Wishing all our clients and those reading this issue of Keeping in Touch a very Happy Christmas and a Peaceful New Year

INTRODUCTION

November and December has been an extremely busy and interesting time for this firm.

On the 28th of November, Richard presented a joint Employment Law Association of Ireland and Southern Law Association seminar in Cork on the "The Practical Aspects of Presenting and Defending Working Time Claims from a Practitioners Perspective".

On the 4th of December, Richard presented the same seminar to a joint ELAI and Limerick Bar Association joint seminar. Copies of the seminar notes are available in the Publication section of our website www.grogansolicitors.ie. As this seminar note runs to 93 pages, we have to facilitate colleagues and those interested in Employment Law, sub divided the lecture in the information section of our website in respect to Section 11 – Section 23 inclusive and Section 26 of the Organisation of Working Time Act.

We have seen a significant rise in what we would have thought was an area which should now have ceased to be a practice area for Employment Lawyers. Pregnancy related dismissals and dismissals during Maternity Leave have risen substantially in the last number of months. We regard this as a worrying trend. We have also seen a significant rise in case of penalisation for bringing a claim under the Organisation of Working Time Act. In one case, before a Rights Commissioner, an award of €12,500.00 was awarded in respect of an individual who worked a limited number of hours at minimum wage.

We have also seen a significant rise in employees not being paid a Sunday premium. Again, we have seen a rise in the number of these claims going to the Rights Commissioner and some of them are going to the Labour Court. Equally, National Minimum Wage claims seem to be on the increase.

Richard Grogan of this firm was involved in the drafting of the ELAI submissions on the Workplace Relations Bill. This drafting involved drafting actual amendments for consideration by the Minister. A number of the submissions made have been accepted in principle by the Minister.

We have also seen an increase in the number of employees bringing their own claims by lodging the claims online. The number of these cases then subsequently arrives on our desk. Some of the common problems which we are finding are as follows:

1) In National Minimum Wage claims a request under Section 23 is not sent prior to issuing the complaint or if it is the required waiting time is not adhered to.
2) Employees are issuing claims against the wrong employer. The type of situation which arises is that the name over the shop or entity is "Blogs Hardware". The employee issues against that name rather than the legal entity being "AB Blogs" or "Blogs & Co. Ltd.".
3) The claim is being brought against under the wrong act.

Unfortunately, individuals believe this is possible to bring their own claims. While individuals would never go and try and treat themselves if they had a medical complaint it seems now prevalent for individuals to believe they can do their own work of a legal nature without the appropriate specialist advise. Claims are coming undone and employees are losing out because of a system where the proper name of the Employer is often not advised to the employee. Equally employers are trying to do their own defences with similar results.

Holiday Entitlements will accrue during periods of sick leave

On the 12th of November the Minister for State in the Department of Jobs, Enterprise and Innovation introduced an amendment to the Organisation of Working Time Act, on behalf of the Minister, which will amend Sections 19 and 20 of the OWTA. The effect of the amendment will be that an employee, who is out on certified sick leave, will continue to accrue holiday entitlements for up to 15 months.

The effect of these amendments is that if an employee is out sick for 15 months or any longer period of certified sick leave, that on their return to the workplace, the employee will have a right to take 5 weeks paid holidays. This is referred to in the Legislation as Annual Leave. This will be in addition to any other holiday entitlements which they will earn in the year of return to the work place.

This is an issue that this office had made submissions to the Minister early in 2014. The reason for this office making these submissions to the Minister was because of a European Court of Justice which ruled

that the Directive had to be read on this basis. It certainly was not the sole reason that the Minister introduced the amendment. The Minister had been advised that there was a prosecution coming against Ireland for failing to provide for an employee to accruing holiday entitlements during periods of sick leave.
There is a Committee in the Dail which is there to review European Legislation. It will be hoped, that going forward, the Committee would also review ECJ rulings as to how they would impact on Irish Legislation.

Workplace Relations Bill 2014

The Report Stage was due to resume in early December but did not. The Minister, it is believed, will be bringing forward a number of new amendments at either the new Report Stage or in the Seanad.

Minister Nash announces review of the use of Zero Hour Contracts of low paid workers

One issue which amused us greatly in relation to the announcement by Minister Nash was the statement that Zero Hour contract workers are protected by the provisions of Section 18 of the Organisation of Working Time Act. This is a misconception. If an employer has a proper Zero Hour Contract then there is absolutely no protection under the legislation, as it currently stands, for those employees. The relevant section is Section 18 of OWTA, which is there to deal with Zero Hour Working Practices. It does not protect employees on Zero Hour Contracts as the most they can get is 25% of their contractual hours. 25% of zero is zero. We accept that this is a very unpopular position for us to adopt but we have done so in our seminar notes to the ELAI/Southern Law Association and the Limerick Bar Association. The arguments which we have in relation to the Law on this topic are available to read in the lecture note which is in the Publication section or in respect to Section 18 of OWTA in the Information section of our website.

