Welcome to the July 2018 issue of our newsletter "Keeping in Touch"

In the area of Employment Law we are seeing a marked shift in the type of cases which are issuing. There appears to be a significant rise in Unfair Dismissal cases and Constructive Dismissal cases. There is also an increase in a number of senior executives whose jobs are being terminated. There also appears to be a significant increase in redundancy claims. It is difficult to explain why but there would appear to be some evidence that redundancy is now being used as a method of getting rid of certain staff members, some on the basis of having an opportunity to dispense with non performing employees, by either determining that the job will be done at a higher level requiring additional skills which the particular employee would not have or that the value of the job is being downgraded.

There is also it appears to us to be a significant rise in a number of cases where there is an employment and a personal injury element. These fall into two separate categories. The first is an employee suffers a workplace injury but then went going through the facts of the accident and how the individual worked it becomes evident that there are quite serious breaches of matters such as the Organisation of Working Time Act. This can have a significant impact on how the accident occurred particularly where there are excessive hours of work or lack of breaks which can result in an employee being tired and therefore either they or another employee in a similar situation creates situation where an accident is more likely to arise which clearly has arisen. The second is where, because of bullying and stress in the workplace, employees have suffered a serious psychological injury.

In the field of Personal Injury claims it is quite disturbing that workplace accidents now are becoming more common and the injuries suffered are quite serious. We do have a concern that due to pressures

of work in companies corners are being cut as regards health and safety which is putting workers at risk of either an injury or in the worse scenario death.

There are real difficulties for the public in both the area of Employment Law and Personal Injury work, particularly workplace accidents. Employment Law is now extremely complex primarily due to the fact that the law is not codified and there are different definitions as to who an employer is and whom the employer is of a particular individual and whether a person will be deemed to be an employee in that some self-employed individuals actually are protected under some pieces of employment legislation as if they were an employee.

In the area of workplace accidents, again, because of the complexity of issues it is now becoming a very complex and specialist area of litigation in itself.

Our newsletter seeks to try to keep those interested in the two areas of specialism which we have up to date with recent developments.

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Out and about and what has been said about us

In June the office has had a number of articles published in Irish Legal News. We are delighted to continue writing for them. We receive various comments at various stages and two individuals in particular made comments who have consented to us using their comments on our website and in this newsletter.

The first was from Roy Lalor, Head of Corporate Training at Pitman Training Swords who stated:

"Anyone studying HR or working in a HR role would do well to follow Richard Grogan and read his posts regularly. The same applies to any SMI owner wishing to avoid costly HR mistakes."

Alec Coakley, who is a mediator, in relation to a post on LinkedIn by Richard Grogan and Michelle Loughnane stated:

"The employment law practice of Richard Grogan and his colleague Michelle Loughnane has evolved into one of the most influential forces in the field of Irish Employment Relations today."

We are thrilled that those reading our posts, articles and newsletter feel strongly enough to make these comments.

We believe there is a role for Solicitor firms, such as us, in ensuring that relevant information in our specialist areas are made freely available. An understanding of the law is important. We believe that we as Solicitors and as part of our profession have a duty to make sure that relevant, informative information is provided so that members of the public and others interested in the law understand both their rights and their obligations.

We would like to thank both Roy Lalor and Alec Coakley for their kind comments and for allowing us to publish these.

In June a case of ours where an employee was held to be unfairly dismissed relating to issues with cooked chickens was reported in Irish Daily Mirror. Paul O 'Donoghue of The Times (Ireland Edition) wrote an article on 29 June dealing with the Lloyd's Pharmacy strike and their employee contracts where Richard Grogan of this firm was quoted on the issue of "if and when" and "zero hour" contracts. We were delighted that article referred to the fact that this firm was awarded Employment Law Firm of the Year 2018 from Irish Law Awards.

Submissions to the Workplace Relations Commission

An issue is arising in relation to Unfair Dismissal cases, which is somewhat worrying.

In an Unfair Dismissal case the burden of proof is on the employer. The burden of proof is only on the employee when the employer

challenges that there was a dismissal. Where the employer does not challenge there was a dismissal then the burden of proof is on the employer and the employer is obliged to go first.

There appears to be an issue with how submissions are being dealt with in such cases. It would be our view that a representative acting for an employee where dismissal is not in dispute is entitled to lodge their submission, with the WRC but on the basis that it will not be furnished to the other side until they have lodged their submission. That is not how the WRC is operating.

Even where an employee is bringing a claim if the employer is not challenging the dismissal, by which we mean that they are not challenging that there was a dismissal by the employer, then in those circumstances it would be our view that the employer must lodge their submission first. That should be given to the employee or their representative and the employee should then be requested to lodge a submission. In the case where the employer is contending that the employee resigned by which mean there is a Constructive Dismissal, then in those circumstances the employee should be requested to lodge a submission and the employer then to respond. We would contend that the employer cannot change their position at the start saying that there was a Constructive Dismissal to then saying it was a Dismissal.

That would not be fair procedures.

This is not happening.

The jurisprudence of the EAT was always that the employer went first and the employee did not have to do anything until the employer made their case.

In the Labour Court, equally, it depends on who appeals. If the employee appeals then they are obliged to put their case in first. If the employer appeals, no matter what the case is, whether it is a Constructive Dismissal or Unfair Dismissal, they have to put their submission in first. How the case then subsequently runs depends on

whether it is claimed that there was a Constructive Dismissal or an Unfair Dismissal.

Where there has been a hearing in the WRC then in those circumstances the procedures being adapted by the Labour Court would appear fair.

The employee, if they are appealing, will know what the employer's case is and the employer will know what the employee's case is.

The procedures in the Labour Court make absolute sense and they are absolutely fair.

There is however a more invidious issue which has crept into the WRC. That is that submissions are not being made in advance or they are being put in extremely late. In one case a submission but without the backup documentation was sent by email at 7.07 p.m. the night before a hearing. A considerable amount of case law was referred to. There was no way to go through the submission before the hearing in a proper way.

Because of this new approach that is being taken by some in relation to Unfair Dismissals, we have now written to the Director General of the WRC and set out matters as follows.

If there is an attempt to ambush us in relation to an Unfair Dismissal case by producing documentation late and in particular on the day or when we have requested documentation which we were entitled to and we do not get it until just before the hearing at a time that we have no reasonable opportunity to review it or it just arrives in on the day then the position is going forward we are going to make the following decisions.

1. In cases that suit us, we will run it.

2. We will be issuing request under the new GDPR Regulations and Act and if we do not get documentation we will issue proceedings. Where we put in a request for documentation and it is not

provided then we will decide whether we seek an adjournment. If we believe that an adjournment is needed first of all we will make sure that proceedings issue against the party that did not produce the documentation if it is covered under the GDPR. Secondly, we will only agree to an adjournment on the basis that we are given a date on the day which is acceptable to our client and where the date is fixed so that it will not be adjourned on any request by the other side without our consent. We will not be unreasonable but we will require that to be the position.

