative

Now that the firm is in its 10th year we thought it was time that we considered undertaking a pro bono initiative in respect of an area of abuse of employees which we regard as abhorrent. We have identified three. We are rolling out the first of these now with a second one hopefully later.

What we are looking at now is the issue of unpaid internships. This is an area where young, vulnerable individuals are being exploited with promises of training and full time paid jobs in the future which very often never materialise. It is a way for some employers to get free labour. While the WRC has highlighted the issue, there is no provision in the WRC for these employees to get free legal representation or any representation. Because the law in this area is complex, these individuals need legal representation. We have decided to offer free legal representation to a number of employees subject to an application to the firm. We are seeking to highlight recent abuses. Therefore we are seeking individuals who worked as unpaid interns for at least 3 months working a minimum of 10 hours a week on average and where the employment is continuing or ceased no earlier than the 4th May 2018. Any person interested in this may contact the office by emailing us at info@grogansolicitors.ie and simply emailing

the words “Unpaid Intern”. We will then send them an application form. We will review the application form. We will then pick those cases which appear to us to be the most deserving or which highlights the abuse to a greater extent. Applicants must have worked in one of the following Counties, being Dublin, Meath, Kildare, Louth or Wicklow.

All applications must be received by the 17th August.

For those who will take it that this is a once off issue so that if they are an employer that they will believe that we will not be acting in respect of unpaid internships which are put in place after that date we will be rolling out this pro bono scheme at other dates over the next 12 months.

Why are we doing this?

There is a very simple reason. We have been to the forefront in raising the issue of unpaid internships. We have been interviewed on national radio and in newspapers on this issue. Highlighting the issue in itself, we believe is not sufficient. We believe that it is necessary for action to be taken to help stamp out this form of abuse in the workplace.

As Solicitors who practice in Employment Law we do take on pro bono cases. However, when we see groups of workers who under no circumstance could afford legal representation and where that involves what we regard as exploitation of vulnerable individuals then we believe it is our duty as Solicitors to be seen to act for such individuals. This is why we have decided to go public to try to help as many as possible take on this scourge of exploitation.

We are going so because we believe it is right. We believe it is proper. We believe that it is our duty as Solicitors to help the most vulnerable.

This is not just a case where we will be giving time for free. There will be actual costs which we will have to incur. We have had these type of cases before. Invariably they have to go for full implementation

through the Courts where there is a Stamp Duty issue which we will pay.

We equally know that when these cases are taken we are going to have employers who will put up every spurious and vexatious argument that can be put up which we will have to deal with.

It is likely that most if not all cases that we take may, ultimately, be settled so as to avoid publicity by employer. We have no problem with that. If an employer wants to pay up a claim so that we assist somebody get what they are legally entitled to then that is what we regard as the best result. If an employer wants to fight the case then we will fight the case and where we have to spend out the money to seek implementation through the Courts, we will do so and the employer can have the publicity of being outed as an employer who abuses and exploits vulnerable individuals.

Employment (Miscellaneous Provisions) Bill 2017

We have been somewhat critical of Minister Doherty in relation to this Bill. Saying that, there are portions of the Bill which we believe are very good and there are other portions where we actually agree with the Minister.

In relation to the amending of the provisions concerning the requirement to furnish basic information, effectively, nearly at the very start of the employment, we would agree with this approach. We disagree in relation to the penalisation provision which is limited to 4 weeks, which we would regard as far too low and in no way a provision which will prevent an employer penalising an employee. Where an employee raises the issue and has less than 12 months service then in those circumstances the maximum cost to the employer of simply firing the employee for raising the issue that they have not got the statement is 8 weeks wages.

We understand the reticence of the Minister in extending the penalisation provision to be similar to all other Acts being 2 years wages. There is an alternative, namely to amend the Unfair Dismissal Act to allow a claim for Unfair Dismissal to be made where the employee has less than 1 year service but has raised the complaint under the provisions of this Bill once it is incorporated into the Terms of Employment (Information) Act.

Saying that there is a crying need for the basic information to be furnished and to that extent we fully support the Minister.

In relation to the provision about incorrectly classifying a person as a self-employed individual which is an amendment proposed by Willie O'Dea TD we would agree with the Minister but for probably different reasons. There is a difficulty with the definition of whom an employee is. The definition is different in different pieces of employment legislation. For those not normally dealing with Employment Law this might sound strange. For those of us who deal with Employment Law we equally find it strange but it is a fact that there are different definitions of whom an employee is so that in certain cases an employee may win under one Act but may lose under another Act simply because of the fact that they come within the definition of an employee in one Act but not in another Act. There would be work that needs to be done to change the definitions within Employment Legislation so that there was one definition of whom an employee is. At the same time it might be useful to give a singular definition of whom an employer is as equally there are difficulties with that.

The concept as put forward by Willie O'Dea TD, we believe, is an extremely good concept. The difficulty is applying it in practice. There does need to be a singular definition of whom an employee is. There then needs to be a clear definition as to the tests as between who is and is not an employee. There is already a Revenue test on this but that is a Revenue test. While in employment cases this is usually fully followed, it is not a legislative test. Therefore it is necessary to put in place a clear and definitive definition as to the test for determining whether somebody is an employee or self-employed.

In the UK there is an alternative which is the category of a "worker". These individuals are not employees but they have rights to minimum wage, holidays and sick pay. Maybe a solution would be to provide that we would have such definition for Irish Employment Law.

There is then maybe an alternative which is an easy to operate provision which will resolve the issue for the vast majority of people who are incorrectly classified as self-employed. The problem is in a lot of cases those who are on lower wages rather than those who are on higher salaries. The solution would be to put in place a test similar to that which the Revenue currently have in place but then to provide that unless a person is being paid at least twice the National Minimum Wage that person would not be regarded as anything other than an employee regardless as to what may be put in a contract of employment. This may sound radical. However, we would not see it as radical. The problem in relation to people being classified as self-employed is to a large extent those on lower pay. Higher paid individuals are more often than not going in to matters with their eyes wide open and with the benefit of getting advice. It would be our view that nobody should sign a document stating that they are self-employed without getting appropriate legal advice but that is another day's work.