We have sent a copy of our lecture note to Minister Nash and we referred him to the relevant pages which are pages 48-55. We note that the Minister is going to have it reviewed, dealing with all the relevant stakeholders. This refers to employers, employees and Trade

Unions. The Minister has not referred to dealing with those who daily bring claims under the Organisation of Working Time Act and who deal with the Legislation, as part of the review process. Our position is that the protections in Section 18 of OWTA are an illusion for those on Zero Hour Contracts.

The submission has been made by this office to Minister Nash in relation to this issue. One of the submissions that has been made is that the Minister, as part of the review will ensure that those who present claims on behalf of workers relating to Section 18, which will include lawyers, would be included as part of the process for the purposes of identifying the issues which arise.

I do believe that there are circumstances in which Zero Hour Contracts are appropriate. However, at the present time, there would be a view that they are significantly abused and do create a form of bonded worker.

An Unusual Unfair Dismissal case

In case UD690/13 the employee was due to meet her employer. Normally she would meet at a pharmacy. In this case she was told to meet at a local hotel. The employer was there with the accountant. The employee was introduced to the accountant and the conversation was about restructuring. Redundancy was mentioned. The employee asked if this related to her. She was told that it was. She said she was shocked. The employee stated she had no problem doing calls to GP's which was relevant to the business or undertaking retraining. The employee was due to go on holidays. The employee went on holidays. When the employee returned from holidays she was advised of her redundancy. She was told that she did not have to work out her notice.

The Tribunal disagreed with the findings of the Rights Commissioner.

The Tribunal was of the view that there was a genuine and honest redundancy due to the changing nature of the business and the change in the required skill sets and qualifications.

The Tribunal importantly went on to state that they were not persuaded by the employee's argument that the employer must;

(a) Afford an employee an opportunity to respond to any proposed redundancy; or
(b) Facilitate an employee by having a representative present or to have the employees' views on the redundancy fairly and impartially considered; or
(c) Have a right to appeal the decision to make the employee redundant.

The Tribunal went on to state;

"Such may be good and prudent practice and is probably found in larger enterprises however the Tribunal is not persuaded that such prudent practice are mandatory with automatic consequences for employers who do not follow them".

This decision of the Tribunal seems to be contrary to the requirements which were succinctly stated by Lardner J In Bolger –v- Showering's (Ireland) Limited [1990] ELR184 as follows;

"In this case it was the ill health of the plaintiff which rendered him incapable of performing his duties as a forklift driver. For the employer to show that the dismissal was fair, he must show that;

(1) It was the ill health which was the reason for his dismissal;
(2) That this was substantial reason;
(3) That the employee received fair notice that the question of his dismissal for incapacity was being considered; and
(4) That the employee was being afforded an opportunity of being heard".

In the case of Frizelle –v- New Ross Credit Union Limited the High Court July 30 1997 Flood J said that a question of Unfair Dismissal was an issue. There were certain premises which must be established to support the decision to terminate the employee's employment for

misconduct. While we appreciate that decision related to misconduct the learned Judge added that;

"Put very simply, principles of natural justice must be unequivocally applied".

The issue of Unfair Dismissal and the rules applicable may require a higher standard from large organisations. Saying this, there are certain minimum requirements which must be met. We would regard this as a decision which is going to be jumped on by many representatives where fair procedures are not followed when acting for employers, to argue that fair procedures do not need to be applied where the employer is a small employer. The very basis of any dismissal is that the employee is made aware that dismissal whether it is for misconduct or redundancy is a possibility. They must have an opportunity of knowing what the issues are. They must have an opportunity of being heard. They must have an opportunity to appeal. They have a right to be represented and to have their case heard and decided on impartially.

We anticipate that this decision will be quoted by a number of representatives who act for employers. We are not fully satisfied that this decision should be regarded as setting a basic principle but may turn on the particular and peculiar circumstances of the particular case.

Where conduct of an employee does not merit dismissal and therefore the employee has been unfairly dismissed.

In the case of Karl Meade –v- Adelphi Carlton Limited T/A Cineworld Cinemas being UD892/2012 the EAT found that the conduct of the employee did not merit dismissal and therefore he had been unfairly dismissed. The reasoning in this decision is clear, precise and reasoned. It is a very good decision of the EAT. The employee was employed by the employer as a multi-functional operator from April 2009. He was dismissed in April 2012. It was accepted that the employee had a good working record with the employer up until the date of the incident which lead to his dismissal.

