Welcome to the February issue of Keeping in Touch*

In this issue of our newsletter there is a considerable portion of it given over to Unfair Dismissal claims. Employers are losing claims because of failure to apply procedures properly or not applying any procedures at all. Some of the awards being made by EAT, are significant. Virtually every time a new set of decisions are placed on the website, from the EAT, relating to Unfair Dismissal claims the issues of procedures and the failure to apply procedures is to the forefront. In this issue of our newsletter we have highlighted what we believe are some of the more important cases as regards the principles involved which employers should be aware of.

Currently the Workplace Relations Bill is going through the Seanad. It has gone through the Dail. A number of significant amendments, since the Bill was commenced, have been added. The new Adjudicators who are being appointed have been chosen and are undergoing training. There is a wide range of experience and expertise in the area of applying the law, HR and IR experience. Clearly a lot of thought has gone into the process of selecting these individuals for this important role and we wish them well. A new Deputy Chairman of the Labour Court is also to be appointed. The application time has elapsed.

On our website you will find a number of new information guides. In addition, in the publication section there is a detailed lecture note on "Presenting and Defending Working Time Claims". There is an updated lecture on "The Taxation of Employment Law Awards" which was presented on the 7th of February to the new Adjudicators who will be appointed under the Workplace Relations Act (when enacted). There is also a detailed lecture note on "Zero Hour Contracts". This was a lecture given to the Employment Law Association of Ireland (ELAI). Because the lecture dealt with various schemes to counteract the legislation under the Organisation of Working Time Act the lecture notes in the publication section are redacted as regards how these schemes can be put in place. The seminar given to ELAI was covered extensively in the Industrial Relations News and a copy of this is in the Publication section.

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THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

We have seen a significant shift in the type of cases which are currently being taken by employees. Up to 18 months ago it was unusual to have claims by employees, against their employer, where the employee was still in employment. Such claims would have amounted to less than 10% of the claims which this office would have seen. Now this is changing considerably. Half of the cases which we are now involved in involve employees who are still in employment at the time the claim is brought. This may well be an indication of confidence in the economy that employees feel confident enough to bring a claim and are not in fear of losing a job. At the same time we have seen a worrying increase in the number of National Minimum Wage claims which are been brought. There is a significant increase in the number of claims being brought under the Organisation of Working Time Act for a Sunday premium. Many years ago these claims did not arise because of the fact they were covered under a REA or JLC. These are no longer in existence. Therefore previous rules which had set such claims such premiums are no longer in existence. Recent cases before the Labour Court on this point where decisions have been held against the employer or under references DWT1489, DWT1469 AND DWT1467. In all of these cases the employee has succeeded in their claim for a Sunday premium. In the case of DWT1467 the employee was awarded €2,000.00. What is interesting in that case is that the employer argued that a free meal amounted to a Sunday premium which was rejected by the Labour Court.

While the number of employment law claims which were brought in 2014 fell from those brought in 2013, a lot of this can be explained by the fact that the number of redundancy claims fell dramatically. In addition there has been a noticeable increase in the number of employment claims issuing to the Labour Relations Commission over the last 3-4 months. There is a significant increase in the number of constructive dismissal claims being brought to the EAT. We are seeing a huge increase in stress claims and bullying and harassment. We put a lot of these down to poor management and lack of sensitivity.

Finally we are delighted with the very positive feedback we have received especially from other solicitors and HR and IR professionals on our recent publications.

Lectures Given in February 2015

Following on from our lectures in December on the "Presenting and Defending Working Time Claims", Richard Grogan of this office was asked to present a seminar along with a distinguished panel of speakers in Trinity College for the Employment Law Association of Ireland on the 2nd of February on "Zero Hour Contracts". Subsequently on the 7th of February Richard Grogan presented a training course on the "Taxation of Employment Law Awards and Settlements" to the new Adjudicators on behalf of the Department of Jobs Enterprise and Innovation.

Copies of all of these seminar notes are available in the Publications section of our website.

We do regard it as an honour that this firm has been asked to present seminars on various aspects of Employment Law and Taxation.

We have been delighted with the positive feedback in respect of these seminars. Some of the comments in respect of same are set out of Homepage of our website.

Workplace Relations Bill

A difficulty that is going to arise in relation to the legislation, when enacted, is that Section 192A, TCA 97 has not been amended to include decisions by the new Adjudicators.

This means that decisions of Adjudicators will not get the same treatment as a decision of a Rights Commissioner currently or an Equality Officer currently. The effect of this is all Employment Law decisions; given by an Adjudicator would be fully subject to tax even though, if a decision was given by a Rights Commissioner or an Equality Officer they would not have been.

Hopefully this anomaly will be dealt with in the next Finance Bill. It is unfortunate it was not dealt with at this stage.

Representations on this matter had been made to both the Department of Finance and to the Department of Jobs, Enterprise and Innovation.

There was a significant amount of work that had to be put in place in respect of the new Bill. However it is unfortunate that while certain matters would slip through the gap and that this would be one of them.

It is going to create significant difficulties and additional costs for both employers and employees and their representatives to deal with the additional tax planning which will have to be put in place to avoid this unnecessary administrative burden which would not have applied if the legislation had of been addressed. It would only have meant that the legislation would have to be amended to include the word "Adjudicator".

Why do Employers Lose Unfair Dismissal Claims?

The issue of training for managers and supervisors in the workplace is probably one of the best investments any employer can undertake. By having training dealing with,

1. Disciplinary procedures,
2. Grievance procedures,
3. Dignity in the workplace,
4. Equality,
5. The Organisation of Working Time Act,
6. The granting of leave; and
7. The importance of record keeping.