In relation to the issue of Banded Hours Contracts we do have a problem with the Bill as it currently stands. The Minister is saying that compensation will not be awarded because it is to avoid frivolous and vexatious claims being made or for the purposes of seeking compensation. We do not believe that this argument stands up. As the Bill currently is drafted, if a person brings a claim who is working within one of the bands that they are entitled to a banded hours contract where their contract may actually provide for less hours, that entitlement does not go back to the date that the claim is lodged. It only applies from the date of the decision of WRC issues. If the decision of the WRC is appealed then the entitlement to the Banded Hours does not come in to effect until after the date of a decision from the Labour Court. The effect of this will be that there will be no

pressure whatsoever on an employer to consent to a claim under the Legislation as it is currently drafted. That means that employees will have to bring claims. The employer can send anybody down to represent them, wait for a decision to issue and then lodge an appeal to the Labour Court. They can wait for the case to come into the Labour Court and then still delay it further by running the appeal. If an employee has been coming within a specific band there will be no defence but it does not mean that the employer cannot delay matters. This is going to mean that where you have an employer that has a considerable number of employees the employer can insist upon a separate hearing for each claim. This will tie up the resources of the WRC and the Labour Court. There are two ways that this can be dealt with. One is that in the event that the individual is entitled to a Banded Hours Contract, seeks it from the employer, is not given a Banded Hours Contract and has to bring a claim to the WRC to get it that an Adjudication Officer would be entitled to award compensation for the fact that the employee has had to bring the claim and that the employer has not admitted it where the Adjudication Officer finds that there has been no real legitimate defence by the employer. The alternative is that the entitlement to be paid those hours goes back to the date that the claim was lodged but subject to the employee making themselves available to the employer to work those Banded Hours. This right could be restricted to cases where the correct Band is nominated by the employee at the very start.

What concerns us in relation to the provisions relating to the Banded Hours is that the WRC and the Labour Court could well be swamped with cases which are running purely to delay the employee obtaining a Banded Hours Contract. It has been said to me that if such action was taken that would be an abuse of the Legislation. That may well be the position but the reality is there is no penalty or financial consequence of any sort for an employer doing this. What worries us is that our prediction will come through and that therefore the resources of the WRC and the Labour Court will be stretched resulting in other cases where there are serious issues between employer and employees being delayed.

We do support the principles which the Minister is putting forward. We just believe that the way it is being done is not in the best interest of getting legislation which will be effective.

Gender Pay Gap Information Bill

The Minister for Justice Mr. Charlie Flanagan in June introduced the general scheme for the Bill.

There is an extremely interesting element in Head 2 being matter (7) namely that Regulations may be made under the section to require the publication of information by reference to job classifications.

This is extremely important.

Let us give an example of a company. The company has 20 managers. 15 are of one gender and 5 of another gender. They are all paid the same.

The balance of the workforce is split 50/50 on gender and each gender receives in that category the same rate of pay and benefits.

Under the UK legislation or if the Regulation simply provided that information was given as regards the difference in rates of pay on a simple calculation because there are more persons of a particular gender in the senior management positions this will result in a report that shows that in that company there is a pay gap between men and women. In reality there may be a gap as regards the number of a particular gender at senior management level but there will be no pay gap between anybody working in the company.

Under the UK legislation if you had a company that had for example 20 senior managers of whom 15 were male and 5 were female. Let us assume that there is a 20% pay gap whereby the female workers receive less to comparable male managers. The balance of the workforce amounting to let us say 250 individuals which is 100%

male who are all paid twice the national minimum wage. In this case it is likely that if you take the wages of all the men and divide it by the number of men in the organisation and then compare that with the women in the organisation it will probably appear that there is a pay gap but one where women are actually paid more than men. The opposite is exactly the position. Namely that at a senior level the women working in the company would be receiving 20% less.

This is an issue which we have raised with the Departments and were delighted to see that this provision in the Head 2 of the Bill in paragraph 7 is in place. This would allow reporting to be done on the basis of job classifications. In the examples set out above in the first case it would show if the Regulations came in on that basis that men and women within the organisation at the various levels receive the same rate of pay. In the second case it would indicate that women at senior levels were receiving 20% less than male counterparts. The Bill as proposed would mean that there would be tangible, real, relevant and informative information produced. Companies in such circumstances would be more inclined to ensure that matters were rectified so as to avoid having to report a pay gap on the basis of gender. We are very pleased that we have put forward this proposal. We are extremely pleased that it has been accepted and that we hope that this legislation will be passed to provide for comparisons on the basis of similar jobs being compared with similar jobs as to what men and women in particular roles are paid.

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Judicial Review of WRC Decision

It has recently been reported that a claim has been brought by a nurse in relation to an issue of racial discrimination where the nurse was claiming she had been overlooked for promotion on a number of occasions. The case went before the WRC. A preliminary issue was raised as to whether or not the claim was within time or not. It

appears that the AO in this case decided that a decision would need to be given in relation to the issue as to whether the claim was within time or not stating that relevant case law needed to be looked at by him and the case was adjourned.

The parties were told that the case would be relisted and it would be listed for a full day. It appears that a number of emails ensued. Eventually in April of 2018 a decision issued. What is interesting is that the AO in this case appears to have decided that the claim was within time and then proceeded to dismiss the claim on the basis that there was no evidence of racial discrimination. What is interesting is that nobody gave any evidence on that issue. It appears on the first date that the only issue that was covered was in relation to whether the claim was within time or not.

Mr. Justice Noonan gave liberty to apply for Judicial Review. This was dealt with on an ex parte basis only being where only one party attends.

In relation to this matter unless the WRC admit the claim and the entity against whom the employee brought the original claim does not contest the Judicial Review the unfortunate fact is due to the current lack of Judges in the High Court it will be at least 18-24 months and probably longer before this case is heard and detrimental. After it is heard then a decision has to issue which is a further length of time.

One of the issues that is now arising in relation to Judicial Reviews from the WRC and Point of Law Appeals is the issue of delays in the Courts having the cases dealt with due to the lack of Judges available to hear such cases.

This is a case which will be followed with interest by this office but unfortunately the current delays in the High Court due to lack of Judges is significantly impacting on cases being dealt with in a speedy and effective way.

This is no complaint of the High Court. There is just a complete lack of sufficient number of Judges.

Interpretation of Legislation and Legislation which is Imprecise

A recent Supreme Court decision being a judgment of Ms Justice Dunne delivered on the 10th July 2018 is interesting in relation to a comment made namely that:

"It is surely desirable that where changes are proposed which may have very far reaching effects, that they should be carefully tailored to achieve their intended object and be clearly expressed."

This comment in relation to legislation being drafted is an issue not only relating to the legislation the Supreme Court were looked at but also often in relation to Employment Law issues also where this comment as made would be very relevant.