The employer submitted that the staff received a 40% discount on items bought in the shop. There was a policy that the staff must ensure that the goods received match with what was on the receipt. Any discrepancy between what is received and what is signed for on the receipt is viewed as a breach of policy. It was found that there was a shortfall in stock. The operations manager examined CCTV footage. The employer submitted that they observed the employee receiving a large hotdog and a packet of wine gums. Having later reviewing the receipt for this transaction it was discovered that the receipt was signed for by the claimant but recorded as a regular hotdog and a packet of malteasers. The increased price of what should have been paid was approximately a difference of €1. The employer made the decision to dismiss the employee on the grounds of misconduct. The employee admitted that he did not read the receipt before he signed it but claimed it was an honest mistake and he did not intend to intentionally defraud the employer.

The EAT considered whether the employer applied fair procedures and was reasonable in its decision to dismiss the employee. The EAT held it was the evidence of both the original decision maker and the person who heard the appeal that the mere fact that there was a breach of the policy in relation to staff discount purchases meant that an act of gross misconduct had occurred and that dismissal was the appropriate sanction.

The EAT held that this suggests to the EAT that whether or not there was an honest mistake by the employee that this could have no impact on the outcome of the disciplinary decision. On that basis the EAT was not satisfied that it was reasonable for the employer to conclude that this was an act of gross misconduct and that the appropriate sanction was dismissal. The employee was awarded €20,000

It is important for employers when dealing with any matter of a disciplinary nature that a proportionate response applies. It is important to look at the previous conduct of the employee and their service with the employer. It is also reasonable to consider whether the employee made an honest mistake or omission. There should never be any black and white views in relation to any matter. Each disciplinary matter should turn on its own particular circumstances. The issue of a proportionate response should always be considered.

It does seem strange but employers seem to work on the basis that either an individual when they are put through a disciplinary process will either have the complaint dismissed, the employee will receive some form of written warning or that the employee will be dismissed. Rarely, where dismissal is an issue, has an employer considered the issue of suspension for a period of time without pay. Where an employer has a very strict policy in relation to for example staff discounts possible the issue of a suspension for a week without pay would be a proportionate response. The issue of suspension without pay is rarely considered. Maybe more employers should do so.

Internships

On our website you will find a note from us on the danger of Internships for Employers.
Ireland is not the only Country in which the issue of Interns is the subject of Litigation. Universal and a group of former Interns, agreed in October to settle a class action Law Suit, where Interns claimed they should have been paid for their work. This was a $6.4 million settlement which is subject to Court approval. In the US there have been a number of high profile claims by Interns.
Litigation in the US was picked up by a claim against Fox Searchlight Pictures which alleged that the Company violated the Fair Labor Standards Act. That Act mandates that unpaid Internships should benefit the Interns not the Employer. In the Fox case it was contended that the Minimum Wage Laws were violated during the making of "Black Swan". The lawyers for Fox Searchlight argued that an independent company, not the studio, hired and managed the "Black Swan" Interns. In 2013, a US District Judge in New York rejected the argument and concluded that "Searchlight received the benefit of unpaid work, which otherwise would have required paid employees".

This ruling has been appealed contending that Interns are not employees subject to wage protection if they, not the employer, are the "Primary Beneficiaries" of the Internships. A ruling of the US 2nd Circuit Court of Appeals in New York is expected in 2015.

Transfer of Undertakings

In the case of Vaiva Navickiene and Noonan Services Group Limited RP684/2013 the EAT had to deal with what is now becoming a common question as to what is the position where an entity contracts with an outside service provider to provide services and subsequently cancels that contract and brings that particular service in-house. The issue which arises then is whether there has been a Transfer of Undertakings or whether this is simply a new contractual situation therefore giving rise to a dismissal for the purposes of the Redundancy payments Acts or a continuation of the employment. In the case in question the EAT gave a very considered decision having referred to the case of ECM-v- Cocks [1998] IRIR416 and Section 7(1) of the 2003 Regulations finding that there was no new employer where a company had brought a service back in-house. In such circumstances the employee was entitled to bring a claim for redundancy. In this case the employee was not engaged by the original contracting party when they brought the services in house. This case opens up the possibility of the following situation arising.

Example

Company A outsourced its cleaning services in 2000.

Company B received the contract and provided four individuals to act as cleaners.

On the 31st December 2014 Company A terminated the contract with Company B. Company A agrees to take on the four cleaners. They provide them with a contract stating that their employment shall be continuous for the purposes of the Unfair Dismissal legislation and by implication the Redundancy Payment Acts.

The four individuals then bring a claim for redundancy against Company B.

Subsequently 6 months later Company A ceases operations. The employees can claim under their contracts for redundancy for 4.5 years from Company A.

It would appear in such circumstances following the reasoning of the EAT which is a reasoned decision that the employees in those circumstances will in fact be able to maintain a case against Company B and subsequently Company A for redundancy.

If Company A did not have a clause protecting the employees' rights in the new contract then if Company A ceased after 2 years the employees would have a redundancy claim based on 2 years' service not 6.5 years' service.

