INTRODUCTION*

Welcome to the March issue of our Newsletter. In this Newsletter we review recent developments.

On 2 February last Richard attended a consultation meeting on the proposed new Posted Workers Directive organised by Deirdre Clune MEP, which is covered in this Newsletter.

On Saturday 25th February Richard Grogan of this office was quoted in an article in the Irish Times dealing with drinking in the workplace. You will find a copy of the article in the publication section of our website.

We have had three publications in Irish Legal News on the Trucking Industry; Constitutional challenges to the WRC and "Exceptional Circumstances". These are reproduced in this publication.

On 1 March Richard addressed the Wicklow Bar Association on the presenting of and defending claims before the Workplace Relations Commission and the Labour Court and the Taxation of Employment Awards and Settlements. It is always a great honour and privilege to be asked to address colleagues. As is our usual practice this office never requests or accepts a fee for speaking to members of the legal profession. We regard it as a way of giving something back. We regard it as a privilege to be asked. It is particularly satisfying as we are a small boutique employment law firm that colleagues consider our input to their continuing professional development as relevant. Copies of the seminar notes are available on our website. There was a fee to be paid. The Wicklow Bar Association has agreed to pay this instead of to us to the Solicitors Benevolent Association directly. We are delighted to continue our support of the Association. Last Year all speaker fees to Skillnet meetings where Richard spoke were paid instead of to us to the Solicitors Benevolent Association. A great charity.

In this publication we review a number of, what we regard as important, decisions of the Labour Court and the WRC. We also review recent High Court cases which we believe are important. We hope that those reading this newsletter find it useful and informative. For those who have contacted us about previous publication we would like to thank you for the very kind comments you have made. We do appreciate these.

We are sometimes asked why we produce a Newsletter. Firstly, it does advertise our services. We make no bones about this. Secondly, we think it important to try to help clients and colleagues keep up to date. Thirdly, it keeps us up to date with developments.

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Banded Hours Contract Bill

This Bill was commenced in 2016. On the 31st January 2017 it was before the Committee in the Dail on Jobs, Enterprise and Innovation.

The reality of the Bill as introduced is that the difficulties with Zero Hour Contracts are being seen from early on in the area of Banded Contract where there is union representation. The real problems with Zero Hour Contracts are for those in non-unionised companies. The focus of the Bill appears to be more toward Banded Contract whereby person has a contract that they will work 10 to 15 hours a week or 20 to 30 hours a week.

The real problem is that we have a gig economy now in place. It is relatively easy for an employment law solicitor to put in place contracts which will look like they are Full-Time Permanent Contracts but are in fact Zero Hour Contracts. This is especially so where the employer is not an employer who recognises a trade union and where trade union membership is not in place in the workplace.

There are significant issues on Zero Hour Contracts which are becoming very prevalent.

Hopefully the Bill even with the limitations which we see will proceed. The University of Limerick undertook an extensive review in this area. They identified a number of the significant problems that there are. Action is needed in this area sooner rather than later. Unfortunately, the progress of Bills through the Dail is now extremely slow.

This office contributed to the report by the University of Limerick and our paper to the Employment Law Association of Ireland was one of the reference documents they referred to in the Report.

Workplace Relations Act 2015 (Fixed Payment Notice) Regulations 2017 S.I. 32 of 2017

Section 36 of the Act provides that where an inspector has a reasonable ground for believing that a person has committed a relevant offence the inspector may give to a person a Fixed Payment Notice.

These new Regulations set out the Form of such a Notice. This is in lieu of a prosecution.

These Regulations revoke the Form set out in the Schedule to the Workplace Relations Act 2015 (Fixed Payment Notice) Regulations 2015. There is an amended Form for the purpose of Section 36 of the Act.

The Form has been amended at paragraph 4 to include a change of the banking details relating to the making of a payment by electronic form of transfer.

Where the Payment Notice is served and the penalty is not paid within 42 days beginning on the date of the Notice a prosecution may then follow. If the payment is made within 42 days no prosecution will follow.

Delegation of Ministerial Functions

In Statutory Instrument No. 6/2017 Mr. Pat Breen TD Minister for State has been appointed as the designated Minister in respect of the Workplace Relations Act 2015 and various Employment Legislation.

Immigration Act 2004 - Immigration Investor Programme

Statutory Instrument No 10 of 2017 provides that the fee for making an application for permission under the Immigrant Investor Programme is now €1,500.

Consultation Meeting organised by Deirdre Clune MEP on the Revision of the Posted Workers Directive

On 2nd February Deirdre Clune MEP was responsible for organising a consultation meeting with institutional presentations from employer and employee bodies with roundtable contributions which included Solicitors including Richard Grogan of this office, Ciara Ruane of William Fry Solicitors and Stephen Holst of McCann Fitzgerald Solicitors.

The main speaker was Elizabeth Morin –Chartier MEP who is one of the joint rapporteurs of the Employment and Social Affairs Committee of the European Parliament.

The Consultation dealt with the principles of the proposals coming from the EU Parliament along with the technical issues and challenges which this raises both from a legal perspective and from stake holders both employers and employees representatives.

Deirdre Clune as an Irish MEP must be congratulated for having organised this consultation.

It is one of the unfortunate facts that our MEP's rarely get an acknowledgement of the outstanding work they do. This consultation meeting was not one which was covered by the media. It was a practical and technical consultation. This is the unseen and unsung work of our MEP's. Firstly, this firm was delighted that Richard Grogan of this office was asked to attend and to contribute but also we must acknowledge the important role played by Ms. Deirdre Clune MEP in organising it. She has tremendous commitment in this area. The consultation started at 6.30pm. Ms. Clune had that day been in Brussels and got on a 4.30pm flight to get to Dublin to attend the consultation. She had been in the Parliament all day. This work of our MEP's really does need to be recognised and encouraged and importantly covered in the media so that we know the outstanding work they are doing for us.

We would like to congratulate Deirdre Clune for having organised this consultation which was important for employer and employee representatives and the legal profession. The new proposed Posted Workers Directive will have significant implications for both employers and employees and it is important that these consultations take place. For them to take place MEP's have a huge role in organising these.

The importance of getting legal advice

In case ADJ-3391 the employee in this case brought a claim. Effectively the employee was bringing a claim for not having received a Contract of Employment. Instead of it being brought under the Terms of Employment (Information) Act the employee bought it under the Protection of Employees (Fixed-Term Work) Act 2003. Therefore that claim could not proceed.

The employee did not bring a claim under the Minimum Notice Legislation and therefore was not entitled to claim for the outstanding Minimum Notice he would otherwise have been entitled to.

We have been raising this issue on a number of occasions of the importance of people obtaining legal advice before submitting claims. In this case ADJ-3391 the employee had two perfectly good claims which on the basis of what is set out in the report the employee would have been entitled to obtain compensation under.

These sort of thing happens but should not.

WRC Decisions

We are attaching a letter which we have sent to the Director General. This should not be regarded as a criticism.

There are many excellent decisions issuing from Adjudication Officers. Unfortunately the facility to research these is more difficult when they are put up on the system and can be slotted into various pages. This means that an important decision which could be a benefit to those who practice in Employment law might not be readily available. A significant number of decisions of Adjudication Officers deal with setting out the law. This often involves precedent case law being referred to. This can be decisions of the Labour Court or the High Court. The current system of posting decisions makes it more difficult to track these cases.

The letter which has been sent to the Director General is in the hope of having a system more akin to the ways the Labour Court issue decisions. Their decisions are very easy to know when they have issued. It enables colleagues to keep up to date with recent decisions of the Labour Court. They are then listed in sequence on the Labour Court website so that it is easy to find the most recent decisions.