In relation to the interpretation of legislation, the judgment of Ms Justice Dunne also helpfully referred to the case of Bederev -v- Ireland, 2016 2ILRM 340 at pages 360 to 361 in which Charleton J, stated:

"*There is a presumption against an accidental alteration of the law. The following passage from Maxwell on the interpretation of statutes (11 Ed, Sweet & Maxwell, London, 1962) at pp. 78 and 79 put the matter as a presumption against any radical implicit alteration of the law;*

"One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares, either in expressed terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general

system of law, without expressing its intention with irresistible clearness, and to give any such effect to general words, simple because they have a meaning that would lead there to when used in either their widest, their usual or their natural sense, would be to give them a meaning other than that which was actually intended."

The extract quoted by Ms Justice Dunne went on to state:

"It is to be stressed that radical and far reaching changes of the law cannot occur through ambiguous language, O'Connell -v- Bank of Ireland 1998 2IR596 1998 2ILRM 465."

In relation to employment cases in particular, thought is not covered in this decision which deals with a different issue entirely, there are difficulties with interpretation mainly because of the fact that at times certain phrases or words are not defined in the interpretation sections of Acts and one has to refer back to the Interpretation Act. It has been pointed out in some cases in the employment law field, though not in the Courts, that in those circumstances an illogical conclusion could arise. That may well be the position. It may even be that this was not intended but where the Oireachtas passes legislation and does not use precise and accurate terms and does not take the time to properly ensure that relevant words are properly defined, particularly where there may be a word defined in the Interpretation Act then in those circumstances, regardless as to what the effect may be, a Tribunal or Court is bound by the strict wording of the statutes and there is no leeway to put in place what somebody might argue may have been intended. The Oireachtas reports may be used to interpret an act but only where there is ambiguity.

Terms of Employment (Information) Act 1994

In ADJ-11827 the AO had to deal with an argument which comes up regularly and at some stage needs to be finally put to bed.

The employee commenced employment in 2014. The claim was not brought for a number of years thereafter. The employer argued that

the obligation to furnish a document under Section 3 is in two months of commencing employment and therefore the time limit to bring a claim expired six months thereafter. The AO in this case quoted the Labour Court case DWT14114. The AO in this case, in our opinion, rightly found that the breach was a continuing breach and therefore the employee was entitled to bring the claim.

The AO in this case awarded 4 weeks wages as compensation for not having received a document which complies with Section 3.

In the recent case relating to Merchants Arch Restaurant Company Limited being a decision of the Labour Court, the Labour Court held that it is a relatively simple matter for an employer to put a document in place which complies with Section 3. A statement under Section 3 sets out the basic main terms of employment and such important information as to what is the legal name of the employer. Unfortunately, we see many employers come up with a defence which came up in this case. It would be out view that if the employer in this case had come in and admitted that they did not have a document that complied with Section 3 and that steps had been put in place so that by the time the matter came before the WRC that such a document was in place which was fully compliant then in those circumstances the compensation would probably be less.

However, to be fair we have to point out case ADJ-11565 wherein that case a document had been provided in 2013 and the AO in that case relying on Section 41 (6) of the Workplace Relations Act 2015 held that as the complaint has been made outside the six months period of time the AO had no jurisdiction to hear the case.

In our view in this later case the AO got the decision wrong. The issue is whether there was a continuing breach. That is not clear. If the document provided in 2013, even though provided late, fully complied with every nuance of the Terms of Employment (Information) Act then in those circumstances there would be no continuing breach. If however the document was not fully compliant with all the provisions

then there is a continuing breach and the AO would have had jurisdiction to hear the case.

We would point out in our opinion that it is unsatisfactory that we could have two AO's give potentially conflicting decisions relating to the interpretation of legislation. As we have said before, we would rather a situation where the WRC was completely wrong or right but consistently wrong or right in giving decisions rather than have a situation where one AO will take one view of legislation and another AO will take a different view of legislation. One of the great advantages of the Labour Court is that consistency is the hallmark of the Labour Court decisions. The same is needed in the WRC. If the WRC are consistent then at some stage the matter will go on appeal to the Labour Court. The Labour Court will either affirm or overturn matters and then going forward the AO's would then give decisions in line with what the Labour Court ruled.

It is unfair to both employers and employees that there would be inconsistency in the WRC in giving decisions as regards the application of the law. It means that representatives whom employers and employees have to pay cannot be certain as to what the attitude of the WRC is going to be. This means that cases which should settle or be resolved or where a breach should be admitted may not be or a claim may be brought on the basis that some AO's will find in favour but others might not.

It does not make sense that in a case that one representative could be quoting cases from the WRC which say one thing and the representative on the other side could be quoting cases from WRC which say the exact opposite as regards the interpretation of the law.

This does not happen in the Labour Court. It should not happen in the WRC. To a certain extent this may now be an issue which has been put to bed by the Labour Court in a case involving Merchants Arch Restaurant Company Limited TED187 where the Labour Court at some length set out the law relating to claims under Section 3 of the Terms of Employment (Information) Act. The Court set out what

should be in a statement. The Court set out that it is a relatively straight forward matter for employers to deal with it. The Court set out that where there are breaches that these can be admitted and dealt with before matters go to an AO and where there have not that they therefore have put an employee to an expense. The Court has set out that the defence of technical defects is not one that will stand up.

It is evident from some decisions which have issued from AO's since that decision of the Labour Court was published that some AO's are taking cognisance of that decision and are applying it.

I know of no case where the Labour Court has held that where there is a continuing breach in respect of not providing a document under Section 3 that the employee would be debarred from bringing a claim where it has issued while the employee is still in employment or within six month of the employee ceasing employment. We would also be of the opinion that the decision of the Labour Court would be totally consistent with the judgment of Mr Justice Hogan in the case of HSE and McDermott 2014 IEHC 331 in respect of the issue concerning a rolling breach which is a continuing breach.

It may well be that a definitive ruling on this is going to be needed by the Labour Court but hopefully not. What is however clear is that it is unacceptable that there would be different AO's giving different interpretations of legislation.

Contracts of Employment

In case ADJ-10989 the AO in this case had to deal with a situation where the employee claimed that the employee had not received the document with complied with Section 3 of the Terms of Employment (Information) Act.

What is very interesting in this case is that the AO took the time to set out each subsection of Section 3 which was not complied with and also quoted the case of Merchants Arch Restaurant Company Limited DWT188 which also includes the decision under the Terms of

Employment (Information) Act. The AO in this case awarded the employee a sum of €1,000. The AO in this case properly took into account, in our view, in line with the Labour Court determination the fact that the employer had stated that they had put in place new contracts which they will be rolling out to staff. It is not clear whether these were produced but from reading the decision it would appear that these had been produced in some format to the AO.