3. If 1 and 2 are not run as from our point of view by which we mean we are not prepared to run the case that day and we cannot get an agreed date on the day for an adjourned hearing then we will simply sign in and leave.

The days of ambushing in cases in which we are involved in, in the WRC, are now finished as of the 1st June. When we act for employees we expect to receive the submission in advance where the obligation is on the employer. We will always lodge our submission. If we do not get a responding submission then the above procedures will apply as we have advised the Director General.

In Unfair Dismissal cases where dismissal is not in dispute we expect to receive the submission well in advance so that we can respond to it and lodge our own submission. In Equality cases we accept that the initial burden of proof, when we are acting for employees, is on the employees and in that situation we will lodge our submission. Where we are acting for an employer, we will expect to receive a submission from the other side.

The WRC is not applying their own rules. In the Labour Court there is an obligation to lodge documentation. Their Rules are quite specific. Saying that, if a submission is not lodged, you will receive a phone call from the Labour Court. It is a very polite phone call. You are asked, is there a particular problem and they are always reasonable. However, it is made very clear that the submission is due and they expect it lodged. You will be contacted before the time limit runs out. In cases

where a submission does not have to be put in within the 21 day rule, you will invariably get a call in advance of the hearing giving you a couple of days to get your submission in. That is very fair. In the WRC all they do is simply put in what is effectively a two page letter. Then they stop. There is no effort to get submissions in. There is no follow up.

There is not one single case in the WRC where any representative has been criticised for failing to lodge a submission. We perfectly accept that there are times when submissions may be lodged which are not up to scratch. Any of us can do that. What is interesting is that the WRC Rules provide that if a submission is not received in time, an Adjudication Officer is entitled to disregard it. They should but they do not. Therefore the reality of matters is that effectively now submissions are not being lodged in advance. This is particularly so by some employer representatives. We regard it as ambushing.

The WRC clearly is not functioning as it should. It is effectively a free for all where no rules apply. We do not blame the staff in the WRC. It most definitely is not their fault. There is a shortage of staff. There is a shortage of investment in the WRC. This is not the problem with the staff. Many of them are overworked. However, we were promised a world class service. What we are getting is not even a third world service. It is due to resources. However, employees and employers have a right to fair procedures. Because of the issues in the WRC some representatives for employers have identified the weaknesses in the system and are playing to that by effectively providing nothing in advance and effectively seeking to ambush employees.

We do act for a large number of employees. We also act for employers but we are known as an office that represents employees. Therefore, we put matters very clearly to the WRC that the days of ambushing have ceased. We have advised the Director General that the letter we sent to her should be notified to the Adjudication Officers as the procedures which are going to apply going forward are going to be applied and if we have to leave a hearing, we will leave it and we will have the case heard in the Labour Court where fair procedures will be

applying. The days of taking part in a charade in the WRC are now gone. We have privately spoken to some people in the WRC and set out how matters could be rectified. There is a resistance to this. Where parties are represented, we have said that there should be case management meetings at which submissions have to be then provided within strict time limits and in the event that they are not provided within the time limits that the submissions would simply be ignored. If there is a case management meeting and a representative has a particular problem it can be set out. Reasonable accommodation can be provided. Time limits can be provided for furnishing submission and for counter submissions or alternatively that submissions are lodged and are not exchanged until both submissions are in. This is not a huge task. It is a process that the Labour Court often undertake.

Unfortunately, currently the WRC is dysfunctional.

Richard Grogan of this firm was a supporter of the concept of the WRC. He was very much in public supporting it against those who opposed it. Richard Grogan is now of the opinion that he was on the wrong side of the argument in that he accepted the statements made by then Minister in good faith that there was going to be a world class service. We are now nearly 3 years since the WRC started and that procedures in the WRC are worse than what was in the LRC, the Equality Tribunal and the Employment Appeals Tribunal. The only thing that can be said is that the WRC is quicker than the Employment Appeals Tribunal or the Equality Tribunal were. It would probably be fair to say that the quality of many of the decisions in the WRC are better than we had in the EAT and the LRC but certainly the Equality Tribunal's decisions were always very comprehensive. Saying this the number of cases in the EAT or the LRC which were overturned on appeal was very, very small so they were getting matters right even if long decisions were not normally given but then often long decisions were not needed. None of the time limits specified in the WRC guidelines are being met. Excuses are being put forward by the WRC to say that where there is no request for adjournments or there is no delay in submissions going in that decisions issue within 6 months, namely a hearing and a decision. This is not happening in

our experience. We lodge a considerable number of claims. Submissions go in day one. When we review the WRC website we are seeing decisions taking between 3 to 6 months to be actually issued. We know the Adjudication Officers produce them quicker but them being sent out is effectively a 3 to 6 months period.

We believe that it is important that there is a comprehensive and properly resourced WRC function and hopefully that will happen but it requires work from all the stakeholders to make it happen.

WRC Complaint Forms

In the case of Janis Eglitis and Ballinalard Transport Limited (In Liquidation) an issue arose in the original hearing whereby the employee brought a claim, represented by this office, relating to a breach of the Road Transport Regulations being S.I. 36 of 2012.

The WRC claim form at that stage did not provide for any complaint under the relevant Statutory Instrument. In this case, therefore, this office amended the WRC claim form by writing in our own box, if we can call it that, and ticking it and setting out that the claim was under S.I. 36 of 2012, namely have not been given the appropriate notification of the relevant Statutory Instrument. The Adjudication Officer/Rights Commissioner in this case dismissed the case. The Labour Court on appeal upheld the appeal on behalf of the employee and an award of a €1,000 was made. There is an issue with the WRC online complaint form. There are other cases which we have referred to though this office was not involved in them, namely situations where individuals have attempted to put in claims for example under Section 6 (4) of the Unfair Dismissals Act which the WRC complaint form does not make provision for. Where the complaint form does not make provision for a claim to be lodged then in those circumstances it is our advice that the claim form is completed as best it can be, it is then printed off and a handwritten note is included with a box that is ticked setting out the relevant Act or Statutory Provision that the claim is being brought under. The claim can then be sent to the WRC

in O'Brien Road, Carlow through the Document Exchange or alternatively by post. In addition, it can be scanned and sent to the Director.General@workplacrelations.ie (it is a capital D and capital G) and to secure.email@owrkplacerelations.ie.

We have been promised a world class service. This office recently was critical of the WRC and their procedures. There has been a response by the WRC that those issuing complaints should do so using the online complaint form. We have significant concerns regarding the online complaint form. These are as follows.

1. There are a number of significant defects in the complaint form whereby specific claims are not captured.

2. For some unknown reason the WRC wants to have every specific complaint given what is called a CA reference number. In the LRC simply claims were given a single reference under a particular piece of legislation regardless as to how many claims were lodged. We see no reason why the WRC have to give a separate CA reference to each claim. It causes huge problems. It means that a separate decision has to be issued for each CA reference, even under the same Act. It there was just a single reference for each individual Act then in those circumstances it would be much easier to operate matters.