It means that a colleague who has been on holidays or out of the office for a couple of weeks can readily keep up to date. This is not happening as regards WRC decisions. It is currently much harder to do so.

Re: Reporting of Adjudication Officers' decisions

Dear Director General,

I am writing to you in connection with an issue which is causing difficulties in reviewing decisions of Adjudication Officers. Helpfully the Labour Court when they issue a batch of decisions set them up on the system so that the most recent decisions are set out and can be reviewed by practitioners.

This is not done in the case of decisions issuing from the Adjudication Officer and I would ask that you would consider doing so.

One of the reasons for doing so is that recently, as part of the regular update of decisions which are undertaken as part of my newsletter "Keeping in Touch", I was looking at the WRC website. On the most recent first page I was not seeing any amendments to it as there were all cases I had read and reviewed. Subsequently I decided to check back pages and found that various decisions had been slotted in on various pages up to and including page 7 at which I stopped.

I do not understand how, when decisions issue, they have been put in on different pages. Surely when they are being entered they would be entered as the most recent. If there is another reason for this it would be useful if practitioners could be advised as to why cases are not put up in sequence on the system.

It makes reviewing decisions of the WRC difficult. The decisions are there to be an aid to practitioners in understanding what the law is as determined by Adjudication Officers. By putting them up in sequence it would assist colleagues in reviewing recent decisions.

Alternatively, would you consider putting up a note as to the most recent decisions issuing and set them out the way the Labour Court does.

The decisions from the Adjudication Officers are an important piece of information on Employment Law for those in practice in the Employment Law area. By having them put up in a way that can be easily

researched so that colleagues can keep up to date has a number of benefits. Firstly it enables colleagues to read important decisions. Secondly it enables colleagues to see what the law is. Thirdly it enables colleagues to determine whether they are acting for employers or employees whether they have a good claim or a good defence. Fourthly anything which assists colleagues in ease of research I would contend is useful. Sixthly anything that makes it more difficult to review recent decisions is not helpful.

I would ask you to see what can be done to make the publication of decisions easier for colleagues to keep track of so that they will know when new decisions go up. In particular I would ask would it be possible for the case to be listed in sequence as they go up rather than slotted in to various pages. I could understand this being done if decisions were being allocated by way of an ADJ reference number but that is not happening.

Yours sincerely,

Constitutional Challenge to the Workplace Relations Act 2015

It has been reported in the papers that a Judicial Review has been sought, in the High Court, in relation to a case which was heard in the WRC where the papers report a claim for Judicial Review on the basis of lack of fair procedures and that the legislation is unconstitutional.

At this stage matters have only gone by way of an ex parte application. No full hearing has taken place.

It is well known and accepted that there have been rumblings in relation to the legislation from when it was first mooted that there were potential claims in respect of the new procedures which would at some stage be open to challenge. Without referring to the current case a number of these issues are well known and it is possibly useful to rehearse them again.

1. There is the issue that proceedings are heard in private. Both the Constitution and Article 47 of the European Convention on Human Rights have been referred to in numerous talks relating to the right for cases to be heard in public. Of course family law cases are not heard in public but there is a strong argument that employment cases should be in public. Of course there would be exceptions in the cases involving sexual harassment or similar type cases but there is a reasonable argument that other cases should be in public.

2. While the Workplace Relations Commission guidelines provide for examination and cross examination it is not done on oath. In the Labour Court evidence is given on oath. It has been strongly argued that it is always advisable that evidence would be given on oath.

   In the case currently before the High Court it appears that the parties had exchanged written submissions. The employee bringing the Unfair Dismissal case it appears from reports was not allowed give evidence or cross examine in relation to the submission of the employer. The difficulty I would see is that in relation to any claim before the WRC parties should be allowed present evidence and cross examine in relation to evidence given. That of course is a basic right.

   At this stage as stated, we only have an ex parte application. This case is going to be important as further particulars emerge in relation to the case I would expect there will be a number of commentaries.

   There are many issues currently before the WRC which will ultimately go to the Labour Court and some of them are already there which are going to have a significant impact in how cases are run even if the current application is unsuccessful. These are;

1. The issue of costs. Because the new rules place a requirement on certain submissions and documentation being sent this increases the economic cost to employees in particular who would be entitled to make a claim under the Von Colson and Kamann principles for the economic cost of bringing a claim. As submissions now need to also include issues relating to the law this could mean potentially there are significant cost issues which may arise.

2. The issue of litigation advice privilege is most definitely there in the WRC and the Labour Court. This issue is also currently before the High Court on an appeal from the Labour Court and therefore this could have a significant impact on how cases will proceed in the future where parties are represented by non-Solicitors or persons who are not Barristers.

3. The issue of the procedures themselves particularly the giving and challenging of evidence by way of cross examination where there is no procedure for sworn evidence is an issue which concerns some practitioners.

4. The issue of fair procedures being seen to be applied particularly where cases are heard in private is a concern to some. It may well be argued that this is no different than before the old Labour Relations Commission. However before the Labour Relations Commission matters were different. A Rights Commission was appointed on the basis of hearing a case but also under the Industrial Relations Act was obliged to see was it possible to reach a settlement of matters. Accordingly while Rights Commissioners in some cases would appear to have been no different than an Adjudication Officer now they also had that additional important function which meant that it was a different type of hearing. Either party could by-pass the LRC and go to the EAT for a public hearing. The new WRC system is adversarial and therefore issues of fair procedures are becoming more relevant.

What is absolutely clear in relation to this matter that has gone to the High Court is this is a significant challenge to the jurisdiction of the WRC and to the constitutionality of the Workplace Relations Act 2015. The employee in this case is represented now by an eminent Senior Counsel namely Mr. Peter Ward. He is and has been a critic of the new Workplace Relations Act 2015 and has been very open in his arguments which all practitioners and the Department were well aware of.

There are some unforeseen implications if this case is successful. The first is that if the claim is successful and the Workplace Relations Act 2015 is declared unconstitutional, or part of it, then all claims currently before the WRC may fall. This will mean effectively that any employee who has a claim which is based on European Law will now have a claim against the State for failing to vindicate their rights. This could potentially be a significant cost to the State as each and every one of those claims will have to be taken in the High Court against the State. The cost element alone to the State will be substantial. Any constitutional action may very well delay claims coming on for hearing. Following a recent ECJ Judgement this may also leave the State open to substantial costs if there was any delay in processing cases because of this Judicial Review. There are interesting times ahead.

The comments made today by me are on the basis of Newspaper reports. Hopefully once the proceedings are closed it will be possible to have all the arguments set out, on both sides, to facilitate colleagues being aware of the issue.

5. There is an issue with the claim form being lodged on-line but not being sent to the Director General contrary to Section 41 (this issue is currently before the WRC in an unrelated case).

Published in Irish legal News 20 February 2017 and quoted in IRN on 23 February 2017.

Claims to the WRC – Getting It Wrong

In this newsletter and in previous issues we have commented on the issue of people not bringing claims under the correct legislation.

It could even possibly happen where somebody was represented.

There is actually an easy way to avoid a claim or a defence being made that the claim has been brought under the wrong Act.

The claim forms of course have the relevant Acts. However the legislation is often difficult to understand.

The legislation only requires that a complaint is put in writing to the Director General. The legislation nowhere specifies that a particular complaint form has to be used. Where a complaint is lodged, if a submission setting out the basis of the claim is put in then it would be our view that there is a valid claim before the WRC. The fact that they may not process it under the relevant Act is actually irrelevant; there will be a valid claim there. Take for example a case that we refer to in this newsletter ADJ3391. If the employee has attached a simple piece of paper that said;

"I gave in my notice. I was not allowed work out my notice. I am due the balance of my notice period as pay. Also, I did not receive any contract or statement which complied with Section 3 of the Terms of Employment (Information) Act.