It would be our view that if that argument is going to be put up that it is only right that these amended documentation is produced at the relevant hearing rather than some vague promise to do it into the future. If it is going to be on the basis of a promise then it would be our view that the AO in such circumstances should put in a determination that the decision will be sent by the AO to the inspectorate requesting that they will undertake an inspection within say a month after the date that the employer has said that the contracts are going to be distributed to employees and if not that appropriate action would be taken. In the alternative that the case will be adjourned for a period of time for those contracts to be put in place and evidence furnished to the AO that they have been drafted, put in place and distributed or at least drafted and in final format.

However, in this case also the employer appears to have argued that the employee suffered no detriment or loss as a result of not having got a document that complied with Section 3. In our view, once that argument is made the issue of mitigation should cease as the issue of detriment or loss is completely spurious to a claim under Section 3 where there is a mandatory requirement to put the documentation in place and the issue of economic loss is not an issue that is relevant in setting compensation.

Saying this we think that the particular decision is very well set out. It is very well thought out and it does raise the issue that in our view if an employer comes in and admits there has been a breach and confirmed that steps have been taken to rectify same as there is more than sufficient time between the time a claim will come in and a hearing date. That is however just our opinion.

Fixed Term Contracts of Employment and the Unfair Dismissal Acts 1977-2015

The case of Malahide Community School and Conaty being UDD1837 is a case which had been before the Labour Court, it went to the High Court and was referred back to the Labour Court in relation to the issue the consideration in particular of Section 2 (2)(b) of the Unfair Dismissals Act 1977-2015. For the purposes of relying on the exclusion the Labour Court pointed out that Section 2 (2)(b) sets out four conditions, namely:

a) The contract must be in writing;
b) The contract must be signed by or on behalf of the employer;
c) The contract must be signed by the employee;
d) The contract must provide that the Act shall not apply to a dismissal consisting only of the expiry of a Fixed Term or the cesser of the specified purpose.

That is well known law. This case involved a situation where on the evidence adduced at the time the Complainant signed the Fixed Term Contract in issue she was already employed by the Respondent on a Permanent Contract of Employment and she enjoyed the full protection of the Act against Unfair Dismissal. The effect of the contract was to alter her tenure of employment from permanent to a fixed term and to extinguish her acquired entitlements to avail of the protection that the Act provided.

In case UDD1752 which is the case that was previously referred to the High Court the Court pointed out that the Complainant was not aware that she was signing her way out of protections under the Act in October 2015. They pointed out nor was she cognisant that her employment status was changing from that of a permanent employee to that of a temporary fixed term employee. The Court was satisfied that the conditions necessary to render Section 2 (2)(b) of the Act to be effective were not satisfied. The Court considered the relevant sections and held that for the Act to apply the contract must be a bona fide

Fixed Term Contract. The Court pointed out for a dismissal to be taken outside the ambit of the Act the Fixed Term Contract must satisfy the four conditions contained. What is interesting in this case is that the Court stated that the Court was not satisfied that the agreement was entered into on the basis of informed consent nor are they satisfied that the employee was aware that by signing the contract she was relinquishing the protections she had already acquired under the Act.

The Court in this case quoted the previous decision and in particular pointed out that the employee was not advised to obtain independent advice before signing the document. This would have been in line with a case of Hurley -v- Royal Yacht Club 1997 ELR 225 which specifically referred to the individual to be advised in writing that they should have obtained appropriate advice which presumably in the case would have been legal advice.

In this case the Labour Court also held that in such circumstances seeking agreement from a Complainant to exclude or limit the application of the Act such an agreement was in breach of Section 13 of the Act and was therefore void.

The Court helpfully set out the difference between an exclusion clause and a waiver clause.

This case has significant importance for those employees, who are older employees, who come into retirement age and suddenly find that they have been provided with a contract which is a fixed term contract.

There is a practice now coming into effect which certain HR advisors, if we can call them that, are putting in place, namely that when an individual is coming to retirement age they are offered a fixed term contract and then the contract is determined when the term expires. This scheme has been put in place in cases where the employee does not have a contract that has a retirement date in it. The employees in question of course are not being advised to obtain advice from a Solicitor. It would appear that this decision of the Labour Court is

going to have far wider impact. Where such schemes are being put in place, following this decision of the Labour Court, it may very well be a lot easier for employees to challenge these cases on the basis that they were never advised of their right to obtain legal advice.

Where an employee would have obtained legal advice from an Employment Law Solicitor they would have been advised that there was no necessity to sign such contract, that they were entitled to continue working.

This case is also important in that the Court ordered reengagement of the employee.

This is an extremely important decision of the Labour Court and one which will have significant impact, particularly for employers who seek to use a scheme to circumvent the fact that there is no retirement age in the contract of employment or the retirement age is going to be difficult to justify.

Know your procedures - Unfair Dismissal

In the case of Unfair Dismissal claims we regularly come across situations where employers do not follow their own disciplinary process. In cases before the WRC or the Labour Court we will constantly hear employers when asked do they know their own disciplinary procedures say that they do. Then questions in relation to the disciplinary process you find out that they have scant knowledge if even that of their own written procedures. Even where they have read up on their own procedures they have not applied them.

We sometimes feel that employers and in particular smaller employers tend to feel that they need to have a Staff Handbook. We sometimes are of the view that this is where the process ends. They get a Staff Handbook. They give it to employees. It sits in the office and the employer may never read it or if they do they may at best skip through it. It is surprising to us how many employers fail to follow their own procedures when it comes to Unfair Dismissal cases, grievances, and

particularly, claims under Equality Legislation. We have employers whom we come across who seem to be of the view that we are saying something completely out of this world when we say that these conditions relating to the employee's employment which the employee could reasonably expect the employer to follow.

We do appreciate that employers have a lot on their plate. They must manage a business. They must make profits to stay in business. They have a mountain of regulatory issues that they must deal with. However, understanding their own Staff Handbook and their Contract of Employment which they give to their employees is part and parcel of the normal regulatory issues that employers need to understand and need to take time to understand.

When acting for employers, we certainly are of the view that it is now necessary to take the time to go through the Staff Handbook on a Section by Section basis so that the employer will at least on one occasion have had to consider same. Equally, employers now need to be advised to read their handbook on a regular basis.

Why are we saying this?

There is a simple answer. It is just good business. When you read this newsletter and previous issues of this newsletter we cover sexual harassment claims, harassment claims and Unfair Dismissal claims. More often than not employees win their claims because of the fact that the employer has failed to follow their own procedures. That is a simple fact. That fact does not seem to get through to employers. We are simple highlighting the issue that those who read this newsletter who act for employers need to make sure employers understand the procedures and apply them.