If these 7 matters are dealt with by employers to ensure that manager and supervisors have a general understanding of these areas of law, as they affect the workplace the potential for claims can be significantly minimised.

This is not saying that employers need to arrange detailed legal seminars. What is needed that the employer ensures that the managers and supervisors have sufficient training to understand their obligations and duties and how these are to be applied in practice.

These are areas where more and more employers should be using the services of solicitors. This type of training can be dealt with in half a day. This is not rocket science. It is common sense. Managers and supervisors do not need to know why something needs to be done they just need to know that it has to be done and that this is the law. They

equally need to understand the exposure to the company if these rules are not complied with. The easiest way to ensure that you don't have employment law claims is to make sure that your managers and supervisors are properly trained.

Unfair Dismissal and Medical Reports

In the case of Seamus Ward and Coberall Courier Services Limited UD1263/2013 the case involved an employee who was injured at work. When he was fit to return to work the company requested a medical certificate. He submitted a fit to return certificate to the company. The employee claimed that the company told him that he was not 100% fit to return to work. The company contended that they felt having read the certificate that the claimant was only 70-75% fit to return to work.

The Tribunal held that the employer could have had the employee medically examined by their own medical practitioner to verify matters but failed to do so. The Tribunal held that without medical evidence to the contrary they were not entitled to disregard the evidence of the claimant on the basis of the medical certificate that he produced.

This case highlights the importance of employers ensuring that if they are going to dismiss on medical grounds that the employer is in possession of the appropriate medical documentation to back up a decision to dismiss.

Unfair Dismissal - Proceedures and More Proceedures

In the case of Eamonn Keating and Cappoquinn Poultry Limited UD927/2013 the Tribunal in this case awarded €35,000 to the employee.

In the case the Tribunal stated,

"The Respondent Company had set out both its Disciplinary and Grievance Procedures in the Claimants contract and Company Handbook".

The Tribunal was satisfied that the investigation against the Claimant was concluded without him being afforded the required opportunity to

engage in the process. Further, the claimant was denied access to information and documentation that were required by him to adequately represent his position at the Disciplinary Meeting. There appears to have been an element of prejudgement on the part of the Respondent and the Tribunal did not consider that the Claimants dismissal was warranted.

The appeal process such as it was amounted to no more than a "rubberstamping" exercise which was a further denial of due process to the Claimant.

This case again highlights what the EAT and this office has been saying in a number of other issues of Keeping in Touch that employers must apply fair procedures which are transparent.

Unfair Dismissals – The Importance of Fair Procedures

In the case of Karen Lam and Emardress Limited T/A O'Donoghue Ring Hotel UD1136/2012. This is a case where the EAT held that no fair procedures were applied in deciding to dismiss the employee. They held that allegations were put to the employee but she was not afforded any opportunity to test these allegations. They held that there was no right of representation afforded to the employee and she was not informed of her right to appeal the decision to dismiss her.

The employee had mitigated her loss and the EAT awarded a sum of €29,000 to the employee.

Again this case highlights the importance of fair procedures being applied.

The case highlights the importance of employees been given the right of representation.

Possibly even more important than this is that employees are advised of their right to appeal decisions.

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The Importance of Procedures and Record Keeping in Unfair Dismissal Cases

The recent case of Sign-a-Rama (Cork) Limited and Garbagnati UD1460/2013 involved a case where the owner of business told the EAT that the employee was not following instructions. The owner contended that he did not terminate the contract but was trying to keep the business alive and hired a sales person/signmaker to try and save the business. He contended that he was unaware of his obligations but was advised of the requirement to pay Statutory Redundancy figures. He said that the amount was made out in a post dated cheque but when the employee took an Unfair Dismissal claim a stop was put on the cheque. The employee contended that he had been let go.

The EAT properly pointed out that there was major deficiencies in the manner in which the purported redundancy was implemented with no adherence to fair policy or procedures. As a result an award of €20,000 was made.

This case once again highlights that if an employer is proposing to make an employee redundant that full and fair procedures are followed failing which the employer may very well find themselves the wrong side of an Unfair Dismissal claim which it may be virtually impossible to defend.

Unfair Dismissals Considering Other Options other than Dismissal

In the case of Brid Tracey and Staunton Sports T/A Elvery's Sports UD931/2012 the issue in this case concerned an employee who was dismissed for absences ranging from 3 minutes to 60 minutes on various dates.

The employee had been working for the employer for six years and had no previous disciplinary record. She had promised that she would not repeat the behaviour. The employee had contended that she frequently worked beyond her normal finishing time as well as lunch breaks and received no additional payment for these.

The case is interesting in that the EAT looked at the issue as to

whether other sanctions were open to the employer. The EAT found that there were other options open and in the circumstances awarded €20,000.
This case highlights again the importance of employers when taking disciplinary action against an employee to consider all the various options which will be open to the employer not only dismissal.

Constructive Dismissal

The case of Ojha and Harry Corry Limited UD848/2013 concerned a case where an employee was required to move premises. The employee handed in a resignation. The EAT concluded that the claimant had unreasonably tendered his resignation. They held that he had only done so in response to a perfectly reasonable request which they referred to as a contractual requirement to move from one store to another.

The case is interesting in that it sets out the relationship between the employer and the employee prior to the resignation. There were issues with demotion during the employment and prior to the resignation.