We had been saying it for some time but the issue as to what is a transfer under our Regulations is often difficult to determine particularly where a service is being provided. This is one area of law where attention is needed to clarify exactly what the law is so that employers and employees will know what their obligations are. The EAT is obliged to apply the law even if they do not like the law. This decision of the EAT in the recent case is a reasoned and we believe correct decision. It clearly opens the potential for employees where the contracting parties deal with matters fairly to be able to claim redundancy and maintain a right by contract subsequently to an additional redundancy payment if they were ever made redundant, or to lose out subsequently. That may seem strange but that would appear to be the position.

Proposed New ERO for the Security Industry

New draft proposals for a JLC for the Security Industry have recently been published.

The time for making submissions finished on 12th November last.

The new proposals make a lot of sense. They will bring clarity and certainty. Minimum rates of pay of €10.75 per hour together with rules relating to overtime payments are set out. There is no provision however in the draft proposals, as published, for a Sunday premium in line with Section 14 OWTA. We have proposed clarity on this issue. We have won two recent cases on this issue recently one being against Viking Security.

As the security industry is heavily populated by non-English speaking or at least non English reading individuals we have also proposed, as part of the process, that any ERO would be produced in various languages to assist employees understand same. The proposals as set make no provision to notify the employees of same under Section 3 or Section 5 of the Terms of Employment (Information) Act and we have also proposed this.

There are great advantages for both employers and employees of having ERO's. It helps to provide a level playing pitch. It provides for a reasonable level of pay. It provides for reasonable certainty for both

employers and employees as to the rules they need to apply and comply with and how they should be applied.

We are delighted to see that ERO's are now being negotiated. There have been a number of cases against security companies recently. By bringing in an ERO, this should help reduce the number of claims against such entities. This will benefit both employers and employees and reduce the number of claims going to Workplace Relations.

Deduction –v- Reduction

In the case of 58 employees and Green Isle Foods Limited PW47-PW105/2013 the case involved a situation where the employer imposed a 5% cut in pay on all the employees from August 2011.

The employees did not agree to the 5% pay cut.

The employees contended that imposing a 5% pay cut without each person's prior authorisation in writing was an illegal deduction from pay and a breach of the payment of Wages Act 1991.

The employer contended it wasn't a deduction from pay as defined in the Payment of Wages Act. The Eat considered the decision of Edward J in the High Court case of Michael McKenzie and Others –v – The Attorney general and the Minister for Defence record number 2009.551JR. They referred in particular to paragraph 5.8 thereof. On that basis they held that it wasn't a deduction but was a reduction and therefor the employees could not succeed and that the decision of the Rights Commissioner would be overturned.

Clause 5.8 of the Decision of Mr. Justice Edwards as regards this particular paragraph of his decision is consistently raised. However, that section of the Decision has to be read in light of the entire decision. In our view that paragraph is being taken out of context.

In addition the decision of Mr. Justice Edwards did not deal with a case of a deduction or a reduction of pay. That case dealt with an allowance. There is no provision under the Payment of Wages Act to bring a claim for an allowance. At some stage this determination

relating to the McKenzie case is going to go an appeal to the High Court. The McKenzie case, in our view, is being quoted out of context. In many cases before Rights Commissioners, clause 5.8 of that Decision only is produced. When the entire decision is produced and clause 5.8 is read in conjunction with the entire decision it is clear, in our view, the learned High Court Judge was referring to allowances which is different than wages.

For the purposes of assisting colleagues who may have such claims we are including in a detailed submission which we have used in other cases relating to this issue. We hope colleagues will find this of use.

Our legal Submission

Reduction/Deduction of Wages under Payment of Wages Act

An argument is currently being made in relation to the issue of wages where there is a deduction.

The argument being made is that the Decision of Edwards and J in the High Court in the case of Michael McKenzie and Others and Ireland and the Attorney General and the Minister for Defence Rec. No. 2009/551JR and in particular paragraph 5.8 thereof where the learned Judge states that

"5.8 Finally, the Court agrees with the Respondents' submission that the Payment of Wages Act, 1991 has no application in the circumstances of this case. First, as has been pointed out, correctly in the Court's view, the reduction in the PDF allowance is not a "deduction" from wages payable. It is a reduction of the allowance payable. The Act has no application to reductions as distinct from "deductions". Secondly, even if that were so, any alleged breach of the Payment of Wages Act, is not justiciable controversy before the High Court in circumstances where the Act sets up specific enforcement mechanisms to be availed of elsewhere in such circumstances".

The Court in making its determination was referring to paragraphs 4.27 and 4.28. In those Sections it was stated

"4.27 In response to the argument based under S.5 of the Payment of Wages Act 1991 the Respondents submitted that the reduction in the PDF allowance is not a "deduction" from wages payable. It is the reduction of the allowance payable. The Act has no application to reductions (as distinct from "deductions").