Company procedures in Unfair Dismissal cases

If any case highlights a warning to employers of the importance of following their own procedures at a very minimum the case of

Newbrook Nursing Home and Roche UDD1834 must be a prime example.

In this case the Court set out the relevant legislation along with case law. In this case the employer sought to rely on the seriousness of the allegations and the allegation that the allegation was straight forward to justify not following the procedures set out in its own disciplinary policy.

The disciplinary policy provided for an investigation stage. This was not undertaken. The Court stated that without an investigation into an allegation made it is difficult to see how any decision to invoke the disciplinary procedure could be considered fair and reasonable.

This case does move matters forward somewhat. It would appear now that the Labour Court take the view that in cases it is necessary to undertake an investigation process before going to the disciplinary stage. Certainly it will be relevant if it is in a company procedure.

This is an interesting decision of the Labour Court. It would appear to move the jurisprudence in relation to Unfair Dismissal cases forward that namely there must be an investigatory process before the disciplinary action or investigation can take place.

Covert CCTV

In Case ADJ8337 the employee in this case lost. It appears from the case that an issue arose in relation to CCTV. The representative of the employee raised the issue that this was covert CCTV. The employer's argument was that there were signs saying that there was CCTV onsite and that it was not covert CCTV as there was CCTV everywhere except the canteen and restrooms.

It would be our view in relation to the issue of data protection legislation and in line with the guidelines from the Data Protection

Commissioner that CCTV can only be used for disciplinary purposes where it is clearly identified to employees in either the staff handbook or on signage that the CCTV may be used for disciplinary purposes. If CCTV is on a premises and is identified to be for example for security reasons that does not mean that it can be used for disciplinary purposes.

The issue we would have is that where such a situation arises and CCTV is produced where it has not been clearly stated it can be used for disciplinary purposes then any such evidence should be discounted and what is on the CCTV should not be referred to. We would anticipate that this is an issue which will end up before the Courts in due course. Employers wishing to use CCTV for disciplinary purposes should clearly have it set out in their staff handbook and it should be made very clear to employees by appropriate notices or communications that the CCTV may be so used for disciplinary purposes.

Case where employee obtained 100% of his losses

In a case ADJ-4641 where a sum of €6,201.70 was awarded this was the employee's full economic loss being the loss of 5 weeks wages after the dismissal and ongoing losses after taking up new employment.

This is a case where this office represented the employee. This case is one, again, where the issue of procedures arise where the employee won due to various procedure deficiencies in the disciplinary investigation and in the application of the disciplinary sanction. The AO pointed out that the complaints were presented to the Complainant at the disciplinary investigation. The AO pointed out that the employee did not have time to prepare evidence to contradict that provided by the Respondent. Various allegations were denied. The AO pointed out that prior to making a finding of substance the Respondent ought to have considered any conflict in evidence and obtain, if necessary, additional evidence. The AO pointed out that the employer ought to have concluded the disciplinary investigation with

findings prior to considering whether disciplinary breach has occurred and the seriousness of any breach or breaches. The AO pointed out that the disciplinary conclusions also present findings that were greater than those discussed in the investigation in that offensive comments were restated as defamatory and allegations of laying hands were restated as physical assault.

Again, this is a case where the employee won because of procedures.

It is vitally important that employers obtain advice from Solicitors in advance of a disciplinary investigation to ensure that fair procedures are applied.

Unfair Dismissal

An excellent decision in relation to the issue of Unfair Dismissal as regards setting out all the relevant case law is a case ADJ-8547.

This is a case which the law on the issue of Unfair Dismissal has been set out in considerable depth.

It is a case where recognised Employment Law Barristers were involved. It would be a case that I would recommend those interested in Employment Law to read if only for the overview of the relevant legislation which is most helpful.

Gross Misconduct

The case ADJ-4887 is a very interesting decision in that the AO in this case has taken the time to set out in some detail what gross misconduct actually is.

The AO in this case referred to the case of the Labour Court in DHL Express (Ireland) Limited -v- Coughlan UDD1738 which stated that the established jurisprudence in relation to dismissal law in this jurisdiction taken a very restrictive view of what constitutes gross

misconduct. The AO referred to the case of Lennon -v- Bredin MI60/78 where the EAT stated:

"Section 8 of the Minimum Notice and Terms of Employment Act 1973 saves an employer from liability for Minimum Notice where the dismissal is for misconduct. We have always held that the exemption applies only to cases of very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer; we believe the legislature had in minds such things as violent assault or larceny or behaviour in the same sort of serious category. It the legislature had intended to exempt an employer from giving notices in such cases where the behaviour fell short of being able to fairly be called by the dirty word "misconduct" we have always felt that they would have said so by adding such words (after the word misconduct) as negligence, slovenly workmanship, bad timing, etc. They did not do so."

In relation to the issue of whether there was substantial grounds for the dismissal on the grounds of gross misconduct the AO pointed out that the applicable test is the band of reasonable responses test as set out by Mr Justice Noonan in the High Court case of the Governor and Company of Bank of Ireland -v- James Reilly 2015 IEHC 241.

This is a very useful decision in relation to the issue of gross misconduct.

Unfair Dismissal

For an excellent overview of the law relating to Unfair Dismissal on the grounds where an employer can dismiss we would refer those reading this newsletter to case ADJ-9098.

This case sets out considerable amount of case law relating to the issue of what is a reasonable response and it is a useful case for practitioners to review.

Constructive Dismissal

In case ADJ-3961 the AO in this case has written a lengthy decision in relation to the issue of Constructive Dismissal. It is extremely well worth reading as the AO has set out in some detail the relevant case law being the UK Court of Appeal case in Western Excavating (ECC) Ltd -v- Sharp 1978 IRLR 27, Berber -v- Dunnes Stores 2009 20 E.L.R. 61 and the case of Murray -v- Rockabill Shellfish Ltd 2012 E.L.R. 331.

For anybody interested in the issue of Constructive Dismissal and the law in this area this is a very useful case to read.

Withdrawal of a resignation

This issue often arise. It has arisen also now in the case ADJ-560. The AO in this case helpfully set out the decision of the Labour Court in Millett -v- Shinkwin 2004 E.L.R. 319 which held:

"A resignation is a unilateral act which, if expressed in unambiguous and unconditional terms, brings a contract of employment to an end. The contract cannot be reconstructed by the subsequent unilateral withdrawal of the resignation. Where adequate notice is given, the contract is generally terminated in accordance with its terms and since there is not repudiation the acceptance of the resignation by the employer is not required in order to determine the contract. There is, however a significant body of authority for the proposition that there are exceptions to this general rule and that there are occasions in which an apparently unconditional and unambiguous resignation may be vitiated by the circumstances in which it is proffered."