A number of years ago Constructive Dismissal claims were virtually unheard of. Now they are becoming very prevalent. Maybe it is a sign that the economy is improving. However employees need to be a extremely careful before issuing a resignation letter. Employees must be in a position to prove that it was reasonable for them to resign. While it is not dealt with as part of this case it is a matter which we have raised on a number of occasions previously in our Publications. It is necessary for the employee to have shown that they have gone through the full grievance procedure. It is necessary for them to be in a position that the letter of resignation was the only course of action reasonably open to them. It would be our view that employees really need to obtain appropriate legal advice from a specialist employment lawyer before tendering any resignation. Failure to do so can result in the employee not winning their Constructive Dismissal Claim.

Be Careful of Making an Employee Redundant

In the case of John Melia and M&J Gleeson and Company UD1569/2012 being a Decision which issued at the end of December 2014 concerned an employee who was employed as a lorry driver from

June 2005 until the dismissal on the 23rd of December 2011. The employee had been reduced to a 3 day working week for sometime before he was made redundant.

The Respondent contended that one of its largest clients had indicated that they were no longer going to engage the services of the Respondent and in anticipation of this the Respondent decided to make a number of drivers redundant. It later transpired that the Respondent did not lose the contract as anticipated but that it continued for another eight months approximately. However the Respondent decided to contract the work out to another company and that company then employed some of the Respondent's former drivers. However the appellant was not one of those taken on by the other company. The EAT was satisfied that the future loss of a large contract necessitated redundancies at some stage. The EAT however was not convinced that the loss of the contract was imminent and that there was a requirement for redundancies at that time.

The case is interesting also in that the EAT held that the respondent failed to call any independent witnesses or produce any documentation in support of its version of events in relation to the loss of the large contract or the circumstances in which services continued to be provided until 2012. They also pointed out that the respondent failed to produce any documentary evidence or independent witnesses to support its version of events in relation to the arrangements entered into with the independent haulier for the period from the end of December 2011.

The EAT held that there was an unfair dismissal and awarded a sum of €20,000 by way of compensation.
This case highlights the importance when considering redundancies of having matters properly documented.
If redundancies are being made it is important that an employer can justify the redundancies and the basis on which individuals were made redundant.

The benefit of having documentation in place is that it can be produced subsequently at a hearing if the redundancy is challenged. While it is not set out in this particular Decision it is also advisable that if individuals are being made redundant that the company

grievance procedure is utilised to allow individuals to challenge the redundancies.

Use of Zero Hour Work Contracts to be Investigated

On Monday 9th of February it was reported in the Irish Times that the Government has appointed a team from UL's Kemmy School of Business to examine the prevalence and impact of these contracts which have been criticised for being unfair to workers.

The study's authors will meet employers, workers and their representatives in areas of the economy associated with Zero-Hour and Low-Hour Contracts.

Mr. Ged Nash the Minister of State for Business and Employment has stated that "work must pay".

It is hoped that the study will help the Government in the first instance to determine how widespread zero and low-hour contracts are and crucially the impact they are having on working people.

The study will also examine if employment law including the Organisation of Working Time Act is being correctly applied.

The academics will report back to the Minister within six months.

Richard Grogan of this office presented a paper recently to the Employment Law Association of the Ireland on this topic. It would be our view that the Labour Court is properly applying the law as it currently is. The problem is not with the application of the law by the Labour Court, but rather how the law is actually drafted. A proper zero-hour contract properly drafted is totally outside the ambit of the jurisdiction of a Rights Commissioner, Adjudicators in the future, or, the Labour Court.

The appointment of the team to review this area must be welcomed. Extending the examination which was announced last July to included low-hour contracts of 8 hours per week or less must also be welcomed. Saying this the restriction to simply 8 hours would appear to be very limited.

One of the difficulties with low paid work is that evidence from the UK would indicate that such structures create a reliance by such workers on Social Welfare. Therefore such work in fact is a cost to the State.

The report and its conclusions will be awaited with interest particularly as the report will be looking at how the law in this area is applied. Hopefully they will also look at how it could be changed to be more effective. Richard Grogan of this office was interviewed by the persons preparing this report.

Minimum Wage

On the 16th of December in the Irish Times it was reported that the Minister of State for Business and Employment Mr. Nash stated that the National Minimum Wage should be increased over time. However Mr. Nash said that any increase should come about only when economic and labour conditions allowed for increases.

The Minister invited people from worker and employer backgrounds, civil society groups and labour market experts to apply for membership of the Governments Low Pay Commission. The nine member commission will advise the Government using evidence based research on the appropriate rate of the National Minimum Wage. The current rate is €8.65 an hour. What would be very interesting to know is the percentage of workers who are on minimum wage and their national profiles.

A disproportionate percentage are likely to be non Irish Nationals. When it comes to the non payment of the National Minimum Wage the decisions reported in Workplace Relations website relating to Labour Court Decisions show that virtually 90% of all claims under the National Minimum Wage Act are brought by non Irish Nationals where these cases are reported on the Labour Court website.

The new Workplace Relations Customer Service Bill proposes a fine of €2,000 for an employer who fails to pay the National Minimum Wage. In the UK the fine is stg£20,000 per worker.

In the UK the policing of the National Minimum Wage is undertaken by the UK Revenue. Under our Bill it will continue to be a matter for NERA.

There is a very strong argument that it should be policed by the Irish Revenue. They should act in association with the Department of Social Protection. There is a considerable cost to the State where an employer does not pay the National Minimum Wage. This is a cost in additional Social Welfare Payments such as Income Support. Employers who pay less than the National Minimum Wage undermine legitimate business.