"4.28 The Respondents further submit that the issue raised of non-compliance with Section 5 of the Payment of Wages Act is not properly justiciable by the High Court...."

The McKenzie case dealt with a reduction of allowances. The Payment of Wages Act specifically excludes allowances from the Terms of the Act as the definition of wages specifically excludes allowances. We would refer to the case of Sean Senan Histon and Shannon Foynes Port Company 2006 IEHC 292. In that case, being a judgement of Mr. Finlay Geoghegan he stated
"the purpose of S.5 is to preclude an employer from making deductions from the wages of an employee unless certain specified conditions are met. Section 5(2) is expressly directed to a prohibition against an employer making any deduction from wages in respect of "any act or omission of the employee unless certain specified conditions are met".

He went on to say

"It does not appear to me arguable that a failure to pay to the Plaintiff any part of his salary is not a deduction from his salary within the meaning of S.5 of the Act of 1991".

We respectfully contend that the McKenzie case referred to previously relates to a reduction of an allowance. An allowance is not covered by the Payment of Wages Act. The Senan Histon & Shannon Foynes Port Company case deals with deductions. The provisions of Section 5 of the Act is absolutely specific and no deduction can be made without the consent of the employee and that consent must be prior written consent.

Dated the _____ Day of _____

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Signed: _____

Viking Security Worker wins Sunday Premium case

In a case of DWT1489 where the employee was represented by this office a security office at Viking Security brought a claim for a Sunday premium payment. The Labour Court awarded time plus 1/3rd to the employee.

The case is interesting. The company contended that the rate was above the minimum wage and incorporated a Sunday premium. The Court stated "that is", "insufficient for the employer to simply say that because the rate exceeds the minimum wage it compensates for Sunday working. If such a contention was to be accepted the effectiveness of the statutory provisions would be seriously undermined in the case of all workers whose pay exceeds the statutory minimum".

The Court went on to hold that the Sunday premium must be clearly discernible where an hourly rate is intended to reflect a requirement for Sunday working, that it should be identified and clearly and unequivocally specified at the time a contract is concluded either in the contract itself or in the course of negotiation.

The contract in this case did not mention the obligation to work on Sunday nor did it indicate in any way his rate of pay reflected such an obligation.

We mention this case because of the argument being regularly put forward that where the rate of pay exceeds the National Minimum Wage that this amounts to a premium. The Labour Court has in this case clearly set out the law on this topic and hopefully these arguments will cease going forward.

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

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

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

Clause 13 of the agreement stated,

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

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

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

would have been legal advice. In the absence of such advice I find the agreement to be void".

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

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

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

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

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

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

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

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

Disability and Equality claims

In DEC-E2014-066 in a case of a Worker and a Company which issued on 26th September 2014. The case concerns a claim by an employee who claimed he was discriminated against on the grounds of disability contrary to Section 6 (2) (g) of the Employment Equality Acts 1998-2011 in terms of failure to provide reasonable accommodation and discriminatory dismissal.

There was no dispute about the employee's illness and disability. The employee confirmed that he asked for accommodation of a 20 hour week. The employee was accommodated in this regard. Subsequently, the employee was called in by the managing Director who told him to return to a 39 hour week of else "forget about it".

The employee stated that since overtime had been cut for other workers it would be in the interest of the company if he worked only 20 hours. The employee stated that he offered the company to split his job with his son who also was employed by the respondent then the employer would have full time capacity for the complainant's role but this was also refused. His Doctor only allowed for 20 hours per week so he had to remain at home. It appears in this case that the employer did have the employee medically assessed. This assessment confirmed the recommendation of the employees' Doctor namely that the employee was not fit to return to do full time work and had a poor tolerance of sound. However, this assessment did not lead to a

renewed effort to accommodate the employee but rather in the space of two days on receipt of the report to the dismissal of the employee.

The Equality Officer held that it is settled law that permitting part time work is one way in which reasonable accommodation can be provided.

The employee received a very short letter advising him that they were not in a position to provide him with a role for less than 39 hours per week and therefore furnished him with a P45.

The employee was awarded €40,000.

This case highlights the importance for employers considering the issue of reasonable accommodation if reasonable accommodation can be provided to the employee.

Even if reasonable accommodation may not appear at first sight to be possible it is important for an employer to show that the issue was considered. Failing to do so, particularly where an employee has a disability may well result in a successful complaint against an employer.

In the November issue of our newsletter "Keeping in Touch" we listed cases in the UK where the issue of accommodation of individuals with a disability were considered by UK Tribunals.