It is helpful that the AO has set this out.

The employee in this case was not successful.

It would be our view that there are going to be times when an employee will reassign "in temper". If they subsequently withdraw that resignation very quickly then, in our view, that would be one of the

exceptions. However, it would be our view that it needs to be withdrawn quickly and it needs to be a resignation that was effectively done in temper or in the particular circumstances that arose at the particular time where there was a reaction rather that a considered reaction by an employee.

Racial Discrimination

In case ADJ-10962 the AO in this case has set out a comprehensive decision wherein having regard to the circumstances an award of €10,000 was made which was made exempt from tax.

The facts in the case are interesting but what is probably more interesting is the approach that the AO took in relation to this matter as regards the investigation undertaken by the employer. The employers sought to rely on Section 14 A(2) which is a complete defence to a claim and submitted that they conducted an investigation and appeal process into the complaints of harassment. The AO in this case held that it was clear from the totality of the evidence produced that the Respondent did have a procedure in place for investigating such incidents and when reported they were investigated. However, the AO pointed out that the investigation into the grievance was flawed and were not applied fairly and consistently and that the findings were made against the Complainant on the basis that supporting evidence was not available even though the accused person did not dispute the allegations made. In addition, the AO pointed out that it is clear that the findings were part of an appeal process without relevant parties even being interviewed. The AO held that the employer could not rely on the defence in Section 14 A(2) in that they had not shown that they took reasonably practical steps to prevent the harassment or to reverse its effect.

This case is a reminder to employers of the importance of having procedures and ensuring that those procedures are applied fairly and consistently. If the employer in this case had applied their own procedures in a fair and consistent manner and have sought to

reverse the effect of the harassment then in those circumstances the employer may very well have won this case.

This case is a further example of why employers need to be extremely careful in making sure that procedures are fully covered.

Equality - Direct Discrimination

The CJU in case C-451/16 held that Council Directive 79/7/EEC on the implementation of the principle of equal treatment of men and women in matters associated with security must be interpreted as precluding National Legislation which requires a person who has changed gender not only to fulfil physical, social and psychological criteria but also to satisfy the condition of not being married to a person of the gender that he or she has acquired as a result of that change in order to be able to claim a State Retirement Pension as and from the statutory pensionable age applicable to persons of his or her acquired gender.

Burden of Proof in claims under the Organisation of Working Time Act

An interesting case on this issue arose in ADJ7789 being a case of a steel worker and a company.

The AO in this case set out that the complainant had failed to specify the dates of the alleged breaches during the time period and that the respondent must know with reasonable clarity what it is expected to rebut in line with fair procedures and following the Labour Court case in Antanas –v- Nolan Transport DWT1117.

The AO in this case held that the complainant had not discharged the burden of proof.

The evidence of the complainant employee was that he usually got his 15 minute morning break but due to the fact that he was a supervisor for the team and that the work was staggered he could not take his lunch break of 30 minutes. The employee set out that he received approximately two lunch breaks per week.

The issue of the case of Jakonis Antanas and Nolan Transport being a case where this office was actually involved is one where we find that there is a startling attitude by some representatives in relation to what they take from that case.

Some representatives in looking at this case seem to believe that there is a requirement for an employee to set out times and dates on which an employee did not receive a particular entitlement under the Organisation of Working Time Act.

That is not our understanding of the case.

In the Nolan Transport case the Labour Court set out Section 25 of the Act and in particular sub section 4 which provides;

"Without prejudice to sub section (3), where an employer fails to keep records under subsection (1) in respect of his or her compliance with a particular provision of the Act in relation to an employee, the onus of proving in proceedings before a Rights Commissioner (now Adjudication Officer) or the Labour Court, that the provision was complied with in relation to the employee shall lie on the employer".

The Labour Court in that case went on to state as regards the particular provision that;

"This suggests that the evidential burden on the claimant to induce such evidence as is available to support a stateable case of non-compliance with a relevant provision of the Act. It seems to the Court that, as a matter of basic fairness, the claimant should be required to do so with sufficient particularity as to allow the respondent to know,

in broad terms, the nature of the complaint and the case which they are expected to meet.

As was pointed out by Lord Devlin in Bratty –v- Attorney General for Northern Ireland 1963 A.C. 386 an evidential burden is satisfied where the evidence adduced is sufficient to "suggest a reasonable possibility".

It would be our view that once the employee sets matters out in general terms in a way that is sufficient for the employer to know, in general terms, what the claim is then the employee has passed the burden of proof.

The next issue then is records. Where there are records in the statutory format (and that rarely is the position) then in those circumstances the onus of proof rests on the employee.

Where there are no records in the statutory form then the burden of proof is on the employer.

Where an employer does not produce records or only an extract of the records then in those circumstances the records are not there before the WRC or the Labour Court and effectively it is back to a situation of there being no records as regards the burden of proof.

An interesting aspect of this case also is the fact that reports from a Workplace Relations Inspector were relied upon. If a report from a Workplace Relations Commission Inspector are to be relied upon then in those circumstances it would be on the basis of the inspector being requested to produce a report, appearing before the WRC or the Labour Court, presenting their evidence and being there to be examined and cross examined. If however what is being relied upon is that there was a WRC inspection that is not sufficient, in our view, as evidence.

If evidence is to be furnished then it is only fair that the Inspector would be there and produce their records and documentation. An inspection carried out by a WRC Inspector under their statutory powers is entirely different than an inspection carried out for the purposes of a case.

An Inspector carrying out an inspection will be doing a general inspection of all records and it is quite clear from the WRC's own documentation that the primary role of an Inspector in such circumstances is to seek compliance going forward. This is quite correct. The Inspector is not there to do a forensic examination for every simple employee. This would be different if there is a situation where an Inspector is asked to do an inspection as part of a claim which would be a forensic examination for the relevant statutory period with the appropriate records being produced.

The issue of reports from Inspectors who carry out WRC inspection being produced to a WRC Adjudicator is an issue which we would anticipate is going to be tested in the Labour Court. Our understanding of Labour Court procedures are that they take the view that the Labour Court is there to investigate matters and that statements from other persons unless carried out under statutory provisions are matters which the Courts themselves would review. Even where an inspection was carried out under a statutory provision to be produced as evidence the person who produced the report, statement or letter would need to be there.

The next issue is that the process is an inquisitorial process. This has been held by the Supreme Court in a decision of the Supreme Court given by Mr. Justice Frank Clarke who is now the Chief Justice. In that case the decision stated that the High Court and the other Courts are adversarial. It was held that the WRC is an inquisitorial process. The Labour Court has confirmed that they are an inquisitorial process.