The fact that that might have been attached on a separate plain piece of paper on a claim form printed off, attached scanned and then sent to Director.General@workplacerelations.ie and secure.email@workplacerelations.ie then that would be a valid complaint and that would have to be processed. There is no statutory claim form for a claim to the WRC. There is no statutory claim form for an appeal to the Labour Court. In fact the Labour Court in rulings have accepted that a faxed copy of a decision with a note from a Solicitor saying that the parties they represented wished to appeal and where subsequently the appeal form signed by the party appealing arrives in the Labour Court after the statutory period for lodging an

appeal has elapsed has still been held to be a valid appeal as an indication to appeal has been sent and received by the Labour Court by way of a letter from a Solicitor.

There is a problem with the current complaint form. It is a minefield to navigate. It is not user-friendly. Now saying this I know the WRC management are looking to see how it is possible to make the documentation more users friendly. It appears that as this office is using scanning and sending in complaint forms that we are certainly reducing the percentage of those who use the online version. We are prepared as we said to work with the WRC to try arranging for a claim form that is more user friendly.

I would caution colleagues in issuing claims to make sure that they identify the correct Act for bringing a claim and if there is any doubt as to what the correct Act is then issue the same claim under all the Acts that they might think it applies to.

Time Limits

In the case EDA172 McKeever Rowan Legal Services Limited / McKeever Rowan Solicitors and Elizabeth Clarke the case concerned an issue under Section 78 of the Employment Equality Act 1998. Section 78 of the Legislation has now been amended but the case is a timely reminder of the importance of time limits.

At the relevant time where mediation took place under the Employment Equality Acts and was not successful the employee had a period of 42 days in which to make an application to the Director or as the case may be for the resumption of the hearing of the case. In this case this was not done within the Statutory Time Limit. The Labour Court in the case refused to extend time. The last day for a request for resumption by the complainant was 17th November 2014. Requests for the resumption to not issue until 1st October 2015.

The case is a reminder of the importance in cases of looking at time limits. Luckily in relation to mediation now the law has been changed so that if mediation does not result in a settlement that in those circumstances the case will automatically be relisted before an Adjudication Officer by the Director General and the requirement to furnish a notice is not necessary.

Ignorance of the law will not result in an extension of time

In the case of Patrick Hoare & Sons Limited and Liam Donnelly the Labour Court had to deal with the issue of an extension of time. The Court restated the case DWT0342 being the Cementation Skanska Limited and Michael McGrath case which is the seminal decision of the Labour Court on this issue relating to reasonable cause. The Court stated that it must follow the dictum of Laffoy J in Minister for Finance –v- CPSU and Others 2007 18ELR36 to the effect that ignorance of one's legal rights cannot in law constitute a reasonable cause for not observing a statutory time limit. This is a very important restatement of the law by the Court.

Time Limit for TUPE Cases

In case ADJ3744 there had been a Transfer of Undertakings. The employment commenced with the transferee on 1st May 2015. The complaint was received by the commission on 23rd May 2016. The Adjudication Officer held that the complaint was out of time and had no jurisdiction to investigate that element of the complaint.

If employees have a difficulty with a claim under the Transfer of Undertakings it is important to get the claim in quickly.

Unfair Dismissal and Redundancy

In case ADJ-2841 it is clear that there was deterioration in the relationship between the employee and her employer. She was selected for Redundancy. There was a deterioration between the employee and her line manager. However, what was clear in relation to the case is that the Adjudication Officer found that the line manager had no role to play in the selection of the employee for Redundancy and that therefore the selection for Redundancy was fair and it was not an Unfair Dismissal.

This case is interesting on its facts in that effectively where there are fair selection procedures put in place even though there may be a deterioration between an employer and an employee a claim for an Unfair Dismissal will not arise in the case of a genuine Redundancy.

Unfair Dismissal and Reinstatement

Case ADJ1367 is a very helpful decision relating to the law on reinstatement. The Adjudication Officer has helpfully set out a number of the important decisions of the Employment Appeals Tribunal and the High Court including the case of Bank of Ireland –v- Reilly 2015 IEHC 241. The Adjudication Officer also looked at the law relating to the respondents objection to reinstatement.

This is a very helpful decision for practitioners on this issue.

The case of Bank of Ireland and Reilly is extremely important for practitioners. That case effectively determined that where a number of employees may be involved in a particular activity and only one or some of them suffer a particular penalty such as dismissal that that in itself is a good ground to seek reinstatement.

Unfair Dismissal – One Year Service

In case ADJ1953 the employee in this case was employed from 1 May 2015 until the employment was terminated on 17th August 2015. The employee referred the case on 17th February 2016. An argument was made that the claim was out of time being outside the six month period of time. The Adjudication Office in this case however correctly referred to Section 1 (1) of the Unfair Dismissals Act 1977 which determines that the date of dismissal where prior notice of such termination is not given or the notice does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act, 1973, then the termination occurs on the date on which such notice would have expired if it had been given on the date of such termination. Therefore the Adjudication Officer found that if the notice had been given the termination would have been 24th August 2015 and therefore the claim was within time. This is a useful case for restating the law on this issue.

This was an important decision for the employee as the employee claimed that she was fired because of her pregnancy and in this case was awarded €5,000 under the Unfair Dismissal Legislation.

Unfair Dismissal and Fair Procedure

Case ADJ1221 is a useful reminder for practitioners. In that case the Adjudication Officer found that fair procedures had been applied in relation to the dismissal and therefore the Unfair Dismissal claim was dismissed.

It is a fact that many employers do not apply fair procedures. Where fair procedures are not applied then effectively it is an unfair dismissal. The employee may be found to have contributed to the dismissal but the dismissal itself will be unfair and therefore compensation may well be awarded. Where fair procedures are applied then in those situations dismissal may well be upheld. It is not the job of the Adjudicator to apply their view for that of the person making the decision if the person making the decision could reasonably have come to that conclusion.

Where however fair procedures are not applied and in those situations the Adjudication Officer can decide matters on fair procedures and determine it was an unfair dismissal for that reason.

Unfair Dismissal and Fair Procedures

Case ADJ-1227 is a further example of a case where the Adjudication Officer has held that the dismissal was procedurally flawed. In this case the Adjudication Officer found that the complainant had made a significant contribution to his own dismissal. Even so a sum of €5,000 was awarded. We have consistently been pointing out the importance of procedures in Unfair Dismissal cases.

Failure to follow procedures will invariably result in an Unfair Dismissal award against an employer.

Gross negligence constitutes gross misconduct?

In the case of Adesokan -v- Sainbury's Supermarket Limited. The Court of Appeal in the UK has held that gross negligence could amount to gross misconduct. The employee was dismissed for gross misconduct on the basis that he failed to take adequate measures to remedy the misconduct of another employee. The Court of Appeal

concluded that the employee had been in serious dereliction in his duty to his employer giving his obligations to ensure that the survey procedure was properly carried out. The Court held that even a failure to act could potentially amount to gross misconduct.

This is an interesting development in Employment Law.

Constructive Dismissal – Often Misunderstood

Constructive dismissal is one of the most frequent topics we are asked to advise on. It can often be misunderstood.

For constructive dismissal claim an employee needs to have resigned in order to bring such a claim.

Constructive dismissal is a way of saying "it was a forced dismissal". In our view for an employee to bring a claim of constructive dismissal they must show that the actions of the employer were so unreasonable as to warrant and justify the employee resigning. Effectively it is on the basis of a repudiatory breach of contract. It is one where the employee is claiming that they were forced to resign because of the conduct of their employer.