3. Having a single complaint form while useful is causing problems taking into account a number of claims that are dismissed because the wrong Act is being claimed under. It would be far better if there was a separate complaint form for each Act. It will then be very clear what Act the claim was being made under.

4. The problem with WRC complaint form is very simple. There is over 730 pieces of legislation being Acts, Statutory Instruments, Directives and EU Regulations which apply. Because of the fact that there is no codified piece of employment legislation and due to the fact that there are different definitions of employer and employee for various pieces of legislation the whole system is now

so complex that the adventure that the WRC has entered into as regards an online complaint form is one which should be abandoned. The facts that they tinker around with the claim form every time a defect in the claim form is found is not a solution. It is the case that there is a significant problem with the complaint form. In addition, from reviewing decisions from AO's it is quite evident that particularly those who are not represented by Solicitors or Barristers are having significant problems in bringing claims. Of course many people bring claims and are successful but a significant percentage of unrepresented individuals are bringing claims under the wrong Act. That means that we do not have a world class service. If we had such a service then such issues would be few and far between rather than arising on the regular basis that they are arising.

Parental Leave (Amendment) Bill

This Bill has passed the second stage in the Dail.

The Bill proposes to extent changing the Leave to 26 weeks. It also seeks to increase the age at which a parent can take Parental Leave up to 12 years of age. Up until now it has been 8 years of age.

This proposed extension which will go through in due course is to be welcomed.

There is however a problem with this legislation. It is unpaid. Unlike Maternity Leave or Paternity Leave there is no Social Welfare payment. This means that it is incredibly difficult for those on lower salaries to be able to take the Leave. Issues such as the payment of mortgages, or other expenses in running a home are issues which impact on an ability of a parent to take Parental Leave. It would have been much better if this legislation had provided that when a parent takes Parental Leave that in those circumstances there would be an automatic right to get a stay on mortgage payments. It would be far better also that an employee who takes this Leave would be entitled,

when they are renting property, to get rent supplement or at a very minimum that Social Welfare would be paid.

There are also some misconceptions about Parental Leave. Parental Leave is there for a parent to spend time with the child. This can simply be the parent being at home with the child. It can also be taking the child on an extended holiday. It is not however an issue which enables a parent to head off on their own without the child to go on a golfing holiday or for the parents to leave the child with one of the grandparents while they head off on holidays themselves.

Where an employee is taking Parental Leave an employer is entitled to know that that time will be spent by that parent with the child. Where the Leave is abused by being used for some purpose other than spending time with the child then in those circumstances that is an issue which can be a disciplinary matter. In a well drafted Staff Handbook it would provide that any abuse of Parental Leave Legislation would be a disciplinary matter.

Parental Leave is an important right. Unfortunately, it is not properly funded. Equally, unfortunately, at times it is abused.

Paternity Leave

While in this newsletter we tend to concentrate on issues such as Maternity Leave and issues relating to women in general. The issue of Paternity Leave is an issue which it is important for men to understand.

The Leave entitles an employee to 2 week Leave on the birth of a child.

The employee is entitled to obtain Social Welfare for those 2 weeks.

Paternity Leave is an important right for fathers.

Self-employed or Employed

In case ADJ-10183 the AO had to deal with the issue as to whether or not an individual was an employee or not.

The AO in this case referred to the case of Henry Denny and Sons (Ireland) Limited and Minister for Social Welfare, 1997 IESC and the decision of Mr Justice Keane. The representative of the employee pointed out that following that decision that the fact that the employee was responsible for her own tax affairs was of minimal value in identifying the contractual status of the employee.

The case of Nethermere - St Neots (Ltd) and Gardiner 1984 LCR 612 in which the test of mutuality of obligations was identified as a prerequisite for a contract for service to exist it was pointed out that a contract for service was not in existence in that employment. The AO referred to the Code of Practice for determining employment or self-employed, employment status group, Programming for Prosperity and Fairness 2017 which set out the relevant tests. The AO found that the individual was an employee.

Settlement Agreements - a Warning for Solicitors

At the present time there seems to be a new trend in Irish business where large numbers of employees are being made redundant. Many are obtaining enhanced redundancy packages.

Because of the way these have been set up, employees are being required to get the termination agreement witnessed by a Solicitor. Fees between €350 and €500 plus VAT are provided.

There are a number of traps for colleagues.

The first is in relation to tax. We know that colleagues will say that they do not advise on tax. That is not sufficient. Where the agreement provides particularly that if there is any miscalculation of the tax that the employee will be liable, it is absolutely imperative that the Solicitor

advises before anything is signed that they obtain tax advice from a reputable tax advisor as to what the net amount they are going to receive. Fail to do so and colleagues are on the risk of a negligence action against them.

The next issue is the real minefield. It is pension planning. Because of the way the tax system works, employees may obtain what is known as SCSB or an enhanced termination tax free allowance. Both of these can have a detrimental effect on future pension rights of the employee signing with regard to tax free lump sums at retirement age. Again, it is imperative that the employee is advised to get independent pension advice prior to signing the documentation.

In situations where the employer is acting in a reasonable way, this will have been provided to the employee. They would have had a meeting with a tax advisor. They would have had a meeting with a pension advisor. They will have received the document setting out what the situation is as regards tax and pensions. Once as a Solicitor you are aware that this has been obtained then you are dealing with the balance of the documentation dealing with such things as non-compete clauses or non-disparaging clauses or all the other regular provisions which relate to a termination. These are ones that Solicitors would be fully aware of. It is safe then to proceed to advise on those, relying on the specialist advice in relation to tax and pensions.

If you fail to address these issues, there is a significant risk that if something goes wrong the employee will be back to you claiming negligence. The defence that you are not a tax advisor or pension advisor will not be sufficient.

This office has expertise in the area of the taxation of employment awards and settlements including termination payments. We do not advise in redundancy situations on tax calculations which could have an impact on an employee's future pension rights. Therefore issues such as SCSB or the enhanced termination payment of an additional €10,000 tax free are ones that we will not act for or sign witnessing the signature of an employee until that information relating to the tax

computation and the pension situation have been clarified, in writing, to the employee. It is simply just far too dangerous.

We speak from experience. Recently we were involved in a matter where there was a substantial termination payment. The employees advised they were fully conversant with all issues, understood the issues and were happy to sign. We insisted that they obtain appropriate pension advice as to how in the way the deal was being structured it would impact on their pension rights in the future. There was a calculation prepared by a top accountancy and taxation firm which has specialist pension services. Our clients were probably well protected in that if they had signed the documentation they would have had a claim against that advisor. However, because of the amount involved we were of the opinion that it would be advisable that our client obtain separate independent advice effectively as a second opinion as this was a complex calculation where the issue of the SCSB was being used to maximise the amount going to the employee now. When the advice came back it indicated that for a relatively small sum of additional monies now there would be a significant loss of future pension rights.