Reasonable Accommodation

In a recent Labour Court decision issued on the 10th of November involving a multi-national employer and a worker. The case involved an appeal by a multi-national retailer against a decision by the Equality Tribunal awarding €30,000.00.
The employee worked on the customer service desk for some 30 years. There was no issue to the fact that the employee was a person with a disability. Following a colectomy the employee needed ready access to a toilet. In 2005 the employee had two knee replacements. The toilet was located upstairs in the store and according to the employee it was too low for her knees. There was no lift in the store. In and around Spring 2009 the employee was told by the then Personnel Manager

that a disability toilet was being provided in the store. Issues proceeded and subsequently the employee was informed that the intention to provide a disabled toilet in the store had been deferred. The Labour Court had to consider the issue of reasonable accommodation. There is a detailed and considered decision by the Labour Court dealing with Section 16 of the act. The court also looked at the issue of Article 5 of the Directive. The cost of providing the toilet would be to the sum of €22,000.00. The Labour Court upheld that the duty to provide a person with a disability with reasonable accommodation is limited by what is reasonable and that includes cost. The court went on to uphold that in considering if the provision of reasonable accommodation would place a disproportionate burden on employers, the Court regarded the financial and other costs involved and the scale and resources of the employer. The court upheld that as the employer was a large multi-national company that expenditure of €22,000.00 could not, by any standards, be regarded as imposing a disproportioned burden in vindicating the employees right to work on the same basis as others. The court disallowed the employers appeal.
This is a very important decision and one which employers should take account of. It is a very well reason and thought out decision of the Labour Court.

Motherhood and Pregnancy still has a negative impact on careers.

We would have thought we had gone past this. However, a new TUC survey, in the UK, has found that thousands of new mothers are still being shunned by employers despite increased legal protection and new flexible working legislation in the UK.
The report is titled "The Pregnancy Test-Ending Discrimination at Work for New Mothers".
The report points out that women who work part-time are on average a third less an hour than an average hourly rate for full time men and two in five part-time women are on less than the living wage.
In Ireland paying part-time workers less than the rate of comparable full-time workers is contrary to the law. Paying women less than a comparable male who is full-time is equally contrary to the law.
This approach towards women is reprehensible. While the report is a UK report it is highly probable that a similar situation will arise in Ireland. There is yet to be a serious debate here in Ireland on this issue. Hopefully we will have a debate at some stage.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Working mothers play an important contribution in Irish society. They have an important function to play in the work place. Having children should not be regarded as the end of a women's career. The recent TUC report indicates that the most common complaints are being sacked for being pregnant, receiving unpleasant comments after announcing a pregnancy, being over looked for promotion and being prevented to attending anti-natal appointments.
Certainly this office has come across situation where employees are being sacked for being pregnant, being sacked for seeking to take their maternity leave entitlements and certainly some employers are not paying employees to take time off for anti-natal appointments.
Our legislation has important protections for women and particularly women who are pregnant or who have had children.
However the law is one thing. Practice is another thing. There is still an attitude towards women with children.
We do need a debate in this country, as to how such women are going to be protected going forward and feel confident that their employer will be compliant. Of course it is a minority of employers. However the mind change needs to be driven centrally by the Government.

Jurisdiction of the EAT in Organisation of Working Time Act cases.

An employee may bring a claim to the Employment Appeals Tribunal under the Organisation of Working Time Act in respect of holiday pay which arises on termination of employment.

In the alternative the claim can be sent to a Rights Commissioner.

For all other matters the matter must be referred to a Rights Commissioner.

The rules relating to implementation of a Decision of a Rights Commissioner under Section 28 (8) Organisation of Working Time Act 1997 can only be implemented by the Labour Court.

In a recent case of Karen Caffrey, Donal Fitzpatrick and Derek Evans and Churchtown School of Motoring Limited reference TE9/2014 and others the EAT implemented a Decision of a Rights Commissioner for two of the applicants under the Organisation of Working Time Act.

In our opinion, that implementation has not been made in accordance with the legislation and could well be open to challenge.

We are somewhat surprised as to how the application itself could ever have got before the EAT taking into account the fact that the forms are specific as regards what can be implemented.

These problems will not arise into the future when all the services amalgamate. Until that happens, these types of situations can arise. It will be interesting to see how these awards could be implemented and that the party against whom the implementation was made could at any stage seek to have them set aside as not being valid implementations under the Organisation of Working Time Act.

Awards for workplace accidents in 2013

Accidents can be prevented. Health and Safety training and awareness is important in the workplace. Employers have a duty. Employees also have a duty towards fellow workers. Unfortunately, accidents do happen.

A recent report showed that the top ten awards for workplace accidents in 2013 in Ireland were:

Compensation	Accident Type
€432,001.76	Trapped in a machine
€272,465.60	Falling from a height
€258,507.24	Falling from a height
€185,367.28	Struck by an object
€178,712.32	Struck by a flying object
€163,406.00	Injury caused by pressure at work
€162,726.83	Falling from a height
€160,398.65	Unsafe system at work
€157,275.00	Animal attack
€154,928.49	Explosion

These only detail the top rewards which were made. They do not cover cases were settlements were entered into. The type of awards is made whether it is serious injuries or serious loss of earnings including loss of earnings into the future.