The case law from the Labour Court is very clear. To bring an Unfair Dismissal claim on the basis of constructive dismissal the employee needs to be able to show that they went through the employer grievance procedure including the appeal procedures. If the employee has not done so the employee will have to show that the actions of the employer were so unreasonable as to justify the employee leaving immediately without giving notice.

An employee who resigns without having gone through the company grievance procedure or at least attempting to have gone through it has a much higher threshold to achieve. Even when the employee has gone through the grievance procedure the employee has a significant threshold to prove that the actions of the employer warranted the employee resigning. On looking at these issues it is important that employees get legal advice. One of the issues that is always going to be looked at is whether the actions of the employer breached a fundamental term of the employee's contract. Some fundamental terms are obvious such as the right to be paid and the right not to be

discriminated against. One of these is less obvious. Each case will be decided on its own facts.

There is an implied term of mutual trust and confidence. For an employee to rely on same the employee would need to be able to show that the employer conducted themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. Even in such cases it would appear in our view that the employee would need to have used the grievance procedures, normally.

A build-up of a number of minor breaches by the employer can amount to a fundamental breach and could be regarded as the last straw".

At the present time we are seeing a significant number of people who appear to believe that just because the employer has not treated them nicely that this warrants an employee resigning and claiming in constructive dismissal. The cases going before the WRC on this point indicate that there is a serious misconception among employees as to what constructive dismissal is.

In a constructive dismissal case the burden of proof is squarely on the employee. In an unfair dismissal case the burden of proof is squarely on the employer.

Before any employee resigns they need to get legal advice. If an employee has a problem with their employer and they are in a business where there is a union they should get the assistance of their union representative. If they are not in a unionised workplace then advice from a Solicitor should be obtained. Of course an employee would have to pay to get advice from a Solicitor on issues they have in the workplace but it can be a lot less costly, in the long run, than having to pay representation in a constructive dismissal case and then losing or being advised they have no case simply for not using the grievance procedure. Certainly with legal advice the employee would be in a position to get the best advice they can and to ensure that they comply with the company procedures before any resignation is put in place.

Constructive Dismissal

In case UDD 1635 the Labour Court in the case of Barnacarroll Area Development Company Limited and Mary Kirrane has again very usefully restated the law relating to Constructive Dismissal when they said:-

"Where Constructive Dismissal is contended for it is for the person making the claim to establish that the behaviour of the employer was such as to leave the appellant no alternative but to terminate the employment or that the employer's behaviour has fundamentally undermined the employment relationship. The person claiming Constructive Dismissal has an obligation to access available grievance procedures in a course of attempting to deal with whatever situation has led to consideration of termination of the employment".

The case is a timely reminder to those advising in this area of law or for employees and also for employers that Constructive Dismissal is an extremely difficult matter for an employee to get over the line.

It is absolutely imperative that the employee does utilise the grievance procedure or at a very minimum is seen to attempt to use the grievance procedure to deal with issues.

Of course there will be situations where the activity of actions of the employer are so serious that they warrant the employee leaving and Constructive Dismissal without using the grievance procedure but they are very much in the minority, in our view.

Constructive Dismissal

In Case ADJ2729 the Adjudication Officer helpfully restated the case of Murray –v- Rockavill Shellfish Limited [2002] 23 ELR331 where the EAT determined that;

"It has been well established that a question of constructive dismissal must be considered under two headings. Entitlement and reasonableness. An employee must act reasonably in terminating his contract of employment. Resignation must not be the first option

taken by the employee and all other reasonable options including following the grievance procedure, must be explored. An employee must pursue his grievance through the procedure laid down before taking the drastic step of resigning."

It is extremely helpful again that an Adjudication Officer has taken the time to set out the law in relation to this matter. In the particular case the Adjudication Officer determined that the employee had not exhausted the internal grievance procedures before resigning and therefore the claim could not succeed.

The case is again very useful for those advising persons relating to a constructive dismissal case to ensure that the employee complied with the internal procedures.

Redundancy cases before the WRC

We are seeing cases under the Redundancy Payments Act, 1967 where the Adjudication Officer is simply directing that the employee would be paid their Redundancy Payment in accordance with the Act.
Before the EAT they always issued decisions, in the case of Redundancy, where they would set out:

1. The date of birth of the employee ;
2. The starting date of the employment;
3. The end date;
4. The rate of pay;
5. Any periods of lay off or other breaks in service not to be taken into account.

It is interesting that this has not happened in a number of WRC decisions.

Equally it is worth noting that before the Labour Court they have actually taken the time to set out exactly what the Redundancy Payment is.

In processing Redundancy Claims with the Department of Social Protection there are serious logistical issues relating to cases. We see these all the time where there is lengthy communication with the

Department. It is always helpful if all relevant facts are set out or a calculation of the loss is set out so that it is easier to deal with the Department.

Deductions from Wages

In Case ADJ2946 the Adjudication Officer found that a deduction for excessive mobile phone usage three days before the employee was made redundant did not meet the "fair and reasonable" standard for making a deduction. The Adjudication Officer directed the return of the sum of €497.17.

The case is also interesting in that it dealt with the terms of the contract of employment. The Adjudication Officer was not satisfied that excessive phone usage would come within the particular terms of the contract. It is therefore very important for employers when drafting contracts of employment to make sure any matter such as excessive use of a mobile phone is clearly set out in the contract of employment. Because of the provisions of Section 5 of the Payment of Wages Act it would be our view also that it would be important that the employee signed the contract to enable the employer to make any deduction. If an employer has a contract which provides for deductions to be made they will need to have a document signed by the employee, but this is simply our view. However, We are certain we are right.

Deduction of Wages

In the case of Petkus and Others and Complete Highway Care Limited Mr. Justice White delivered his decision on 20th January.

It was a statutory appeal. The employer had introduced a deduction of 10%.

Mr. Justice White reviewed the law under Section 5 of the Payment of Wages Act.

Mr. Justice White held that he did not accept that a determination of the Tribunal that there was a reduction of wages as distinct from a deduction was a pure question of fact. His Honour held that it was a

mixture of law and fact. He held that because the respondent company arbitrarily reduced the wages of an employee without the consent of the employee this does not necessarily remove the deduction from the jurisdiction of the Payment of Wages Act entitling the employer to ignore its provisions.

Mr. Justice White held that the Employment Appeals Tribunal had erred in law and remitted the matter back to the Court.

What is interesting in this case is that His Honour pointed out what is commonly referred to as the McKenzie case as the remarks of Mr. Justice Edwards in relation to deduction and reduction were obiter and further that the McKenzie case related to the reduction of an allowance payable in respect of travel subsistence and that the definition of wages in the 1991 Act expressly excluded any payment in respect of expenses or allowances.

His Honour pointed out that unfortunately the McKenzie case had caused particular confusion to the determinations of the Employment Appeals Tribunal and Rights Commissioners on the issue of Section 5 of the Payment of Wages Act and refered to five cases which have been referred to the High Court on that issue.

Importantly His Honour pointed out that the judgement of Mr. Justice of Kearns P in Earagail Eisc Teronta –v- Doherty of 5 June 2005 has clarified the issue and that the McKenzie case is not a precedent to allow a reduction of wages which does not offend Section 5 of the Payment of Wages Act 1991.

Payment of Wages Awards

In the Labour Court case of Tapastreet Limited and Joseph Mitchell under PWD172 is one where the Labour Court determined that the complainant should be paid the sum of €35,000 in respect of a breach of the Act.

The associated case under reference UDD175 confirms that the employee's rate of pay was €70,000 per annum.