The transaction, in the way it has been structured had to be restructured. The net amount received by the employee now was reduced. However, the full pension entitlements to draw down €200,000 exempt from tax on reaching retirement age were protected.

Solicitors dealing with these transactions will invariably say that they are not involved in tax and pension planning. There is no problem with that. If however, and this is only our opinion, a Solicitor is not conversant with the tax and pension aspects of any proposed settlement document then unless there is documentation from a reputable tax and pension advisor setting out what the net tax is which the employee will receive and how any structure will impact on the employee's future pension rights then in those circumstances Solicitors should not witness the termination agreement until such time as that is received and they have it on their files with the

employee client confirming to them they are happy with that situation as regards tax and pension and understand same fully.

This is simply our opinion.

We are strong on this point. Recently we were asked to advise a group of employees. None of them were going to be provided with tax or pension advice. Calculations have been prepared on the basis that this was an estimate or what they would receive. No guarantee was being given by the employer and there was a clause stating that if there was any incorrect tax calculation that the employees would have to repay same to the employer. We refused to act until such time as verified tax calculations for each employee was done and there was a clear and definitive statement from a pension advisor as to what the pension position would be on retirement as a result of signing the agreement and that that would apply to each and every employee.

We are simply passing on our opinion.

This is a minefield. It can look very attractive if you were getting a fee of €400 plus VAT for 20 or 30 employees there would be a fee of €8,000 to €12,000 and where the documentation can be signed up for those employees over a day or possibly a day and a half maximum. However, it can be a nightmare if it goes wrong as you then can have 20 to 30 separate claims against your insurance policy.

If in doubt, make sure appropriate specialist advice is obtained before you put your name as a witness to a termination agreement where there is any issue of tax or pension planning to be taken account of.

Getting a client to say they are refusing your advice to get tax and pension advice may not be sufficient as Solicitors are deemed to have the basic knowledge of the tax and pension effects, even if they do not.

Contracts of Employment – What else do you Need?

There are two schools of thought as to what should be in a contract of employment. The first is that it should include everything such as

policies and procedures. The second is that it should be more limited and that relevant policies and procedures should be included in the staff handbook.

We are of the view that the contract should set out the main conditions of employment. It is a legal document. It cannot be easily changed. If a clause put into a contract of employment then it is a contract, it is legally enforceable. It cannot be changed without consent.

However, where matters are included in a staff handbook then policies can be subject to change. It is important that the contract has a particular provision in it that the staff handbook policies and procedures will apply but also that the handbook can be changed to take account of changes in practice, changes in the law or changes in the way the business operates.

The most important policies and procedures to cover in a staff handbook are:-

1. Grievance procedure
2. Disciplinary procedure
3. Bullying and harassment
4. Sexual harassment
5. Health and safety
6. Whistleblowing
7. Internet policy
8. Privacy policy

There will be many other provisions included in a staff handbook. The matters set out above are merely examples.

In drafting a contract of employment it is helpful in the contract to advise where particular policies and procedures are and where they can be found. The contract can set out that these will be set out in detail in the staff handbook. It is not advisable to provide that the

policies and procedures will form part of the terms and conditions of the employee's employment contract. And the reasons were set out above. Changing a contractual term requires consent. In addition incorporating policies and procedures means that the employee is contractually bound to follow these policies and procedures but so too is the employer. This leaves the employer more open to a claim for breach of contract. It will often be now that the contract will provide something such as "*full details of the company procedures are contained in the employee handbook which is attached to this contract. These procedures do not form part of your contract of employment".* It is vitally important to ensure that an employee signs a letter confirming that he or she has read and understands the employee handbook. This should always be kept on the employees personnel file.

Contracts of employment are important. They are the basis of the contractual agreement between an employer and an employee. Both employers and employees can rely on these contractual provisions.

It is very important that employers get contracts of employment drafted by qualified solicitors.

It is equally important that senior management or owners of a business take the time to read and understand any staff handbook or contract which is in place as failure to comply with same can cause significant difficulties for an employer if they are subject to a subsequent claim in the WRC or for breach of contract.

Unfair Dismissal

In case of Aurivo Co-Operative Society Limited and Jonathan Bowens UDD 1830 the issue in this case relates to fair procedures.

The Court in this case referred to the case of Samuel J Frizell -v- Newross Credit Union 1997 IEHC 137 where the High Court set out the principles to be observed. Namely:

1. The complaint must be a bona fide complaint unrelated to any other agenda of a Complainant.
2. Where a Complainant is a person or body of intermediate authority it should state the complaint, factually, clearly and fairly without any innuendo or hidden inference or conclusion.
3. The employee should be interviewed and his version noted and furnished to the deciding authority contemporaneously with the complaint and again without comment.
4. The decision of the deciding authority should be based on the balance of probabilities flowing from the factual evidence and in light of the explanation offered.
5. The actual decision, as to whether a dismissal should follow, should be a decision proportionate to the gravity of the complaint, and of the gravity and effect of dismissal on the employee.

To put very simply principles of natural justice must be unequivocally applied.

In this case the employer sought to rely on a failure to follow an instruction. The Court held that the employee was not given a written copy of the instruction or policy nor was the policy displayed in the workplace. The Court pointed out that in or around the same time the other workers also breached the policy which had to raise issues as to how clearly the policy was understood by the staff in general and the importance attached by management to the particular policy. The Court pointed out that at no time was staff advised that a breach of this policy could lead to a disciplinary action up to and including dismissal.

The Court also pointed out that an impartial manager should have conducted the disciplinary hearing.

The Court in this case approved the decision of the Adjudication Officer.

This case is important not only for having set out the law but also for the Court clearly pointing out that the issue of fair procedures is of paramount importance in cases of Unfair Dismissal.

Unfair Dismissal Where there is no Financial Loss

Case ADJ8705 is a perfect example of the provisions of the Act where the employee suffers no financial loss either directly or where they have pension or other rights. The AO in this case set out that this was the position and awarded the employee the maximum compensation which is 4 weeks wages. That is the most that the AO could have awarded.

In this case the decision as to how this was arrived at is set out in a very clear and pragmatic way. Unfortunately, in some cases employees do not understand that where they have not suffered any economic loss the maximum compensation they can receive is 4 weeks. Where they have suffered an economic loss, again the maximum they can receive is the actual economic loss.

There is an issue with this namely that where an award like this is made, this award is subject to tax. If it had been settled the award could have been made exempt from tax as a termination payment. Where a decision is issued the employer has to deduct Tax and USC. In addition, the employer has to pay their own employers PRSI on the amount of the award.

Unfair Dismissal Act

In a the case of Sasta Hardware Limited and Emma Noack UDD1827 the Labour Court has set out the law in relation to what is an unfair dismissal.