In contentious cases, a Solicitor may not charge fees or expenses as a proportion of any award or settlement.

The Irish Government will now recover any Social Welfare benefits paid as part of personal injury claims

Since the 1st of August 2014 what is called the Recoverable Benefits and Assistance Scheme has been in force.
In effect this means that the Department of Social Protection will recover certain illness/related social welfare payments.
The Department can recover illness benefit, partial capacity benefit, injury benefit, incapacity supplement, invalidity pension and disability allowances relating to a personal injury.
The amount is limited to a maximum period of 5 years from the date of the first entitlement.

When will this arise?
This will arise where a person obtains compensation as a result of a court order, an Injuries Board order or as a result of an agreement or a settlement between the injured party and the other party.
It might have been thought that as this scheme came in on the 1st of August 2014 it only applies to benefits since the 1st of August 2014. That is not the position. It applies to all benefits paid in the last 5 years where the personal injury claim is resolved after the 1st of August.

How does this affect you if you have a personal injury claim?
This is a question we are often asked. Before paying out any compensation the defendant or usually their insurer must pay to the Minister for Social Protection the amount of the benefit and assistance specified in what is called a Statement of the Recoverable Benefits and Assistance.
This means that before making any payment to an injured party the person or entity paying the compensation must apply to the Minister for this statement. The Minister must then within four weeks issue

the statement and send a copy of this to the injured party. This statement is valid for three months from the date it was issued. After that date, if the compensation has not been paid over, a further application must be made for a new statement.
The money must be repaid to the Minister in the full amount set out in the statement. This would be off set against the amount of compensation for loss of earnings/profits to be paid to the injured party. This must be notified to the injured party. It should be noted that this deduction cannot affect any general damages. General damages or the damages for the pain and suffering endured by the injured party.

What happens where there is a Court Order?
Where the compensation arises from a Court Order or an Injury Boards Assessment the entity paying the compensation can pay the smaller of either the total amount of compensation assessed in relation to the loss of earnings/profits or the amount of the Recoverable Benefits and Assistance which has been specified.

What happens if there are more than two insurance companies?
Where there are more than two insurance companies then each of them are liable to pay the full amount. This does cost difficulties in working out matters.
Where the Injuries Board is involved they must also apply for a statement before making an order to pay an award.

How does this affect the injured party?
In theory there is no change in the final amount of compensation received. In the previous system social welfare payments were deducted from compensation received for loss of earnings. The new system means that the social welfare payments are recovered by the State in advance of the compensation being paid.
The effect of this is there is a cost for the insurance companies as before they got effectively a situation where a deduction for the social welfare paid but did not have to pay it back to the Department of Social Protection.

How will this affect an injured party?
The first issue is that settlement talks may now not take place at short notice as it can take approximately four weeks to receive the statement from the Minister. In the alternative, the compensation

cannot be paid out for at least four weeks until the amount is ascertained. Both of these are unsatisfactory. In the first there is a delay in setting up a settlement meeting, which may or may not result in the settlement. In the second situation the injured party may not know what the final amount of the compensation will be until the statement is received.
The second is that details of the benefits received by the injured party will be made known to the insurance company.
The third issue which arises is where there is a dispute about liability or where the injured party is guilty of contributory negligence. The insurance company in such cases will still be liable to repay the full amount that is set out in the statement unless there is a court order to the contrary. This means that if a case is settled and it is proposed to make a deduction from the amount specified in the statement because of the contributory negligence the settlement may need to be approved by the court. This will unfortunately cause additional costs and expenses. It will also delay matters.

Does this apply in Fatal Injury cases?
The new rule does not apply in Fatal Injury Cases!!!
There has been some criticism over the new system. Saying this, it is reasonable that where the social welfare benefits received will be taken in to account as regards losses, that the insurance company will be obliged to pay the State.
The new scheme has only been in operation now effectively for a little over two months as the courts were closed until the beginning of October, we would expect to see a number of developments happening over the next number of months.

Slip and Fall Accidents on Footpaths

In a case of McCabe –v- South Dublin County Council been a decision of Mr Justice Hogan which was recently issued by the High Court on the 18th November 2014. Mr Justice Hogan reviewed the law in relation to misfeasance and to nonfeasance. In this case the plaintiff fell on her right hand and banged her head. She suffered a minor fracture to her hand. Fortunately, she did not suffer any long term adverse effects.

The individual fell in the opening of about 8cm by 8cm, where a stopcock cover was missing. It was clear it was a danger to the public at the time of the incident.

Mr Justice Hogan gave a detailed overview of the Law relating to the misfeasance and nonfeasance. Mr Justice Hogan was critical of the Law as it is. He pointed out that Section 60 (1) of the Civil Liability Act 1961 is over 50 years old and was never enacted by the Government to make Local Authorities liable for nonfeasance. Mr Justice Hogan set out at some length the reason why he felt he was obliged to apply the nonfeasance rule to hold against the plaintiff.