It would therefore appear that once a claim has been raised that there is a requirement on the WRC to put in place an inquisitorial process which means looking to see has there been a breach. Once the employee identifies the breach in very general terms where records have not been produced then that is all the employee can be expected to do.

The issue as to the burden of proof and how cases are to be run in the WRC on the issue of records which are particularly relevant for the issue of breaks or rest periods or excessive hours of work or notifications will have to be dealt with by the Labour Court in due course with a definitive ruling as to how these cases are to be run.

The Labour Court did in the case of Nolan Transport and Jakonis Antanas give a very detailed decision. The difficulty with it is that it is a decision with seems to be misquoted a lot of times. We are not criticising anybody for misquoting it. It is written in absolutely plain language to enable employer representatives to properly quote the case. In our experience the case is quoted without reference to the exact terms of the decision but more in a general statement. It may be useful and hopefully will happen that the Labour Court will address this issue again so that there is absolute clarity. Unfortunately, misquoting cases or providing limited "extracts" is becoming all too common.

There is a very interesting aspect of this case also namely the claim that holiday pay was not paid in advance. The AO in this case found that it had not been paid in advance and that that was a breach of the Act.

This is a very detailed decision of the AO. It runs to 72 pages. It equally covers issues relating to extension of time. It is a comprehensive decision. We are certainly not criticising the AO in this case as regards the finding in relation to the Organisation of Working Time Act. The AO in this case has set out in broad terms the evidence that was given and it may well be that this case was being run on a

particular basis. We will be interested to see whether this case goes on appeal to the Labour Court.

Claims under the Organisation of Working Time Act

There is a very interesting decision by an AO under ADJ-11827.

In this case the employee had difficulties setting out in any great particularity the basis of his claim. In addition, however, the employer in this case was in an equal position and further the employer had not maintained records as required under the Organisation of Working Time Act. The AO in this case was properly critical of the employer not having records. The AO referred to the provisions of Section 25 of the Organisation of Working Time Act which places the burden on the employer in the absence of records. The AO in this case partly upheld the employee's claim. What is extremely interesting is that the AO took the time to direct that the employer going forward would maintain records in accordance with the Organisation of Working Time Act. While it is not within the remit of an AO as was not covered in the decision it would our opinion, and it is only our opinion, that in cases such as this the WRC Inspectorate should themselves in the coming months be calling to the employer to make sure that the records are being maintained.

Naming an incorrect employer in WRC cases

In ADJ-13596 the AO in this case found that they had no jurisdiction to hear the case because the employee had listed the wrong entity as the employer.

This is not an uncommon issue.

Employees regularly appear and tell Solicitors who represent them as to whom they claim they were employed by. This is very often not the full employer name. It could be a business name. It may be different

than the name on their P60 or on the P21 which they receive from the Revenue.

Unless you have a full company name, it is imperative that employees go and check out whom their employer and by that we mean the legal name of their employer.

When the original Bill was going through the Oireachtas we had proposed along with the Employment Law Association of Ireland that it would be sufficient for an employee to set down the business name of the entity. This was rejected by the then Minister. Therefore, unfortunately employees are losing cases because of failure by them to properly identify whom their employer is.

Tax Treatment of WRC Decisions

In case ADJ-13396 the AO in this case must be commended for the very logical way in which the decision is set out as regards the tax treatment. The AO in this case has set out in a structure what each award is and the tax treatment of same. It is very easy to see from that decision how matters have been set out.

There are many AO's who are very clearly and properly setting out what the tax treatment of any award is.

This is useful. It is useful to employers. It is useful to employees. If a mistake is made the matters can always be appealed to the Labour Court. While the Labour Court will treat matters as a *de novo* appeal it would be our view that if the only issue relates to the proper tax treatment of any award that this is a matter which the Labour Court can deal with that specific issue if all other matters are agreed between the parties as being a reasonable decision but I do commend the AO and those AO‘s who do actually take the time to set out the tax treatment as this is extremely important.

Risk Assessment for all breastfeeding mothers

There is an interesting decision of the European Court of Justice in case C-531/15 being a case of Ramos and Cervico Galego de Saude.

In that case the ECJ held that Article 19 (1) of Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment must be interpreted as applying to a situation in which a breastfeeding worker challenges, before a Court or other competent authority of a Member State concerned, the risk assessment of her work insofar as she claims that the assessment was not conducted in accordance with Article 4 (1) of Council Directive 92/85/EEC which is a Directive on the introduction of measures to encourage improvements in the safety and health at work of pregnant employees and workers who have recently given birth or are breastfeeding. The ECJ held that on a proper construction of Article 19 (1) of the Directive it is for the worker in question to provide evidence capable of suggesting that the risk assessment of her work had not been conducted in accordance with the requirement of Article 4 (1) of the Directive and from which it can therefore be presumed that there was direct discrimination on the grounds of sex within the meaning of Directive 2006/54.

For employers in order to be in conformity with the requirements or Article 4 (1) of Directive 92/85 the risk assessment of the work of a breastfeeding worker must include a specific assessment taking into account the individual situation of the worker in question in order to ascertain whether her health or safety or that of her child is at risk.

The ECJ held that Article 19 (4) (8) of the Directive 2006/54 states that the rules reversing the burden of proof in Article 19 (1) also apply to situations covered by Directive 92/85 insofar as discrimination on the grounds of sex is concerned.

The ECJ pointed out that in Danosa case C-232/09 the objective pursued by the rules of the EU Law is to protect women before and after they give birth. They have held that a worker who is

breastfeeding must be protected on the same basis as workers who are pregnant or have recently given birth.

This is an issue which employers need to be very careful of an ensure that appropriate health and safety checks are put in place to protect such workers.

Employee's rights against the State

In case C-57/17 the CJEU held that where an employee seeks statutory compensation on the termination of a contract of employment at the workers request on account of a transfer of workplace by the employer obliging an employee to change residence would fall within the provisions of Article 3 of Directive 2008/94/EC. This Directive deals with the protection of employees in the event of the insolvency of an employer. This is an interesting case as to the protections that employee would receive.

Living Wage

The Living Wage is to be increased to €11.90 per hour. The National Minimum Wage rate is €9.55 per hour for an experienced adult worker. The National Minimum Wage is a binding rate of pay.

The Living Wage is not a binding rate of pay. However, many employers have on a voluntary basis agreed to pay to employees, at a minimum, the Living Wage.