The Court in this case stated,

"*The act deemed the dismissal to be unfair until the respondent in proceedings under the Act demonstrates that it was neither substantially nor procedurally unfair.*"

The Court in this case held that the selection of an individual on the basis of an absenteeism record is not sufficiently objective and impersonal for the purposes of selecting someone for redundancy. The important aspect of this case, for practitioners, is an issue which often arises in cases namely that the test in an Unfair Dismissal case is whether the dismissal is substantially and procedurally fair. If a dismissal was not procedurally fair then it is an Unfair Dismissal. If it is not substantially fair then it is an Unfair Dismissal.

While the Court in this case did not need to go any further it invariably arises in other cases that the issue in defending cases from employers is that they seem to justify why the person was dismissed. The issue of procedures is often skipped over. The reality on matters is that even if a dismissal is substantially fair if it is not procedurally fair it will still be an Unfair Dismissal.

Unfair Dismissal

In case ADJ-7808 the AO in this case has taken considerable length of time to set out the law.

The employee stated that she had not resigned. The Respondent employer had said the Complainant left herself. She was suspended and on the day of the hearing said she was dismissed. The AO referred to the book by Frances Meenan being Employment Law First Edition 2014, Chapter 20-68 where the author states:

"It should be noted that there is no provision for "self-dismissal". In other words, an employer cannot state to an employee that if that employee does not do something or does not come to work it is deemed a "self-dismissal". There is no such thing. Either the employer or the employee must actually terminate the contract of employment."

The AO referred to the same book and Chapter 20-135 to 20-137 where it relates to theft or irregularities where it states:

"Generally speaking, in a dismissal arising from an alleged theft, the value of the goods taken is immaterial, because if the employer has reasonable belief that goods were taken, there is a clear breach of trust.

Even if an employer has CCTV footage of alleged employee dishonesty, the employer must still carry out a full and thorough investigation and not merely rely on the footage as grounds for dismissal. The use of CCTV must also be lawful in that employee should be advised that CCTV is being used and the reasons as to why it is being used along with the extent of its use. It must be consistent with the Data Protection Acts 1998-2004" (now the new Data Protection Legislation).

This is a most helpful overview of the law set out by the AO.

The AO also in this case has clearly set out that the employer simply did not follow its own procedures at all. Compensation was awarded.

This is a helpful decision by the AO.

Unfair Dismissal - Non-payment of Wages

In case ADJ-10120 the AO dealt with the issue of Constructive Dismissal. The AO correctly set out that the burden rests on the employee to prove that he or she has left the employment due to the unreasonable behaviour of an employer.

In this case the AO held that a Constructive Dismissal is set to occur when the employer breach goes to the root of the contract whereby the employer is not to be bound by one or more of the essential terms. The AO referred to the case of Western Excavating (ECC) -v- Sharp 1978 ICR 1221 and applied in this case in the case of O'Brien -v- Murphy Plastic UD142/4/1980. The AO found that it was reasonable in the absence of pay and any concrete plan to remedy this omission that the employee was entitled to consider himself Constructively Dismissed and therefore the claim was well founded.

This is an important decision. The issue of pay is such a fundamental issue, in our opinion, that the requirement to go through grievance

procedures or otherwise does not arise if the employee can show that monies due to the employee were not paid.

European Community (Protection of Employees and Transfer of Undertakings) Regulations 2003

In the case of Euro Carparks (Ireland) and Dermot Kelly TUD180 this is a case where an Adjudication Officer has held that there had been no transfer where the contract to run the Paul Quay Car Park in Wexford in which the employee Dermot Kelly was an employee had not been a transfer under the Transfer of Undertakings therefore his complaint was not well founded.

The facts of the case are interesting. The employee was employed as a car park officer. On the 14th October 2016 a company called Oyster Lane Limited served a notice to terminate the contract of Euro Carparks (Ireland) Ltd to operate the Paul Quay Car Park.

The issue was to be determined then whether there was a transfer under the Transfer of Undertaking Regulations.

The Appellants referred to the Court a number of authorities in support of its submission that there had been a transfer. These are set out in the decision of the Court.

The Court set out that the aim of the Directive and by extension that of the Regulations is to save the rights and entitlements of employees arising from their employment relationship where the business or part of the business in which they are employed transfers from one employer to another employer. The Court referred to the Spijkers case 24/85, case C-13/95 Suzen, case 340/01 Abler and Others. The Appellant submitted that the business carried on at the car park up until the date its contract to operate the business ceased was identical to the business now carried on there by Oyster Lane Ltd and therefore having regard to the Directive and Regulations a Transfer of Undertaking occurred. The Labour Court set out the relevant case law including the Spijkers case and the case of Sophie Redmond Stichting

being case 39/91 along with Case C-173/96 and C-247/96. The Labour Court referred to the case of Abler being case 340/01. In that case the Labour Court pointed out that the ECJ found a transfer within the meaning of the Directive occurred where a provider of catering services was succeeded by second provider in circumstances where both providers had the use of the same kitchens, food storage and food preparation facilities owned by the client and whose behalf the services were provided. The Court pointed out that the parallels would apply to the successive operators of a facility such as a multi storey car parking complex as both operators provide a service utilising the same substantial and fixed essential assets.

The Court held that there had been a transfer under the Transfer of Undertakings.

This is an extremely important decision of the Court. It cannot be underestimated as regards its value. There are numerous fights which take place in relation to the issue of the Transfer of Undertaking Regulations. This is a very clear and precise decision from the Labour Court. As effectively the Court has looked at it as the same business effectively being carried on in the same premises with the same assets and facilities. The Court has held that where that is the position then there is a transfer under the Transfer of Undertakings.

There is of course huge resistance to the Transfer of Undertakings applying. There is a significant cost to the entity acquiring to take on existing employees whom they do not know and some of whom they may not want. This is a decision I would recommend anybody interested in employment law would read.

Transfer of Undertaking Regulations

There are a number of problem issues we see arising in relation to cases where there is a transfer under the Transfer of Undertakings Regulations.

What are these?

The most usual issue relates to Terms and Conditions of Employment.

Many of those purchasing business where the Transfer of Undertaking Regulations apply fail to recognise that the employees being taken over, except in very limited circumstances, come to the new employer with their existing contract of employment and any agreement which has been agreed with them and their previous employer being the Transferor.

The Regulations are clear. Where an employment contract transfers then the employee transfers on the existing terms of employment, effectively, as if the contract was made between the employees and the person acquiring the new business.

Some of the problem issues which arise are that an employee comes to the new employer in relation to their claim for an increased wage or bonus or other benefit which has been agreed with them in advance of the transfer. The fact that the new owner does not know about these does not mean that they are not bound. They are bound by these agreements between the old employer, if we call them that, and the new employer.

The issue sometimes arise as to whether the new employer can simply ignore any such agreement with the employees. The answer is NO. Any unilateral variation of the contract is void under the Regulations if the sole or principle reason for the attempted change is the transfer itself. An attempt to revoke a pay rise or other benefit that has been agreed with the employee or employees will be void. In the case of wages the employer can be subject to a claim under the Payment of Wages Act for an illegal deduction of wages. This can issue week by week or month by month.