The contract provided that the employment could be terminated by giving six months' notice in writing. The Labour Court in this case

confirmed that the employee was not dismissed for gross misconduct and was therefore entitled to the six months' notice.

The Labour Court determined that the employee would be paid €35,000.

This is a gross award.

However, as this is a payment of wages it would be subject to tax. There is an anomaly in relation to the taxation of these awards.

In the normal course of events the employee will receive his salary monthly or if he was weekly paid then weekly. The employee in those circumstances would get either the monthly or the weekly exemptions. However, where an award is made which is subject to tax the allowance which the employee would receive will in fact be for the week in which it is received. Therefore for example the normal credits which would apply will no longer apply, only a simple weekly allowance. In addition because the employee is no longer employed significant additional tax will be liable to be paid as there are no credits available. The employee in such circumstances can make a reclaim from the Revenue but unfortunately no such refund provision is provided for in respect of USC.

The Labour Court or the Adjudication Officer can only apply the law as it stands and the tax follows from same. A payment of Wages award is always subject to tax.

Net Pay Agreements

There is nothing wrong with an employer deciding to pay an employee net of tax. However, the case of ADJ-717 is an example of a case where the employer got badly caught out because of the Act that they had agreed to pay net of tax.

It is one that any employer or representative of an employer taking and pay a net rate of pay should seriously read.

It is far wiser, in our opinion, that employer's will provide for a gross rate of pay. Tax will then be deducted in the normal way. In case ADJ-717 because of the way the tax system worked for the particular

employee meant that the employee's gross rate of pay for the period of 30th July 2015 to the 4th December 2015 was actually €1,682 net less than what the employee should have received.

The reason for this is that the employee's tax situation has certain difficulties which effectively significantly increased the daily rate of a €120 a day which is equal to €600 a week to a substantially higher figure.

The Adjudication Officer in this case applying the provisions of the legislation felt that there was an agreement to pay €120 net per day and that the employer was obliged to pay same even where the effect of the Tax Legislation was to significantly increase the actual gross amount well in excess of what the employer originally intended.

For this reason it is our view that wages should always be stated by way of a gross amount.

On Call Service

The case of ADJ3663 is interesting in that the Adjudication Officer in this case had to deal with the issue of on call time and how it would impact on the rights of an employee to public holidays.

The Adjudication Officer quoted Ms. Francis Meehan in her book Employment Law in Ireland where it is stated;

"It is settled case law that on-call duty performed by a worker where he is required to be physically present on the employers premises must be regarded in its entirety as working time within the meaning of Directive 93/104 regardless of the work actually done by the person concerned during the on-call duty".

In the case of Sindicato de Medicos De Asistencia Publica (Simab) –v- Conselleria de Sanidad y Consumo De la Generelidad Valencina the ECJ considered that Doctors working in primary health care teams fell within the scope of Directive 89/391 and Directive 93/104. National Law must meet the provisions of Article 17 of Directive 93/104, which provide for certain derogations in respect of working time, when, on account of the specific characteristics of the activity concerned, the duration of working time is not measured or pre-determined or can be

determined by the workers themselves and particularly in the case of managing executives or other persons with autonomous decision making powers, family workers or workers officiating at religious ceremonies in churches and religious communities such derogations must be adopted by means inter alia of laws or collective agreements".

The Adjudication Officer pointed out the neither party had opened a collective agreement nor did both recognise that the complainant was contractually bound to provide on call duties. The Adjudication Officer found that there should be provision made for the respondent to rectify the disturbance in accordance with section 21 given that the complainant was clearly not in a position to pursue his own interests during these periods of on call duty being at the disposal of the employer. This relates to public holidays.

The complaint in this case was lodged on 20th June 2016.

The Adjudication Officer held that the employee had been accommodated for 17th March 2016 and therefore the Adjudication Officer could not include the earlier submissions in the cognisable period under the Act. i.e. December 21 2015 onwards. This part of the decision we do not agree with. Any entitlement within the six months prior to lodging a complaint can be dealt with.

Disability and Reasonable Accommodation

In the case of a Dublin Transport Company and a Worker being EDA171 the Labour Court has restated the test for reasonable accommodation set out in case EED037 being a Health and Fitness Club and a Worker and the case of Nano Nagle School –v- Daly [2015] IEHC 785.

In this case the Court found that the respondent company did not have procedures in place that put it in a position to seek a bona fide decision regarding the complainant's capacity to remain at work. It failed to determine whether with reasonable accommodation the employee could continue in employment. It failed to seek any information on the medical prognosis in respect of the employee because of the disability and it failed to afford the employee a reasonable opportunity to influence the decision to retire him.

This case is an important decision for anybody considering the issue of reasonable accommodation on the grounds of disability. The relevant legislation is in Section 16 of the Employment Equality Legislation.

The decision is extremely useful in setting out the facts and the law in this area.

The decision is an extremely good decision. It is well set out. It is easy to read and easy to understand. I will certainly recommend this to any Solicitor or practitioner having to deal with this issue. It is equally extremely important decision for any employer to read.

Dress Code Discrimination

The UK Parliament has had two committees call for a review of current equality legislation after gathering evidence of sexist instructions issued to female employees but not to their male colleagues.

Women who face demands at work to wear high heels, make-up or other particular types of outfits require a new legal framework to halt such discrimination.

When Theresa May was the Woman's Minister she dismissed concerns over sexist dress codes saying that traditional gender based workplace dress codes encourage a sense of professionalism in the workplace. That report was lodged following the treatment of Nichola Thorp who reported for work 2015 as a receptionist in PwC in flat shoes. She was sent home without pay after refusing to buy a pair of at least 2 inch heels despite pointing out that men were not required to wear similar attire. To be fair to PwC this was not the policy of theirs but rather of the agency that the reception work had been outsourced to. PwC made very clear their attitude towards this inappropriate behaviour. The MP's stated they were inundated with troubling examples where evidence of their equality legislation was not protecting such workers. They heard of hundreds of women who told about the pain and long term damage caused by wearing high heels for long periods as well as women who had been required to dye their hair blonde, to wear revealing outfits and to constantly re-apply make-up. They determined that discriminatory dress codes remain widespread. The committees

examined overwhelming evidence dating from 1880 to the present day which showed the direct causative relationship between the protracted use of high heels and serious conditions including stress fractures and bunions. The requirement to wear make-up or skirts above the knee made some workers feel sexualised by their employer and deterred progress within the company. The MP's also expressed concern that gender specific dress codes reinforced stereotypes which could make some workers feel uncomfortable especially those in the LGBT group of workers.

The UK MP's concluded that employers are actually not expected to take dress codes such as high heels into account when calculating health and safety risks despite the fact that high heels are actually a health and safety risk.

The issue of dress codes are a serious issue for employers. There is no problem having a uniform for employees provided it is suitable and that it is applied in a fair and reasonable way towards male and female employees. There is no difficulty in having a policy that provides people will dress in a professional way. In the case of female workers a skirt does not need to be above the knee to be dressing professionally. A female employee does not need to wear heels to look professional. It is important for employers to understand that dress codes should not be such which does stereotype people or make employees uncomfortable. The dress codes must be suitable for the business and it is necessary to be able to objectively justify a dress code. An inappropriate dress code can be determined to be discriminatory of individuals.

There is also a health and safety issue which employers need to be aware of. If consistently wearing high heels can cause fractures or other injuries to female employees this is a potential risk issue for employers into the future. Employers do need to take appropriate advice on any dress code to ensure it is suitable for the particular employment.