The Commission proposed by the Minister is welcome. However, the Commission in looking at the issue of low pay has not addressed the issue as to how the issue of low pay, when it comes before the new Workplace Relations Service or before the Labour Court can have any deterrent effect on an employer. There is no method of compensation for failure to pay the National Minimum Wage. It is a pure economic loss. If any employer gets caught with underpayment of the National Minimum Wage at worst it is form of interest free loan to the employer. There is no penalty element for not paying the National Minimum Wage unless the employer is prosecuted by NERA. Very few cases which have gone before the Labour Court where there have been awards made have resulted in any prosecution against the employer. It will be interesting to see if this might be addressed.

Entitlements to Annual Leave during Periods of Sick Leave

The European Court of Justice has confirmed in the Decisions in the joined cases C-520/06 and C-350/06 Stringer and Others –v- HM Revenue and Customs Commissioners of Inland Revenue –v- Ainsworth and Others and Schultz – Hoff –v- Deutsche Rentenversicherung Bund there is an entitlement to accrue Annual Leave in respect of a period during which an employee was on sick leave and not at work.

In the case of Seclusion Properties Limited and Kieran O'Donovan DWR14114 the issue came on for hearing before the Labour Court. The Labour Court held that the OWTA when it is literally construed does not afford an employee the entitlement to accrue Annual Leave during periods of sick leave.

There was no issue in the case as to what the European Law was. The issue being determined was whether the Labour Court could construe the Irish legislation in line with the European Decisions. In this case

the submission for the employee did draw the Courts attention to the Decision of the High Court in Minister for Justice Equality and Law Reform –v- The Equality Tribunal [2009] 20 E.L.R 116 and in particular the Decision of Mr. Justice Charleton. The issue raised the question as to whether the Labour Court had Jurisdiction to apply the doctorin of conforming interpretation at all. The Court held that the correct application of National Law involved the interpreting of that law in light of the wording and purpose of the Directive upon which the law is based. The Court properly held that it is founded in part on the presumption that that National Legislature intended to transpose a Directive faithfully. The issue therefore was whether the Court is circumscribed in applying the law of the EU and could this offend against the principles of effectiveness and equivalence. The Court decided to reserve its position on that question. The Court however held that it is clear that the domestic Courts and Tribunals must interpret National Law in conformity with the Directive as far as possible. The Court held that it cannot interpret the legislation contra legum. The Court in this case held that it could not through the legislation avoid a contra legum and therefore allowed the appeal by the respondent employer against the Decision of the Rights Commissioner who had awarded €2000 in compensation.

This case is interesting. It opens up the potential for any such claims, which are currently before the Labour Court or the Rights Commissioner Service for a claim against the State for failing to properly implement the Directive. Once the new Workplace Relations Bill is passed, taking into account the amendment to the legislation concerning sick pay, which the Minister has announced will be included this will become a moot point. However in the interim there is the potential for a significant number of claims against the State.

Beware of duplicate claims

The case of Ciaran Culkin and Sligo County Council [2015] IEHC46 was a judgement given by the President on the 6th of February last.

An application was brought to the High Court to strike out a personal injury summons of February 2011 as an abuse of process and as a duplication of the plaintiff's Equality Claim.

The facts of the case are that in and around September 2009 the plaintiff made a complaint to the Equality Tribunal under the Employment Equality Act.

The grounds of the referral to the Equality Tribunal was "Access to employment, promotions/radish grading, training, conditions of employment, discriminatory dismissal, victimisation and victimisory dismissal".

In addition a personal injury claim issued to PIAB. The County Council contended that the employee after the Council had raised the issue that the claims would be put forward to the Equality Tribunal and the High Court were the same and that the plaintiff was precluded from perusing both claims. It was averred that the plaintiff requested the Equality Officer to continue to hear the case.

The President in his decision referred to the case to Cunningham –v- Intel [2013] IEHC2007 and held that in that case that Hedigan J referred to two sets of proceedings arising out of the same matter rather than the same case and that Mr. Justice Hedigan concluded that the complainant had breached the provisions of Sections 101 (2) (a) as well as the rule in Henderson and struck out the personal injury cases.

The President held that the rule in Henderson –v- Henderson is well established so as to avoid double litigation of the same issues. The President held that at the outset of the Equality Tribunal hearing following a primilary submission by the defendant that the option of perusing the Equality Tribunal complaint or the common law claim was made clear to the plaintiff and that the plaintiff opted to pursue a remedy before the Tribunal. The President held that he was satisfied that the plaintiff now was stopped from residing from this position after having his claim rejected by the tribunal.

The President held that the term "case" in Section 101 (2) (a) of the Employment Equality Acts must be taken to include the underlining facts which give rise to the complaint. The President held that the matters in the plaintiff's common law and Equality Tribunal proceedings both date from a time when a new supervisor was appointed and arise from the very same alleged incidents of mistreatment. The President held that in the case of Henderson –v-

Henderson coupled with the provisions of Section 101 (2) (a) requires as to where there is such a considerable degree of overlap the plaintiff should be precluded from perusing the High Court proceedings and that the plaintiff had a right of appeal to the Labour Court in relation to the Equality Tribunal case which was dismissed.

The case is interesting in setting out the position which would arise where a person has alleged personal injuries arising from bullying and harassment and has also issued a common law claim for personal injuries for bullying and harassment.

The case highlights the importance of not seeking to double claim in respect to the same event.