An employee is also protected from having their working conditions substantially altered by the transfer. If this happens the employee can treat themselves as effectively being dismissed.

The argument is often raised that the old employer should be responsible. That is not the law in Ireland. The new employer is

responsible for any breach. This includes a breach which may have occurred prior to the transfer. This comes as a shock to many employers. For example if an employee has a claim that they did not get their annual leave in the year ending 31 March 2018 and the transfer takes place in June and the employee issues proceedings in July, it is the new employer, not the old employer, who is responsible for that breach. If equally an employee issues a claim under the Employment Equality Legislation for sexual harassment, for example, or racial discrimination or any other employment claim that claim goes against the new employer not the old employer.

The issue we are often asked is how can the new employer protect themselves.

The first issue is that before any transfer takes place, the new employer should meet with an Employment Law Solicitor. This is different than meeting with their commercial Solicitor. An Employment Law Solicitor is needed to go through the various issues. Equally, an Employment Law Solicitor will help guide the new employer in relation to the due diligence which needs to be undertaken prior to any transfer being completed.

What does this mean in practice?

In practice this means that the contracts for all employees need to be reviewed. Particulars or any agreements with employees need to be furnished. Particulars of any claims need to be notified to the new employer. It is useful to require a list of all employees and that a check list is sent to them to ensure that they confirm that they have received their contract, that they have obtained their holiday pay, they received their holidays, that they have no claims for underpayment of wages, and to get confirmation from them as to whether they have any other claims against the existing employer. There will be resistance from the seller of the business. However, as claims have a 6 months' time limit. Even if the old employer in certain circumstances will not know about any potential claims, in any transaction the recommended approach to deal with the risk is to include a series of

warranties and indemnities written into the contractual agreement that covers the business transfer.

Equally, it is important between the time that negotiations start and the completion of this sale to the new owner that there is a warranty from the Transferor, being the seller of the business, that they will not agree any pay rises between exchange of contracts and the transfer date itself or any change in terms and conditions of employment without the approval of the purchaser of the business.

There should be an agreement and the seller of the business should indemnify the purchaser for any cost resulting from a breach of that warranty or in respect of any possible claims that can arise.

In larger organisations or even in smaller company and business situations it is now advisable that a certain sum of money will be set aside and held by the Solicitors acting for the seller of the company or business until such time as the statutory period for issuing proceedings has elapsed and that if any such proceedings issue that these monies will be held pending the outcome of any such case and that any award and costs resulting in the defending of any such cases will be discharged out of those sums with the Solicitor for the vendor giving an irrevocable undertaking not to release the money and to pay the said sums. When acting for anybody selling a business, it is worthwhile to include a provision that if any claim issues that they should have the right to nominate a firm of Solicitors to defend the case. In some cases a consultation with the employees will be required and it is vitally important that if you are involved in the purchase or sale of a business that the appropriate notification is sent by both the vendor and purchaser of the business notifying them of the pending sale and advising as to whom the new employer will be. Both parties need to provide this information and it should be provided in writing along with evidence that same has been complied with.

As economic activity increases in Ireland, the issue of the Transfer of Undertaking Regulations is becoming a common problem and is

leading to litigation. We believe that there will be substantially more litigation in this area by employees in the future.

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Protection of Employees (Fixed-Term Work) Act 2003

The issue of the complexity of Employment Law is clearly evident in a case of Blackrock College and Valerie Coyle, case FTD183.

The employee brought a claim under the 2003 Act. The issue in this case was whether in fact the employee was a Fixed-Term worker. The Court has helpfully pointed out that despite the fact that the employee was employed for the academic year and was laid off each year thereby being able to claim Social Welfare and was re-employed the following year, was in line with how seasonal workers were treated and did not detract from the fact that the employee had a permanent contract of employment.

The case of The Minister for Finance v. McArdle 2007 E.L.R. 165 was discussed. In that case the Minister had denied that the Complainant had acquired a Contract of Indefinite Duration until the eve of the case coming on for hearing. The Court found that conceding this aspect of the complaint at such a late stage of the proceedings could not be relied on by the Minister for Finance to defend Ms McArdle's complaint that she had been treated less favourably than a permanent employee while being treated as a fixed-term worker by the employer. The Court in this case pointed out that the Blackrock College at no point sought to deny that the Complainant was a permanent employee. The Court pointed out when the College received correspondence from the Complainant's Solicitor in October 2016 it replied immediately that it considered the employee to be a permanent member of staff. The Court therefore held that this case had no comparisons with those of the McArdle case. The Court helpfully pointed out that even if the Complainant was to establish that she was on a serious of successive fixed-term contracts of employment at the time at which the complaint was lodged with the Workplace

Relations Commission she had acquired a Contract of Indefinite Duration by operation of law and was no longer a fixed term employee. The Court helpfully pointed out that had the College denied or hesitated in acknowledging that the Complainant was a permanent employee that her claim could succeed and she would come within the scope of the Act in respect of both Sections 6 and 9 of the Act. However, the Court pointed out that the College had at all times treated her as a permanent employee and immediately confirmed the status when queried and therefore she could not come within the scope of the Act. Ms Coyle had won before the WRC but that decision was overturned.

This is an extremely important decision of the Court.

The reason that it is important is that it has confirmed two important aspects, namely:

1. That an employee will automatically acquire a Contract of Indefinite Duration and when they do they cannot bring a claim under the Protection of Employees (Fixed-Term Work) Act 2003.

2. That even where the employee has acquired that legal right, if the employer denies that the employee is under a contract of indefinite duration then in those circumstances an employee can still process a claim.

While the issue is not covered in this particular decision, an issue arises as to how claims should be lodged. The first is of course that the relevant Act must be identified. It is quite clear from this and other cases that due to the complexity of employment law cases there will often be an issue as to whether an employee comes within a particular Act or not. In relation to issues of pay, it is possible for this type of employee to come either within the 2003 Act or the Employment Equality Acts. If there is any doubt whatsoever it is always advisable that the claims are brought under both Acts. Equally, if there is any doubt as to who the correct employer is which did not arise in this case but can in other cases it is equally important

in those circumstances to ensure that claims are issued against every potential individual or entity who could possibly be the employer.

Unfortunately, a submission that was made by the Employment Law Association of Ireland to the effect that claims could be brought against the entity for whom the employee worked, even where it was a trade name, was rejected. Therefore, a requirement on employees or those representing employees to identify whom the correct employer is. At times this does require the employee attending with their Inspector of Taxes to obtain a copy of their P21 and if that is not clear actually attending to get a letter from the Inspector of Taxes as to whom their actual employer is.

The only reason we are mentioning this is that it is becoming evident to us that the complexity of employment law is such that claims are being lost because of the fact that the law in this area is so complex.