UK Government's response to Women and Equalities Committee

In August 2016 the UK Women and Equalities Committee published a Workplace Pregnancy Discrimination Report. 21 recommendations were made. Some of these recommendations included:

1. Implementing a mechanism within the workplace of individual risk assessment by doctors and midwives for new and expecting mothers.

2. To take measures so that the existing rights are enforced to tackle pregnancy and maternity discrimination in the UK.

3. A controversial recommendation was to request from the Government to adopt a system similar to Germany where pregnant women and those on Maternity Leave can only be made redundant only in specified circumstances. This protection would apply during pregnancy and Maternity Leave and for six months thereafter.

Most of the recommendations have been rejected by the UK Government. The Government has however indicated that greater protection will be afforded to mothers facing redundancy. It will be interesting to see how this develops.

Mandatory Retirement Ages

The Labour Court issued a decision in Transdev Light Rail Limited –v- Michael Chrzanowski. This was in favour of the employer. There are some interesting decisions which came out of the case. Because there was a mandatory retirement age alleged to be in place this was sufficient to shift the burden of proof from the employee to the employer to prove that the practice was not discriminatory. In this case the employer successfully defended the case but it is useful as a

reminder that the burden of proof is on the employer where there is a mandatory retirement age.

The employer in this case successfully invoked the safety critical nature of the role of a luas driver and for the equitable distribution of employment opportunities between generations as an objective justification for selecting a 65 year age as a compulsory retirement age. What is very interesting in this case is that it was noted that the employer had sought medical advice on two occasions in 2010 and 2014 when considering an amendment of the mandatory retirement age and the employer had complied with that medical guidance.

There is a very helpful review of case law around objective justification of retirement ages on the genuine occupational requirement ground. The position is that the law allows employers to use the genuine occupational requirement ground as a defence to direct age discrimination where they can show that possessing a characteristic related age is a genuine and occupational requirement. In addition the employer must be in a position to show that it is proportionate to apply that requirement in the particular case.

The Labour Court held that an employer is entitled to rely on a mandatory retirement age even when the mandatory age is not expressly set out in a contract of employment and can rely on custom and practice. In this case the employment age had been incorporated into a collective agreement which the employee had signed. The Court set out that a term of employment regarding retirement age can be provided in conditions of employment either expressly or by implication.

There was an issue in relation to this case as regards the choice of comparator where the Court found that the comparator company was not appropriate.

The Court held that it was reasonable for employers to have a legitimate interest in workforce planning. This is an area of law which is likely to develop significantly over the years. The issue of fixed retirement ages is going to become a significant issue not only for employees seeking to challenge forced retirement but for employers. If employers wish to rely on a mandatory retirement age they are going to need to be able to show that that age has been objectively set. They

will need to show how it has been objectively set. They will probably need to show that they have obtained appropriate professional advice in setting same particularly if it is set on a safety ground that it would need to be by way of medical evidence. If it is on the basis of promoting people within an organisation then they will have to show how that has been structured and what planning has been put in place.

Effectively it is not going to be a matter of simply turning up and saying well we said 65 and we regard that as reasonable and we want to be able to promote people. The burden of proof will be on the employer where there is a mandatory age and the employer is going to have to be able to justify same on objective grounds when that age was set and at the time of retirement. We see this as an area of law that is going to develop significantly in years to come.

There has been an issue in the Dail about excluding mandatory retirement ages. However, Private member Bills are issuing nearly every week. Few of these will fully proceed through the system. The Bill which the Government accepted in principle will require significant amendments.

Organisation of Working Time Act Case and TUPE before the Labour Court

In the case of Kilsaran Concrete Limited and Mindaugas Viskontis this was a case where the employee had been employed by one company where there had been a transfer over to Kilsaran Concrete Limited.

Under a request under the Data Protection Act Cemex (ROI) Limited had furnished documentation. Unfortunately the company did not have the documentation but it was shared by this office with the representatives of Kilsaran Concrete Limited. There was no question of us wanting to take short.

The interesting aspect of this case which is not covered in the decision was that claims had gone against Cemex (ROI) Limited and Kilsaran Concrete Limited and there had been a lengthy discussion in the Labour Court about the Transfer of Undertakings and to whom liability attached.

As part of the discussions which took place between this office on behalf of the employee and Ibec on behalf of the employer it was agreed between the representatives that where a Transfer of Undertaking takes place the liabilities under an employment law claim transfer to the new employer.

There have been some ongoing discussions as to what the effect of the Transfer of Undertaking regulations are in Ireland where there is a transfer of an employee from one company to another.

It is now appears settled or certainly accepted by this office and by IBEC and applied by the Labour Court that where there is a transfer under the Transfer of Undertakings that any claim that the employee had against the prior company automatically transfers to the transferee. This may appear unfair but that is the law.

For employers who are involved in a transfer of an undertaking it is vitally important that appropriate due diligence is carried out as failure to do so can result in the new employer being left with an employment law claim and the liability for same.

Accruing Annual leave and Public Holiday entitlements during a notice period

The Labour Court in the case of PWD171 being Synergy Security Solutions Limited and Gerard Reilly is one where this issue had to be determined by the Court. The Court in our opinion rightly held that where entitlements to minimum notice, annual leave and public holidays arise and are not discharged then this can amount to an unlawful deduction under Section 5 of the Act.

In related proceedings UD-16-96 the Court held that the employee's employment had pursuant to the European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 transferred to the respondent employer. The Court found that the respondent had failed to meet his obligations to employ the complainant and that this amounted to a dismissal of the complainant from his employment. The Court found that the dismissal was unfair.

In that case, the Court awarded €8,000 for Unfair Dismissal. The Court found that the employee was dismissed without notice or payment in lieu of notice and held that the employee was therefore entitled to minimum notice of four weeks.

In relation to the issue of annual leave and public holidays the representative of the employee confirmed that the claim in respect of annual leave and public holidays was based on the premise that had the complainant been facilitated with working during the notice period he would have accrued annual leave entitlements on 1.66 days and would have been entitled to the benefit of a public holiday on 17th March 2015. Essentially the Court noted the claim was grounded on the complainant having notionally worked for four weeks.

The Court held that as the employee had not worked from 27th February 2015 he did not work up to the week ending on the day before the March public holiday.

The Court therefore did not apply the payment for the public holiday.

We disagree with this decision of the Court. The issue of minimum notice is that the employee is entitled to same. During a notice period the employee is still employed by the employer. In some employment contracts there will be a provision to place the employee on Garden leave. There is nothing wrong with that. In some contracts there will be a provision to pay in lieu of notice. There is nothing wrong with that. In other cases contracts will be silent as regards pay in lieu of notice or Garden Leave. Again, there is nothing wrong with that. However, in our view a contract of employment cannot be terminated without giving the appropriate minimum notice. Where the Minimum Notice arises this extends the period of employment for the period of notice specified either under legalisation or in the contract. In our view it is not a notional period of employment it is an actual period of employment and therefore during such period of time the right to annual leave and public holidays accrue. The employee is entitled to work his/her notice unless the contract provides otherwise.

We do appreciate that the Labour Court has given their ruling in this case. The Labour Court regularly follows their own decisions. The Court in this case did say that there were extensive arguments put forward on both sides although the decisions do not set these out in

detail as to what these were as regards the issue of accruing holidays and Public Holidays during a notice period. We would expect this decision to be subject to further argument in the future in other cases.

Exceptional Circumstances

In the case of RS247 Resources Limited and Bogdan Newmann the Labour Court considered the issue of exceptional circumstances.

The Court in this case pointed out that the Court dealt with this matter in the case of Gaelscoil Thulach Na Nog and Joyce Fitzsimons – Markey (EET034) as follows;

"The Court must first consider if the circumstances relied on by the applicant can be regarded as exceptional. If it answers that question in the affirmative the Court must then go on to consider if those circumstances operated so as to prevent the applicant from lodging her claim on time. The term exceptional is an ordinary familiar English adjective and not a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course or unusual or special or uncommon to be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered".