The issue which did not need to be addressed in the recent case was what would have happened if the plaintiff had simply sought a claim and simply limited his claim in front of the Equality Tribunal for example to discriminatory dismissal. What is interesting from the case law is that the High Court has held that where there is a considerable degree of overlap between a claim before as in this case a statutory Tribunal and at common law that the employee could not pursue both claims. It therefore appears important in employment cases if an equality claim is being brought that the claim is limited to matters which could not be litigated before the courts in a common law claim. It would appear to mean that a claim for bullying and harassment for example on the grounds on gender should not be taken under the Employment Equality Acts if a claim is considered for personal injuries. There is nothing to stop both sets of proceedings issuing but then the employee taking a view as to which set of proceedings they will proceed with. The decision would appear not to preclude an employee from bringing a claim for example of constructive dismissal or for example dismissal on the gender or on any of the other protective grounds and at the same time bringing a Common Law claim for the personal injury as a result of any bullying or harassment, provided the effect of bullying and harassment is not pleaded or claimed as part of a constructive dismissal or Equality claim.

The case highlights the difficulties for employees and their representatives. Various statutory rights are in various pieces of employment legislation but there is no jurisdiction for the courts as

part as a personal injury claim to, for example deal with a discriminatory dismissal claim as part as a personal injury claim. That does make common sense. It is however necessary for employees and the representative when considering claims to ensure that there is no overlap.

The recent decision by the President of the High Court is one of particular importance in relevance to all employment lawyers whether acting for employers or employees.

UK Rules on Holiday/Back Pay Claims

In the UK case of Bear Scotland –v- Fulton the UK EAT decided that non-guaranteed compulsory overtime should be taken into account when calculating holiday pay. The UK EAT also went on to decide that claims for alleged under payment of holiday pay as a series of unlawful deductions will be time barred if there is a break of at least three months between successive under payments. This part of the Decision was seen as very helpful to employers in limiting substantial retrospective claims for underpaid holidays.

We have written about this issue in previous issues of Keeping in Touch.
The Irish legislation appears to exclude payments of even compulsory overtime in calculating holiday pay therefore this is the potential for substantial claims against the Irish State. These claims in Irish law could go back six years against the State.

The UK, in their new draft regulations, provided that the right to pay for annual leave under the Working Time Regulations 1998 do not confer any contractual rights. This will prevent claims for underpayment of holiday being brought as breach of contract claims.

The Decision in the UK which was given by Mr. Justice Langstaff sitting alone under appeal number UK EAT S/0047/13/BI is a very well thought out and considered Decision that goes through the UK legislation and importantly the European legislation also.

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Keep on Trucking

The legislation dealing with truck drivers was in a shambles. We had a situation where part of the claims were brought under SI36 of 2012 and part of them are brought under Section 11 of the Organisation of Working Time along with Section 17, Section 19, Section 20, Section 21 together with Sections 13 and 14. SI 36 has a provision in it relating to a truck driver being entitled to 11 hours between finishing work one day and starting work the next day. That is similar to Section 11 of the Organisation of Working Time Act. However the then Minister for Transport in his wisdom in dealing with the Regulations forgot to put in a complaint procedure to a Rights Commissioner in that particular Statutory Instrument which means that no claim could be brought for that part of the Regulations but could be brought under Section 11 of the OWTA.

How did this happen? It happened because the Regulations were copied from the UK Regulations but the UK Regulations were slightly different and this is why this fell off the table.

We had the dreadful vista that employees may actually have a claim against the State. Under the OWTA the claim is limited to 6 months prior to bringing the claim. Under SI 36 of 2012 the claim can effectively go back to the 1st of February 2012 unless the employee has been notified of the relevant Statutory Instrument.

The reality of matters is that the new system was a disaster. It was a disaster for employers. It was a disaster for employees. It was a nightmare for representatives.

SI 49 of 2015 is a new Statutory Instrument which relates to truck drivers.

SI 36 of 2012 brought in new rules relating to what can the term Working Time claims for truck drivers. The rules which were brought in 2012 were defective. There was no provision to making a complaint to a Rights Commissioner under one of the provisions. This meant that part of the claim for what would have been traditionally a Section 11 Organisation of Working Time Act had to be brought separately. This now since the new Statutory Instrument has come into effect is no longer necessary.

It is still necessary to bring claims for holidays, public holidays, Section 17 for example under the Organisation of Working Time Act as there is no equivalent under the relevant Regulations.

The new regulations also increased the time limit for employers to retain records from 2 years to 3 years. It should be noted that an employee can request these records at any stage and failure to furnish them can result in an award of up to 2 years wages.

There has been a considerable amount of criticism of the Regulations which were brought in 2012 and it is great to see that the matter has been rectified.

Is Obesity a Disability?

The European Court of Justice of the European Union delivered its Decision in case C-354/13 Carton Kaltoft –v- Municipality of Billund in this case the Court found that in certain circumstances the obesity of a worker will constitute a disability for the purposes of the Equal Treatment Directive. This Directive became law in Ireland by virtue of the Employment Equality Acts.

The employee in this case had worked as a child minder in her Local Council in Denmark for 15 years until 2010 when her employment was terminated for a reduction in demand for child minding services. Her body mass index was 54. It was undisputed by the parties that the employee was obese. This is obesity as defined by the WHO. The employee claimed that his dismissal had been on a discriminatory ground on the basis of obesity and he sought compensation.
The ECJ found that obesity may be a disability in some circumstances. The Court noted that the concept of Disability must be understood as referring to

"A limitation which results in particular from long/physical/mental or psychological impairments which in interaction with various barriers my hinder the full and effective participation of the person concerned in professional like on an equal basis with other workers".
The effect of the Court decision was that the concept of disability must be understood as referring not only to the impossibility of exercising

professional activity but also the hindrance of exercising profession activity.
The Court importantly went on to state that the Directive does not depend on the extend which the person may have contributed to the onset of the disability.