Protected Disclosures Act 2014

The issue of penalisation arose in the case of Fingal County Council and John O Brien. In that case being reference PDD184 the Labour Court held that there had been protected disclosures. The employee contended that he had been moved to a new role and that it was effectively a demotion.

The Court set out that there were three tests that had to be proved, namely:-

1. That the employee had made one or more protected disclosures
2. That the employee had suffered a detriment;
3. That there was a causal connection between matters 1 and 2 above.

The Court pointed out that they had previously considered this issue in the case of Aidan and Henrietta McGrath Partnership –v- Anna Monaghan PDD162 where the Court had stated,

"*..The detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the complainant having committed a protected act."*

This suggests that where there is more than one causal factor in the chain of events leading to the detriment complained of the commission of the protected act must be an operative cause in the sense that "but for" the complainant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motives or reasons which influenced the decision maker in imposing the impugned decision"

In this case the Courts held that after hearing the submissions the employee had been reassigned some months later. The Courts were not satisfied the employee had suffered a detriment. The Court also pointed out that there was no evidence that the transfer occurred other than in the normal way such transfers take place in a public body as part of a routine and legitimate and wider reorganisation of staff. The Court pointed out that the employee did not suffer any reduction in salary or other benefits following the transfer. As a consequence they held that there had been no penalisation under the Act.

This is a very important decision in clarifying the law on this point.

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Protected Disclosures Act, 2014

In a case of Fingal County Council and John O'Brien PDD184 the Labour Court has helpfully restated the test which a Complainant under the Act must satisfy in order to establish that he or she has suffered a penalisation within the meaning of Section 12 (1). That is that as a consequence of having made a Protected Disclosure in order

to establish a causal connection between their Protected Disclosures and the detriment complaint off. The Court referred to the case of Aidan and Henrietta McGrath Partnership -v- Anna Monaghan PDD162 and quoted extensively from that case.

Organisation of Working Time Act Notification of Overtime

An interesting case arose in the case of the Carambola Limited and Wrobel DWT 1810. In that case the employee contended that the employee was not given proper notification under Section 17 of the Act. The defence was that the fluctuation and the volume of orders placed with the respondent for its packed lunches amounted to "circumstances which cannot reasonably be foreseen" and the respondent sought to rely on Section 17 (4) of the Act to justify varying the complainants finishing times. The Court in this case has set out that the Respondent had not set out a case that came within Section 17(4).

While the amount awarded in this particular case was small it is an important statement of principal by the Court.

Organisation of Working Time Act - Notification of Hours of Work and Finishing Times

In the case of Stobart (Drivers) Services Ireland Limited and Robert Kennedy and others DWT1815, the Labour Court dealt with an issue of the notification of hours of work to employees.

The Court in this case has held that under Section 17 of the Act an employee is entitled to know their start and finishing times and that it is a requirement that this is in the contract of employment or alternatively that it is set out by one of the other means as provided for in Section 17 which would effectively include 24 hours' notice in advance.

Employment Equality Act 1998

Case ADJ-8084 is a case that runs to some 17 pages. We are simply bringing this case to readers' attention as an excellent decision setting out a considerable amount of law relating to the issue of harassment and sexual harassment, discrimination, discriminatory constructive dismissal and victimisation.

A considerable amount of case law was referred to by the representatives. It is not clear whom the representatives were, which is a pity. However, this is a case that we would recommend to those interested in equality legislation to read.

A Legal Deduction of Wages

In ADJ-7727 the AO had to deal with a case where an employee was not paid commission due to the employee. The AO in this case held that the non-payment of commission was an illegal deduction from wages.

Tips

An employee has no legal right to keep tips. However, most decent employers will allow an employee to keep tips or have a policy in relation to the distribution of tips among all employees. There isn't really a big tipping culture here in Ireland unlike the US so employees are not going to be earning big bucks from getting tips. Despite this, there are a number of bad employers out there who do not allow employees to keep their tips and / or do not distribute tips evenly among staff. There are even worse employers out there that keep employee tips to help pay for employee wages!

The National Minimum Wage (Protection of Employee Tips) Bill 2017 is currently going through the Houses of the Oireactas and is at its second stage before Seanad Éireann. It seeks to amend the National Minimum Wage Act 2000 so that *"an employer shall not withhold tips*

or other gratuities from an employee, make a deduction from an employee's tips or other gratuities or cause the employee to return or give his or her tips or other gratuities to the employer unless authorised to do so" under the Act. If an employer does otherwise, the amount withheld will be an enforceable debt to the employee as if it were wages owing and can be referred to the Director General of the Workplace Relations Commission for an adjudication hearing.

The Bill also seeks to amend the Act to require employers to display on menus or in another suitable manner, its policy regarding the distribution of tips to employees. The Bill seeks to exclude employers, directors or shareholders from sharing in such a distribution of tips or gratuities unless he or she regularly performs to a substantial degree the same work performed by the other employees who are part of the distribution or other employees in a similar industry who would be part of such a distribution of tips or gratuities.

The Bill seeks to amend the Act to make it an offence to withhold tips or gratuities from an employee, to make a deduction from the tips or gratuities or to cause an employee to return a tip or gratuity without a lawful excuse.

The Bill does not seek to amend any tax laws for receiving a tip or gratuity.

This would be a welcome piece of legislation for those working in the service industry. It will provide them with protection and a legal entitlement to their tips. Only the bad employers have anything to fear from this proposed legislation. In the meantime, coverage of the proposed legislation will highlight to customers that when you tip, your server may not necessarily be getting the benefit of that tip!

Bullying and Personal Injuries

"It is important to record at the outset that bullying is one of the more obnoxious traits in human behaviour. That is so because it involves a deliberate and repeated course of action designed to humiliate and belittle the victim."

This is how the former President of the High Court, Mr. Justice Nicholas Kearns, described the act of bullying in the case of *Glynn –v- The Minister for Justice, Equality and Law Reform, Ireland and the Attorney General [2014] IEHC 133*. He is right. In fact, I think many would be in agreement with him and yet bullying continues to be an ongoing issue in many Irish workplaces.

Bullying can have a devastating impact on an employee's health and lead to an employee becoming very ill and being uncertified as unfit for work. For those employees who have suffered personal injuries as

a result of bullying in the workplace, there is little legal redress available to them. There are no laws on bullying in the workplace. The Safety, Health and Welfare at Work Act 2005 is about as close as one can get to redress. There are various codes of practice on what is best practice in the area of bullying in the workplace but codes of practice are not laws.

Due to the lack of legislation in this area, employees with injuries as a result of bullying in the workplace are left with seeking redress through a personal injuries claim. This is not the best form of redress for an ongoing injury that has been manifesting over a long period of time as a result of treatment in the workplace that more than likely has been ongoing for years. No clear statutory framework means that this is very costly litigation for an employee. Personal injury cases as a result of workplace bullying are a textbook example of having to be *"a pauper or a millionaire"* to be in a position to litigate in the higher courts of our judicial system.