In this case the Court found that there were 13 days remaining available for the representative of the appellant to submit an appeal on time at the point of notification to them of the decision of the appellant to appeal.

It was argued that the Solicitor for the appellant had to secure alternative Counsel and to brief an alternative Counsel such that the Counsel could prepare the submission necessary to make an appeal. It was pointed out by the Court that there is no requirement to make a legal submission at the point of lodging an appeal.

The terms of the appeal were;

"Please find attached form of appeal with copy of WRC decision attached.

We will furnish written submissions within 21 days. In the meantime we await hearing with acknowledgement".

The Court held that the documentation submitted by way of appeal demonstrated no characteristics or content which would suggest that the input of Counsel was required for its completion.

This case is interesting.

There appears to be as this office certainly is hearing it from colleagues and those who do not regularly appear before the WRC and the Labour Court that there is a requirement to put in a submission at the time of lodging an appeal.

There is no requirement to put in a submission at the time of lodging an appeal.

In the case of an Unfair Dismissal case and Equality case there is an obligation to furnish a statement within 21 days and to copy it to the other side.

The Labour Court has consistently accepted very short appeal documentation. In some cases in the past the Labour Court and we have no reason to believe that this would not be the current position have accepted a faxed letter from a Solicitor attaching a copy of a decision and stating that the client of the Solicitor wishes to appeal. The Appeal document to be sent to the Labour Court is a non-statutory form. Therefore any form of communication would be sufficient.

Whether a person is lodging a claim or lodging an appeal it would be always our view that you lodge at the earliest possible date for any claim and lodge an appeal at the earliest possible date. The initial submission can be very short. It can be as simple as

"I was unfairly dismissed" in an unfair dismissal case or in an equality case "I was discriminated against".

It is useful to add in that further particulars would be furnished at a later stage but it is not necessary. In employment cases the time limits

are very strict. Speed is of the essence. This is clearly demonstrated by this case.

Published Irish legal News 28 February 2017.

The Trucking Industry

An opinion of Advocate General Tanchev delivered on the 2nd February in case C-102/16 Vaditrans Buba and Belgische Staat. This case has the potential to revolutionise claims by truck drivers.

The relevant legislation in Ireland is SI 36 of 2012 as amended.

This case will have particular relevance to international truck drivers and international trucking companies.

The issue relates to drivers taking weekly rest periods. The relevant EU Regulations are Regulation No 561/2006. Regulation 8 (6) provides that in every two consecutive weeks a driver shall take at least two regular weekly rest period or one regular weekly rest period and one reduced weekly rest period. Where the driver takes a reduced weekly rest period the driver must be compensated by an equivalent period of rest taken in block before the end of the third week following the week in question.

Regulation 8 (8) provides that where a driver choses to do so daily rest periods and reduced weekly rest periods away from base may be taken in the vehicle as long as it has suitable sleeping facilities for each driver and the vehicle is stationary.

This case revolved around the issue of weekly rest periods and reduced weekly rest periods. The Advocate General Tanchev has in the opinion stated that only the reduced weekly rest period can be taken in the vehicle.

The Advocate General has fairly stated that the ECJ has yet to squarely address the questions as to whether under Article 8 (6) and (8) of Regulation 561 of 2006 that a regular weekly rest period for drivers may be spent in the vehicle. It is even questionable taking account of questions which have been raised in the Commission as to whether a regular weekly rest period can be taken inside the vehicle.

The Advocate General has effectively held that the weekly rest period cannot be taken in the vehicle. A reduced weekly rest period can.

There are significant implications for those in the trucking industry particularly those who are involved in the long distance haulage. These Regulations as regards rest periods have never been seriously contested before the Labour Court, in our knowledge, relating to the issue of weekly rest periods having to be taken away from the vehicle. We now have a very live issue for employees and employers. If the weekly rest period has to be taken away from the vehicle and it is not then this is a criminal offence.

SI 36 of 2012 is silent as to where a rest period must be taken. The Labour Court has consistently held that they must interpret Irish Legislation in conformity with European Legislation unless it is *conta legume.* As SI 36 of 2012 is silent whether the rest periods have to be taken then SI 36 of 2012 will have to be read in conjunction with Regulation 561 of 2006.

It should be noted that it is only when the driver choses to take daily rest periods or reduced weekly rest periods he/she may do so in the vehicle therefore it would appear there can be no requirement for the employee to do so as this would breach Article 8 (8) of the Directive.

Of course this is only an opinion of the Advocate General. I fully expect that the decision will issue in due course but it is likely that the decision will follow that of the Advocate General. This usually happens. There are times when it does not but this is a very recent decision and it would appear to me that it is very likely that the Court will follow the opinion of the Advocate General.

Published Irish Legal News 16 February 2017.

Doctors Pay

On 20th February a settlement was reached with Doctors whereby an allowance of monies which had been reduced as regards accommodation allowance was agreed to be repaid. The benefit to the 4,500 Doctors will be €3,000 each per annum which in a year will have a cost of €13.5 million euro. This is a substantial additional cost for the health services.

Mediation before the WRC

This office is a firm believer that mediation is important. We support mediation.

Saying this we do have a concern in relation to Section 39 of the Workplace Relations Act 2015.

The issue is whether a mediation agreement is covered by the Insolvency Legislation. It is not clear that this is the position.

This is another issue which needs to be addressed. Clearly a decision of an Adjudication Officer is covered by the Insolvency Legislation.

The issue arises where an employer goes into liquidation or is declared bankrupt. If there has been a decision by an Adjudication Officer then those monies can be claimed under the Social Fund.

It is not clear from Section 39 that that can happen where there is a mediation agreement.

This may require amending legislation. The alternative is that the Department of Social Protection issues a circular to confirm that a mediation agreement would have the same standing as a Court order for a claim under the Insolvency Legislation.

Tackling Workplace Stress

A very useful publication has been produced in the UK on Tackling Workplace Stress. Workplace stress is an issue which we are seeing consistently coming into us.

It would be most helpful for both employer and employees that there was such a document available for employers and employees here in Ireland.

Employers who have an employee out on Stress Leave have significant problems because of this. Sometimes the stress is caused in the workplace or volume or complexity of work. In other cases it can be an outside issue such as a debt in the family or a marriage breakup to

give just two examples. Sometimes it can be a combination of issues both inside and outside the workplace. Employers need tools to deal with workplace stress. It would be most helpful if resources were put in place to create such a tool which could be used. In the UK a very novel approach was taken in relation to dealing with the tackling of workplace stress. The UK TUC and their Health and Safety Executive got together to deal with creating a guide. It is an excellent guide addressed mainly to employers.

The use of private investigators in employment cases

We now see that private investigators are being used more and more often from personal injury accidents right up to and including employment law matters.

When considering using a private investigator it is important to consider the Private Securities Services Act 2004 and the Private Security (Licensing and Standards) (Private Investigator) Regulations 2015.

If using a private investigator you can only use a private investigator who is licenced by the Private Security Authority.

When considering a private investigator it is important to look at the Data Protection Commissioners Rules which were set out in Study 13 of 2011. It is necessary;

1. There is a written contract in place with the private investigator.

2. That contract should comply with the provisions of Section 2 (C) (3) of the Data Protection Act.

3. Processing of Information by a private investigator must be in full compliance with the Data Protection Act. The Private Investigator must comply with the legislation at all times.

4. It is important to ensure there is no unauthorised processing use or disclosure of personal data. This should be included also in the contract with the private investigator.