The Court held that while that obesity does not in itself constitute a disability never the less a workers obesity will constitute a disability for the purposes of the Directive where it entails a limitation resulting in particular from the matter as set out above.

This is not some seismic shift in our Equality legislation. However it is useful in reaffirming that obesity is a disability.

Industrial Relations Amendment Act

On the 16th of December Richard Bruton the Minister for Jobs Enterprise and Innovation and Mr. Nash, Minister for Business and Employment announced Cabinet approval to legislate for an improved framework for workers who seek to better their conditions where collective bargaining is not recognised by their employer. It was announced that it is hoped that the legislation will become law by mid 2015.

Minister Bruton confirmed that this new legislation was a commitment to make sure that Irish Law is consistent with recent Judgements of the European Court of Human Rights.

There was a lengthy consultation process with a view to arriving at broadly acceptable proposals which will give clarity to employers and operate effectively for workers. In order to improve the working of the Act the legislation will provide a definition of what constitutes "collective bargaining", guidelines to help the Labour Court indentify if internal bargaining bodies are genuinely independent of their employer, clarify in the process of Trade Unions advancing a claim under the Act and policies and principals for the Labour Court to follow when assessing workers terms and conditions.

The new legislation arises as a result of recent Judgements of the European Court of Human Rights and the ILO report in 2012

concerning the case of ICTU and IMPACT arising from the 2007 Ryanair Supreme Court Judgement.
It will be interesting to see how this legislation proceeds and applies in practice. Saying this, this legislation has been promised for a considerable period of time and will bring a much greater degree of clarity to workplace relationships.
We will deal with the legislation in more depth once the legislation is published.

Anti Bullying Training for Supervisors in California

On 9 September last Governor Jerry Brown signed into law increased regulations of workplace civility. Californian employers with more than 50 employees must now provide training to all supervisors on bullying. Previous legislation required two hour sexual harassment training for supervisors. The new regulations now require that abusive conduct must also be covered in the training. Abusive conduct is defined as conduct of an employer or employee in the workplace with malice that reasonable person would find hostile offence and unrelated to an employer's legitimate business interest. The conduct may include verbal abuse such as derogatory remarks, insults and epithets verbal or physical conduct that a reasonable person would find threatening, intimidating or humiliating or the gratuitous sabotage or undermining of a persons work performance.

The legislation notes that a single act is not sufficient to constitute abusive conduct unless especially severe.

The Californian law should not be regarded as arising from nothing. According to a Harvard Business Review some 98% of employees have faced some form of bullying in the workplace ranging from verbal abuse to physical threats or assault. Bullying is a problem for employers to. Bullied employees are often less productive and innovative and also more likely to leave their jobs. While we are unlikely to see mandated training for supervisors in Ireland relating to bullying the Californian legislation in interesting. Requiring employers to train supervisors on the issue of abusive conduct and sexual harassment in the workplace is not unreasonable.

Certainly this is an area of law that does need to be looked at and possibly this is one of those approaches, to a difficult problem which should be considered from a Health and Safety perspective.

The Dangers of Posting on Facebook

The case of Wilson and Ferguson being a Decision of the Supreme Court of Western Australia 2015 WASC15(16 January 2015) is an interesting case.

The case involved a situation where the Plaintiff alleged that in the course of their romantic relationship the Plaintiff and the Defendant obtained photographs and videos of each other naked or partially naked. It was contended by the Plaintiff that these photographs and videos were intended for the exclusive enjoyment of the Plaintiff and the Defendant as long as their relationship lasted. The Plaintiff alleged that on the 5th of August 2013 the Defendant posted on his Facebook page about 16 of the photographs and 2 of the videos which depicted images of her.

The Supreme Court of Western Australia held that this was a breach of confidence and awarded substantial compensation.

The Court held that it was appropriate to award the Plaintiff compensation for the damage which she had sustained in the form of significant embarrassment, anxiety and distress as a result of intimate images of her in her workplace and amongst her social group.

The case highlights the dangers of Facebook. It takes only seconds to upload and distribute an image.

This sort of action is not only one that can result in the person sending the communication finding themselves in Court but you also have the potential of huge reputational damage if this is done between work colleagues. It is important for employers to consider having very stringent rules in place regarding the use of social media by employees as part of their work. It is very easy for difficulties to arise in the workplace. Take for example a situation where two work colleagues are in a relationship. One colleague posts an inappropriate picture or video of the other colleague. This then is put out on Facebook. Other workers in the workplace see it. The company may

well in those circumstances be facing an Equality claim for harassment. The speed of social media is becoming something which employers need to be extremely wary of.

The Protected Disclosures Act 2014

This Act is an important piece of legislation which employers need to be aware of. We have previously covered this in previous issues of Keeping in Touch.

A number of questions have been asked in relation to how the Act applies. The first issue is to whom it does apply. The Act applies to "workers". This is wider than just employees. Effectively it includes independent contractors, casual workers, agency workers, interns, trainees and workers on zero hour contracts. Effectively the definition of "worker" is so wide that it probably includes virtually anybody who works for the company.

The next issue which is asked is often what is a Protective Disclosure? It includes matters such as the commission of an offence, failure to comply with a legal obligation, as examples. It would include for a example a threat to the environment from pollution.

It is important to understand however, that it would not include breeches of an obligation in relation to a contract of employment of a worker.

The next issue which arises is what is penalisation? Again penalisation is very wide it includes disciplinary action. It includes suspension. It would include a lay off or a dismissal.