I would comment to say that, that this is my personal view, it is quite staggering to believe that a piece of Legislation has been on the statue books for over 60 years but has never been brought into effect. It is equally staggering to believe that the Law that stands at the pressing time that is if a Local Authority seeks to repair and does so badly that they are liable for injury but if they simply do nothing and don't repair that regardless of the injury or damage sustained they have no liability.

Taxation Issues for Employers

Change to the rates and thresholds of USC for 2015:
The rates and thresholds of the USC are changing with effect from the 1st of January 2015. Employers should ensure their payroll software is updated to facilitate these changes.

Employer Tax Credit Certificates:
In December 2014, Revenue will issue 2015 Tax Credit Certificates (P2Cs) to employers for all employees advising the rates and thresholds applicable from 1st of January 2015. If you have not received the 2015 P2Cs in time to run January 2015 payroll you should follow the instructions found in Question 4.33 of the USC FAQ document.

Changes to Form P45:
Both the ROS and paper form P45 were updated. If you are using the paper P45, these can be ordered from Revenue's forms and leaflets service.

Illness Benefit and Occupational Injury Benefit Notification:
The Department of Social Protection uses Revenue's ROS in-box facility to deliver Illness Benefit Notification letters directly to all ROS enabled employers. To access these letters employers must access their ROS Inboxes.

In-Secure Email:
To ensure the confidentiality of client information in sending confidential and personal data, the Revenue has a secure email system. Particulars of this are available on e-Brief 69/2014.
For employers seeking help the employer customer service unit can be contacted on employerhelp@revenue.ie.

Revenue's tax/allowance for long service awards

The issue of long service awards "LSA" is sometimes overlooked by employer's as an opportunity to recognise an employee for their service to their employer.
Generally employers are entitled to make a small benefit tax relief gift to employee's each year. The annual tax allowance applies to gifts or vouchers up to a value of €250. This benefit cannot be in cash. The tax relief on long service awards LSA is separate. It is in addition to the small benefit tax relief.

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

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

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

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

for each year of service.

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

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

The definition of tangible articles refers to awards given in the form of other than vouchers, bonds or cash. Unlike the annual tax allowance where vouchers are allowed vouchers are not allowed in the cases of long service awards. A long service award which would qualify would be an item like a gold watch, a piece of jewellery, a set of golf clubs or virtually anything that is a tangible article. It is possible under the current rules to give an employee a benefit every 5 years after they have served the employer for 20 years. Therefore an employee will receive the benefit now of up to €1,000 after 20 years' service can receive a tangible asset valued up to €1,250 after 25 years and a further €1,500 after 30 years rising to €1,700 after 35 years. While the allowance may not seem generous it is still a tangible benefit. Where an employee is on the top rate of tax who receives a benefit of up to €1,000 the real benefit to that person is equivalent to a figure in excess of €2,000 in salary. The annual tax allowance and the long service award allowance are benefits which employers sometimes fail to take advantage of as a method of recognizing employees. Before acting or refraining from acting on anything contained in this publication appropriate professional legal advice from a Solicitor should always be obtained.

What NERA is not doing

A recent issue that have arisen in respect of NERA are causing considerable annoyance and controversy to this firm.
We acted for two individuals. The two individuals made request under the Data Protection Legislation. Documentation was furnished which we questioned on behalf of our client. The question which was raised was that there were clock in records that were not furnished. The employer denied that there was ever such clock in records. This office had written to both the Data Protection Commissioner about it and NERA. The Data Protection Commissioner had written advising that if we believe that this was the position we should write to the employer.

They did indicate once we did so that they would continue the investigation if necessary. We subsequently received from NERA that a letter stating that these records where in existence but that they were only there to check whether our clients received the proper rest periods and therefore as far as NERA was concerned our clients were not entitled to those records. This is despite the fact that our clients both have claims for not receiving the proper rest and break periods. NERA is aware that there are records in existence but these relate to non-Irish nationals. Nothing has been done in obtaining the relevant records and having them sent to the employees. This is despite the fact that under the Data Protection Legislation working time records are an entitlement of an employee.

We are regularly finding now that requests issued under the Data Protection Act, employers do not furnish full documentation. We then find that additional documentation requested suddenly appears on a hearing date. We find that the employer is aware of certain documentation or records being in existence and the employer deny same. To be fair to the Data Protection Commissioners Office they are extremely pro-active. The same cannot be said about NERA where they have become aware there are records but do nothing to make sure the employee can get them.

We would have a significant concern that there is a conspiracy of silence to ensure in particular that non Irish nationals do not have their employment rights fully vindicated and this allegation is specifically made against NERA.