The fact that there is a difference between a Living Wage and the National Minimum Wage does raise some important questions. Firstly, if the National Minimum Wage does equate to a Living Wage then this is a significant problem. The issue in relation to the National Minimum Wage is that many workers who are on the National Minimum Wage are also in receipt of Social Welfare benefits. In effect this means that other tax payers are given a subsidy to employers who

engage people at the National Minimum Wage. There is a question as to whether this is fair.

What is clear however is that there are many employers who being responsible employers are agreeing to pay at least the Living Wage and they should be commended for this.

The National Minimum Wage will rise to €9.80 from January next.

Recent judgements in Personal Injuries cases

The case of *Natalie Grimes –v- Motor Insurers' Bureau of Ireland [2018] IEHC 330* highlights the importance of proper investigation and due diligence before proceeding to sue the MIBI. Ms. Grimes was involved in a road traffic accident when a passenger in her own motor vehicle being driven by Mr. Sheridan. She suffered injuries as a result. Ms. Grimes did not have insurance for her motor vehicle. Similarly, Mr. Sheridan was not insured to drive the motor vehicle on the night in question. After the accident and an attendance at the A & E Department, Ms. Grimes stated that Mr. Sheridan could not be traced. On that basis, Ms. Grimes sued the Motor Insurers' Bureau of Ireland as a sole defendant for compensation for her injuries. The MIBI argued that the only reason why Mr. Sheridan could not be traced was because Ms. Grimes failed to make enquiries with the investigating Garda. The investigating Garda did in fact have addresses for Mr. Sheridan in Ireland. The MIBI therefore argued that Ms. Grimes had not established a cause of action or right of recovery against them. Barr J in the High Court was not satisfied that Mr. Sheridan was an untraced driver within the meaning of the 2009 MIBI Agreement as the investigating Garda at all times had the necessary information. Barr J held that the MIBI can only be named as a sole defendant where the owner or driver of the unidentified or untraced offending motor vehicle is unidentified or untraced. Ms. Grimes did not establish an entitlement to sue the MIBI as a sole defendant and, in those circumstances, the claim was dismissed.

The case of *Rachel Hardiman –v- Dublin Bus and James Richardson* involved a healthcare worker who was injured while travelling as a passenger on Dublin Bus on her way to work. The Dublin Bus driver had hit Mr. Richardson when he ran onto the roadway, taking a bottle from his pocket and throwing it at a group of Asian people, including a child, and ran back across the roadway. In the meantime, Ms. Hardiman had been jolted forward on the bus and hit her head and arm off the bus fittings, injuring her face, neck, shoulders and arm. Mr. Richardson, having been joined as a third party to the proceedings, did not appear in court. Judge Terrence O'Sullivan awarded €25,000.00 in damages to Ms. Hardiman. He stated that although the Dublin Bus driver had lifted his foot off the accelerator after seeing the man on the roadway, this was not enough. A prudent driver would have slowed down as drivers could not always expect pedestrians to do as they should do. The bus driver had assumed that Mr. Richardson was going to continue to cross the road instead of turning back. This case is currently under appeal.

The case of *Ruari Owens (A Minor) –v- Zoological Society of Ireland* involved a horrific incident in Dublin zoo. Ruari and his family were visiting Dublin Zoo when a Brazilian tapir lifted his two year old sister in her mouth and violently shook her, causing her injuries. Their very brave mother dived at the animal and managed to dislodge her daughter but suffered injuries herself as a result, including significant bite injuries. While Ruairi and his brother, Cathal, did not receive physical injuries, they suffered psychological injuries after witnessing this violent attack. Ruairi was awarded €25,000.00 for his injuries as a result of this incident. Cases remain ongoing for other family members. This was a very violent incident and devastating for a family after what should have been a family day out. In December 2014, the Zoological Society were prosecuted in the District Court. They avoided criminal prosecution but were ordered to pay €2,500.00 each to two different charities.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Mitigation of Loss

When you bring a claim for personal injuries, you have a legal duty to mitigate your loss. What does this mean? It means that you must do your utmost best to keep your injuries and losses arising out of your accident at an absolute minimum. Below are our top 3 tips for minimising losses: -

1. Follow all of your doctors' advices in relation to treatment, e.g. if physiotherapy has been recommended, go for physiotherapy. If swimming or core strengthening exercises are advised, do it! If a specialist referral is recommended, go to the specialist. If you do not receive the appointment from the specialist, follow up with his/her secretary. Excuses such as, "I can't afford it", "I'm too busy" or "I don't like it" will be deemed just that – excuses.
2. Return to work as soon as you are certified as fit to do so. If you are no longer able to do your job because of long term symptoms, you will need to start thinking about what jobs you can do and taking steps towards getting such a job. You may need to re-train or do courses. Unless you have suffered a very serious injury, you will not obtain future loss of earnings from the date that your case is finalised to the date that you reach retirement age.
3. Replace any personal property damaged in the accident, as soon as possible. For example, replace or repair a damaged motor vehicle, as soon as possible. Take photographs of the damage to the motor vehicle and retain all invoices/receipts for repairs. Do not continue to use car hire or taxis. You will not recover all of these expenses if you have not been keeping your loss at a minimum.

If you have not been mitigating your losses by keeping your losses at a minimum, a Judge can reduce any amount of compensation payable to you for your failure to do so.

Update on Transvaginal Mesh problems

On 10th July 2018, the NHS suspended all vaginal mesh operations in England. This was following the Chair of an independent review expressing concerns on the "life changing and life threatening injuries" to women who have had vaginal mesh inserted.

Following this suspension, the Chief Medical Officer in Northern Ireland has advised that a pause in mesh surgery in Northern Ireland be introduced.

Given that a suspension of the use of mesh to treat stress urinary incontinence was introduced in Scotland in 2014, the US re-classified vaginal mesh as a high risk medical device in 2012, England have now suspended vaginal mesh operations and now the Chief Medical Officer in Northern Ireland has advised a pause in mesh surgery, what is being done in Ireland?

We know that the Chief Medical Officer is to prepare a report on the use of these devices. In June 2018, Minister Simon Harris met with women who have been suffering following the insertion of mesh and following this meeting, a circular was issued by the HSE advising doctors that they should only use the vaginal mesh if more conservative measures have not worked. It also advised that women be advised of the risks, including the risk of pain long term. However, we have yet to see a suspension or ban similar to other countries.

For those women who are suffering in silence, please don't. Report your symptoms to the Health Products Regulatory Authority in Dublin as official reporting cannot be ignored. You should also speak with a solicitor. Many Irish women are suffering in silence and are not linking their symptoms with possible negligence and/or a possible defective product.

***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.**