Employers should remember that compensation of up to 5 years remuneration as compensation can be awarded.

There is significant potential for claims under this legislation going forward.

State Immunity

In the recent UK case of Benkharbouche and others against the Embassy of the Republic of Sudan and others and Janh against Libya the UK Court of Appeal raised issues of public international law, the European Charter of Human Rights and the EU Charter of Fundamental Rights. The case involved two domestic workers bringing Employment Law complaints against the respective embassies of Sudan and Libya. The embassies claimed state immunity based on UK Legislation.

The question was whether envoking state immunity for these employment claims amounted to a breach of Human Rights Law. The argument was under Article 6 of ECHR, being the right to a fair trial and access to the court according to case law of the European Court of Human Rights. This raised the issue of rights giving that Article 47 of the EU Charter of Fundamental Rights guarantees a right to a fair trial. This would encompass claims under EU Law. It would not cover claims such as wages or unfair dismissal. The reason for this is that they would not be linked to EU Law.

The UK Court of Appeals followed the previous judgement of the UK EAT. It was held by the Court of Appeal that state immunity could no longer be evoked against all Employment Law claims but only against those claims concerning core embassy staff. This would not include to domestic workers.

The case is interesting for those interested in this area of law for the very comprehensive decision by the Court of Appeal. The reference is [2015] EWCA Civ 33.

UK High Court Rules That "Without Prejudice" Correspondence should be Disclosed

In Avonwick Holdings Ltd –v- Webinvest Ltd 2014 Chancery Division concerning a dispute over the terms of a company loan the issue arose during the proceedings as to whether the Claimant could apply for disclosure of certain correspondence which had been marked "Without Prejudice" by the lawyers for the parties.

The Court accepted that the marking of a document "Without Prejudice" was a strong indication that it applied but it was not conclusive. The Court pointed out that in the normal course of events, an experienced litigation solicitor, would only use the expression "Without Prejudice" in circumstances where it was justified to do so. The Court pointed out that as part of a genuine attempt to resolve disputes "Without Prejudice" can be used. However, as pointed out by the House of Lords in Bradford and Bingley –v- Rashid in 2006 it was essential for there to be a real dispute capable of settlement in the sense of a compromise. The Court held that discussions as to how an admitted liability was to be paid, for example could not therefore be covered. In this case the Court held that throughout the period of the relevant correspondence no dispute had in fact existed between the parties as the liability had been admitted. It followed accordingly that in accordance with established authority, the relevant correspondence was not covered by the "Without Prejudice" privilege and was therefore admissible evidence which should be disclosed.

This case is a reminder that the phrase "Without Prejudice" should be used with caution and relied on it with greater caution.

Should all Injury Claims be Sent to the Injuries Board

In the case of Clarke and O Gorman the Supreme Court [2014] IESC72 being a Judgement delivered by Mr. Justice O'Donnell it was pointed out that if the provisions of the Personal Injuries Assessment Board Act 2003 are not complied with then the Plaintiff is at risk of having his or her action defeated and costs awarded against them. It was pointed out that in most if not all cases where proceedings where commenced without the required authorisation the result would be just as fatal for a Plaintiff. In this case it was held that the lack of authorisation under the Act had not been raised by the Defendant at anytime during the process of Pleadings. It was only mentioned in correspondence shortly before the trial and the application was made at the commencement of the trial. It was held that it is not a Jurisdictional matter it could only be raised if it was pleaded.

The Decision is a very well thought out and technical Decision.
For practitioners it would appear that in every case involving personal injury an application should be sent to the Injuries Board. The case in question involved the case of an individual who claimed that she had

been sexually abused. Such claims are certainly not regarded as mainstream personal injury actions as was pointed out by the learned Judge.

From reading the Decision it would appear advisable that in any case involving personal injury that practitioners submit matters to the Injuries Board for assessment.

Home Renovation Incentive Scheme – Extension to certain Rental Residential Accommodation

The tax relief is by way of an income tax credit at 13.5% of qualifying expenditure on the repair, renovation or improvement works of a qualifying residence. The amount of the relief depends on the amount you spend on qualifying work. The minimum amount of expenditure is €4405 the maximum is €30,000. Therefore the lowest relief is €595 being €4405x13.5% the highest credit is €4050 being €30,000x13.5%.
The Finance Act 2014 extended the Home Renovation Incentive Scheme to certain residential accommodation in relation to expenditure carried out in the period from 15 October 2014 to the 31st of December 2015.
The definition of a qualifying residence now includes a residential property situate in the State which is owned by an individual and occupied by a tenant under a tenancy which has been registered with the PRTB and the registration requirements have been complied with by the individual or which is owned by an individual and which again is registered with the PRTB and is occupied by the tenant within six months of the qualifying works on the premises.
It should be noted where work involves the conversion of the residential premises into more than one unit the relief is available for work on each of those units.

It must also be pointed out that the work must be carried out by a tax registered and tax compliant builder/contractor. When engaging such a builder or contractor it is important to check that they are tax compliant and that appropriate documentation is produced.

Expiry of the 7 Year CGT Exemption

The seven year CGT Exemption ended on the 31st of December 2014. It will only apply for properties which are acquired before 31st December 2014.

For CGT purposes in most cases a property is "acquired" when contracts for the purchase of the property are actually signed. It is not the date that the purchase completes.

The relief applies for land or building that are acquired and held for a period of seven years. Any gain on disposal in the seven year period is tax free. To qualify for the exemption the property must be located in one of the following countries, Ireland, all EU member States, Norway, Iceland or Liechtenstein.

If you hold a property for longer than seven years then the relief will operate on a time apportioned basis.