Before embarking on a personal injuries case arising out of bullying, an employee needs to ensure the following: -

There must be an injury to health. If this is not a physical injury, it needs to be a recognisable psychiatric injury. Only a specialist medical practitioner such as a psychiatrist can make this prognosis.

The injury must have been caused by the treatment in the workplace, i.e. the bullying. Again, only a specialist medical practitioner such as a psychiatrist can determine the causation of the injury.

The treatment in the workplace must be wrongful and actionable in law.

It must have been likely that in all of the circumstances, the employer should have foreseen that the employee would be harmed.

The employee must be within the 2 year statute of limitation period within which to bring the claim.

Each of the above elements must be met before embarking on a claim for personal injuries as a result of bullying. Let us examine each element in more detail below.

A Recognisable Psychiatric Injury:

A specialist medical practitioner will make this prognosis. There will be no compensation for upset, distress, humiliation and ordinary stress as a result of bullying with no treatment from a specialist medical practitioner. A certain degree of robustness is expected of employees and this has been recognised by the Supreme Court. The Supreme Court have also noted that the injury must be measurable and the conduct which caused the injury must be severe.

Causation of Injury:

It might be very obvious to state that the bullying must cause the injury. However, an employee may have a psychiatric history or an underlying condition and, in those circumstances, it might be difficult to separate what has been caused by the bullying and what may have manifested itself over a period of time. Again, it will be up to a specialist medical practitioner to make this prognosis.

Wrongful Treatment:

What an employee may think is bullying can be very different to what the law determines as bullying. The legal definition of bullying is as follows: -

"Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work. An isolated incident of the behaviour described in this definition may be an affront to dignity at work but, as a once off incident, is not considered to be bullying."

The Supreme Court in the case of *Ruffley –v- The Board of Management of St. Anne's School [2017] IESC 33* indicated that all elements of this test must be fulfilled, i.e. each of incident of bullying must be repeated and inappropriate and be regarded as undermining the individual's right to dignity at work. With regard to repeated, the Supreme Court did indicate that two different incidents would not be enough. It was also indicated that inappropriate behaviour does not mean unfair behaviour. Inappropriate behaviour is behaviour that is unacceptable at a human level. The element of undermining dignity at work must be severe and offensive at a human level. It was also noted in this case that while a malicious intent and public humiliation were not necessary components to a bullying claim, their presence would certainly strengthen a claim for personal injuries as a result of bullying.

When determining if the behaviour towards the employee was wrong and actionable in law, the court will adopt an objective test, i.e. would any reasonable person deem this behaviour as wrong and actionable in law? In the case of *Berber –v- Dunnes Stores [2009] 20 ELR 61*, the Supreme Court set out the following test: -

" 1. The test is objective;

2. The test requires that the conduct of both employer and employee be considered;

3. The conduct of the parties as a whole and the cumulative effect must be looked at;

4. The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it."

Foreseeability: Could or should the employer have seen this injury coming?

As seen in *Ruffley*, an employer is entitled to expect a certain degree of "robustness" from employees. When addressing the issue of foreseeability in *Berber*, the Supreme Court indicated that the question which must be asked is whether the employer was aware or ought to have been aware of an employee's particular vulnerability. What will help get over this test will be scenarios such as where there has been grievances raised by the employee, long periods of sick leave from work, absenteeism from work which would be unusual for the employee, excessive working hours and/or any previous issues with bullying in the workplace.

Statute of Limitations:

The claim for personal injuries must be within the two years of the first incident of bullying. This is usually very difficult as the bullying will usually occur over a period of time. If the claim is issued late and the earlier incidents of bullying are not included, then there may be an argument that the events which caused the harm might be statute barred. The statute of limitations is a very difficult aspect of bullying cases and another example of why personal injuries litigation is not the best method of dealing with injuries as a result of bullying. This issue was dealt with very well by Mr. Justice McDermott in the High Court in the case of *Catherine Hurley –v- An Post [2017] IEHC 568*. The Defendant in this case argued that the Plaintiff's case was statute barred. Mr. Justice McDermott did not accept this argument and stated that the Plaintiff's date of knowledge of a significant injury only became available to her when;

The symptoms manifested themselves;

The symptoms were diagnosed; and

The symptoms were attributed professionally to the behaviour of which the Plaintiff now complains.

While it is clear from the case law that employees are entitled to protection from bullying and psychiatric injury, these cases are very difficult cases to win and should not be entered into lightly. Due to the absence of any real legislation in this area of law, they are extremely expensive cases for employees and are a classic example of the type of case that only a "millionaire or pauper" can afford to take on. In addition, where an employee has suffered an injury to mental health as a result of bullying, litigating the issue is often counterproductive to recovery. Before embarking on such a case, take careful consideration to the advice given by both legal and medical advisors.

Recent Judgements in Personal Injuries Cases

The case of *Edward O'Connor –v- Wexford County Council* involved a claim by Mr. O'Connor for personal injuries he sustained when working for the Defendant as a Water Inspector. On or about 6th February 2011, he slipped on a steep grassy bank at the Ferns Water Reservoir and injured his back. The Plaintiff claimed that Wexford County Council had failed to provide him with a safe place of work and a safe system of work. The Defendant argued that it was not necessary for the Plaintiff to go to the steep grassy bank to reach the manhole cover. Mr. Justice Twomey in dismissing the Plaintiff's claim held that the Plaintiff did not take reasonable care for his safety by accessing the manhole cover by using the steep grassy bank when there was a flat route a short distance away. In addition, the court also held the route to the manhole used by the Plaintiff on this occasion was not approved by the Defendant. This case highlights how an employee's own negligence can be the cause of an accident at work.

The case of *Joan Dineen –v- Depuy International Limited* is the latest case involving defective hips. Ms. Dineen had a defective hip inserted on 6th February 2009 during a right hip replacement. Judge Cross awarded Ms. Dineen the total sum of €321,000.00 which he broke down as follows:

General Damages to date:	€ 85,000.00
General Damages into the future:	€ 35,000.00
Orthopaedic Review:	€ 1,000.00
Past care:	€ 15,000.00
Future care:	€150,000.00
Aids and appliances:	€ 35,000.00

Aggravated damages did form part of this claim. However, Judge Cross indicated that the threshold for aggravated damages had not been met.

We have had another update in relation to claims involving *Setanta (In Liquidation*). On 11th May 2018, President Kelly ordered that where the Liquidator has notified the Accountant of the Courts of Justice that there are solicitors on record for a particular claimant, the cheque for damages, made payable to the claimant, will be sent by the Accountant of the Courts of Justice to the solicitors on record. Credit is due to the Law Society and the Accountant of the Courts of Justice for agreeing the terms of this order following an application from the Law Society.

***Before acting or refraining from acting on anything in this Newsletter, legal advice should be sought from a solicitor.**

****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**