5. It is important to ensure that the private investigator undertaking the work only undertakes the work on the instructions of the Data Controller and only to an extent necessary to fulfil the duties and that there are appropriate measures to protect loss of destruction of damage or access to the process.

6. The Contract should specifically provide that on conclusion of each investigation all data collected will be provided to the Data Controller.

7. It is important to ensure that the private investigator does not breach the Data Protection legislation. By this we mean that the private investigator may not seek to access personal data held by other Data Controllers which is not in the public domain without the consent of the data subject or unless otherwise permitted by law.

The Data Protection Commissioner takes a hard line in relation to these matters and a private investigator may well be prosecuted and has been prosecuted for breaches of Section 22 of the Data Protection Acts. Just because you have obtained a report from a private investigator does not mean that the evidence obtained by him or her can be used. The Data Protection Commissioner can if they find there has been a breach of Data Protection legislation order the destruction of the evidence gathered by the private investigator. If such an action was taken this would prohibit an employer from relying on the information in any proceedings or investigation. It is not acceptable to simply send out a private investigator to see "if there is anything there" or put another way going on a "fishing expedition". Covert surveillance of individuals is difficult to reconcile with Data Protection and there must be strong evidence based justification for such surveillance in the first instance.

If seeking to rely on a private investigators report it could be if there was a subsequent claim by the employee before the WRC or the Labour Court if the surveillance was excessive this may preclude the employer from relying on the information.

Evidence gained from a private investigator is no different than any other type of evidence. It means that it must be put to the employee concerned. They must have an opportunity to challenge it. They must have an opportunity to make submissions on any findings. CCTV now also is regularly being used in disciplinary matters. CCTV surveillance can only be used where employees have been advised in advance that there is CCTV surveillance and that such surveillance can be used in disciplinary matters and for what it can be used. Many employers will have a CCTV policy that provides that there is CCTV in the shop or premises and there to cover issues of for example shop lifting or stealing being the stealing of goods. If that is as much as has been communicated to employees then it cannot be used for any other purposes. It is therefore important if an employer proposes to use CCTV that there is a clear CCTV Policy setting out what the CCTV can be used for. Covert surveillance by a private investigator can only be used where there is a legitimate serious belief of inappropriate behaviour by an employee. CCTV can only be used where there is a policy relating to same which sets out what it can be used for.

We would envisage going forward that there would be a considerable amount of further interest in the issue of private investigators and CCTV in employment cases. The paperwork, policies and contractual documentation relating to same will be carefully reviewed.

Where employers have CCTV and there is outside monitoring then appropriate protections under the Data Protection Act must be in place also before it can be used.

US Immigration Rules

The issue of any form of travel ban can have a significant impact for Irish employers.

When President Trump issued his executive order to place a 90 day ban on entry to the US for nationals of certain country's it immediately became clear that some 5,000 individuals living in Ireland are nationals of these listed countries but also have Irish citizenship. It was made clear that where persons had dual nationality that the ban would not affect them provided they were not travelling from one of the listed countries to the US.

However, there are a considerable number of individuals working for Irish companies who come from the countries which were listed. Where these individuals do not have an Irish passport or dual nationality with another country that are not on a banned list then they will be prohibited from travelling to the US.

Some 6,000 travel from Ireland to the US every day. Many work for large tech firms. There is a necessity now for an Irish employer intending to send an employee to the US to work for any duration to make sure they check their status and in particular their immigration status under US laws.

There are significant issues here in Ireland also. For employers it may be necessary to avoid putting an employee where they could be in a precarious position. Our legislation does not make explicit reference to this by which we mean having to alter your approach due to change in another countries immigration policy. Employers will need to carefully check each situation individually with due consideration to our employment Equality legislation.

It would be advisable for Irish employers to make sure that they keep up to date with US Immigration laws and keep employees who may be travelling to the US updated so as to review feedback from them if they could be in any way affected.

President Trump has made "promises". Whether you like him or his promises he certainly appears to be intent on following through on them.

Damages for hurt to feelings is not a claim which can be made

The case of Martin Murray and Others trading as Michael E Hanahoe Solicitors [2017] IESC4 is a case where the claim against the firm of Solicitors was dismissed. However, the case is very interesting for some of the points raised by the Supreme Court in the decision.

As regards the issue of damages the Court stated;

"I agree with the decision of Hogan in Walter –v- Crossan 2014 IEHC377 …where he held that damages for worry and stress not giving rise to psychiatric injury are not recoverable in Tort".

The Court at 28 stated;

"I note also the decision in Larkin –v- Dublin City Council 2008 1IR391. There the plaintiff suffered upset and emotional upheaval but no psychiatric illness, because a mistake in communication that he had been promoted. Clarke J accepted that there had been a duty of care which had been breached but held it did not give rise to any injury which entitled the plaintiff to recover damages".

These issues also often arise in employment cases. While this case had nothing to do with employment law the Court did refer to the case of Addis –v- Gramaphone Co Limited 1909 AC488 where it was held;

"I cannot agree that the manner of dismissal affects these damages. Such considerations have never been allowed to influence damages in this kind of case".

The reason for quoting this case is that in many employment cases which we come across and also in injury claims clients sometimes are under the mistaken belief that they can obtain damages or compensation for loss of feelings. In employment law there is no provision to provide for damages, in an unfair dismissal case, other than the financial loss. There is no compensation for loss of feelings. There is no compensation for loss of professional or business standing. There is no compensation for the manner in which a person was dismissed.

In employment law and in personal injury cases we are regularly met with the issue that there should be a punishment element for the way in which the employer or wrongdoer in the case of a personal injury case treated a person who was dismissed or injured. The recent Supreme Court decision clearly indicates that there is no such remedy available. The Supreme Court has helpfully reaffirmed the law on this issue. A decision in employment law cases can include an amount to be persuasive of an employer going forward being complied with any law coming from an EU Directive but that is a distinct issue.

Rickshaws are a death trap

We have motorised vehicles by which we mean electric motors on rickshaws operating in Dublin and elsewhere. These vehicles often have no insurance. There is no regulation of the drivers. There are no regulations regulating the business. In addition to very serious health and safety issues for people using footpaths where some of those operating these vehicles have little or no regard for pedestrians and where those using these vehicles are having their lives put at risk and the potential for serious injury being caused with no recourse because many do not have insurance is a national disgrace.

Legislation was introduced last year to cover rickshaws but unfortunately the quality of the legislation left a lot to be desired particularly as the National Transport Agency are of the view that the legislation does not cover those with an electric motor, which most of these have.

It is now necessary for the Dail to deal with this legislation and to put in proper legislation. The problem with the drafting of this legislation goes down to the fact there is a lack of facilities in the Draftsman's Office in the Dail. This needs to be addressed. However that is a secondary issue. We have a situation where we have uninsured vehicles operating for gain on streets where somebody someday is going to be killed. There is an obligation on ALL of our TD's to address this issue sooner rather than later.

I am sure that there are some who are 100% legitimate but nobody can know because there is no registration, no regulation, no testing and most importantly no insurance for a lot of these vehicles.

This office is involved in personal injury law. We see some horrific accident cases coming into us. At times we deal also with fatal injuries. We do not want to have to tell somebody someday who has suffered a serious injury or where a member of their family has been killed that because of the inaction of our legislators that there is no effective recourse for them.

This is a national scandal that needs to be addressed sooner rather than later.

Previous Issues of Our Newsletter

You may access previous issues of our Newsletter in the publication section of our website www.grogansolicitors.ie

Lent

This lent we will not be "giving up" writing our newsletter. Therefore the next issue will be published on Monday 2 April.