For example if you purchase a property in December 2014 and sold the property in December 2024 being ten years time at a profit of €200,000 the gain is free but only up to 7/10 of the gain therefore €140,000 of the gain is tax free with the remaining €60,000 being liable to tax.

There is tax planning opportunities available to minimise the tax liability.

Local Property Tax – Deduction at Source

Legislation governing Local Property Tax (LPT) provides for payment by a liable person of the amount due in respect of the 2013 (half year) 2014 and arrears of 2012 household charge in either a single payment per year or by payments over the course of the year. One of the phased payment options provided for in the legislation is a deduction at source from a person's wages or salary or an occupational pension. It is important for employers/pension providers to know they are required to make this facility available to their employees/pension recipients since July 2013. Where a deduction at source is the means

by which the tax is to be paid the Revenue will notify the employer/pension provider via the Tax Credit Certificate (P2C) to deduct the amount from the employee's net salary or pension as appropriate.

Access to Social Benefits

The EU Parliament recently has announced that some 14 Million citizens of the EU work in countries other than their home country. Because of the fact that there can be difficulties in such individuals obtaining Social Welfare benefits if they lose their employment the European Parliament Research Service has produced a very comprehensive publication entitled "Freedom of Movement and Residence of EU Citizens – Access to Social Benefits".

UK Revenue Clampdown of Professional Footballers

It has been reported that more than 100 Premier League footballers are said to be in serious financial difficulties. They have received accelerated payment notices from the UK Revenue because of a particular tax planning scheme.

The accelerated payment scheme was introduced in 2014. A notice issued under the powers requires a user of a tax planning scheme to pay the disputed tax immediately if the scheme falls under the Disclosure of Tax Avoidance Schemes rules or it resembles one which has already been defeated in Court or has been disallowed under anti-abuse rules. In July last the UK Revenue published a list of several hundred tax planning schemes and notices were sent out to 43,000 current users of the schemes. Payment must be made within 90 days. There is no right of appeal. The only recourse is litigation of a tax assessment at a Tribunal or Court. A recipient who cannot pay for example because his income has fallen sharply due to retirement can be made bankrupt. Even if a taxpayer later wins at a Tribunal he or she will only receive their money back plus a tiny amount of interest. This will probably be after many years of litigation.

There is a situation now facing some former professional footballers who used certain schemes which created artificial trading losses.

Praise in Public – Criticise in Private

One of the first things I learned as a solicitor was that in managing people it is important to praise in public and criticise in private.

This makes absolute sense.

In today's business environment many employers forget that the easiest way to motivate a member of staff is that you praise them before fellow workers. Equally the easiest way to have the opposite effect on an employee is to criticise in public.

Far too often we forget to thank people for the job that they do. If somebody does something well it is important to thank them for it. It is surprising how much people feel empowered by being thanked in public.

Managers often also forget, because of the pressures of business, that if an employee is subject to criticism in public it undermines the confidence of the individual. It undermines the self esteem of the individual and can cause significant upset, which upset could easily have been avoided if any criticism had been directed at the individual in private. Where employers criticise in public this can often result in employees subsequently bringing claims against the employer out of frustration with the employer. Some of these claims might never have been taken if the employee had been treated with dignity in the first place.

German Employment Law in 2015

There are significant changes in German Employment Law. For the first time a general statutory minimum wage applies in Germany. There are due to be changes in their parental leave and care for close family members. There is legislation which is proposed to establish a quota of women at management level.

Since the 1st of January 2005 Germany now has a minimum wage of €8.50 per hour. There is a transitional period up until the end of 2016 only where there is a collective agreement. The minimum wage applies to all business.

In Germany employers face extensive record keeping and documentation obligations. This is to facilitate the monitoring of compliance with the minimum wage by the authorities.

It is interesting what the German penalty is for a breach of the obligation to pay the Minimum wage. In Germany failure to pay the minimum wage can result in a fine of up to €500,000. Yes, half a million. This shows just how seriously the German authorities are taking the issue of the payment of minimum wage.

In Ireland the reality of matters is that the non payment of Minimum Wage is generally applicable in the case of non Irish nationals. In Ireland the penalty is virtually nonexistent. Prosecutions are rare. If a claim is brought the only penalty which can be imposed for breach, by the LRC of the National Minimum Wage is that the employer is instructed to pay it.

In the area of Parental Allowances and Parental Leave since the 1st of January new rules apply as regards children born on after the 1st of July 2015. The new legislation allows families to receive parental allowance from 14 months to 28 months. This means that in future parents will be able to obtain a parental allowance and take on a part time job. From July parents will be able to take parental leave in 3 blocks without the employers consent. Formally it was 2 blocks. Formally the employer could refuse but now they cannot.

There will be additional provision for what we would call carers leave.

The German Authorities are going to change the law but no legislation has been published as yet on temporary agency work. It has been announced that the maximum period of temporary employment of 18 months will be laid down by statute and that temporary workers shall in future be put on an equal footing with regular employees no later than after 9 months.

There are proposals for equal participation of men and woman in leadership positions in private and public sector companies. A Bill was published on the 11th of September 2014. It is currently at committee stage. For listed companies the quota of women will be 30% of supervisory board seats. This will apply to companies who employ more than 2000 staff. Only approximately 100 businesses will be

affected by this quota. However there will be obligations on companies below this level to set specific targets to increase the share of women on supervisory boards, the executive board and the two management levels below the executive board and to set time limits within which the target is to be achieved. At the present time there is no minimum target figure. Some 3500 businesses will be effected by the new obligations.