INTRODUCTION

Welcome to the April issue of Keeping in Touch

We are delighted to announce the continued development of the firm. Richard Grogan of this firm is going forward assuming the position of Head of Employment Law and Dispute Resolution. Michelle Loughnane has been appointed Head of Litigation and Contentious Business.

Both Richard Grogan and Michelle Loughnane going forward will be seeking to expand the firms practice. Having moved to new premises in August of last year we are looking at opportunities to expand in the near future. Michelle Loughnane who joined the firm in 2015 will now be assuming a management role within the firm to manage and develop our Litigation and Contentious Business practice and all in the firm wish her well in this endeavour.

In March of this year Richard Grogan was involved in assisting the Law Society in putting in place the Inaugural Employment Law Masterclass which took place on 9th March.

Richard also spoke at that conference and a copy of the paper presented by Richard is available in the publication section of our website.

Richard spoke on the issue of presenting claims in the WRC and the Labour Court on behalf of employees.

In April Richard will be speaking to the Waterford Solicitors Bar Association at their Annual Conference on the issue of employment law with the talk entitled “Walking the Talk, not Talking the Talk”.

In May of this year Richard will be speaking at the Law Society Skillnet Finuas conference in Leitrim organised by the Law Society and the local Bar Associations in the North West on “Termination of Employments.”

The firm is continuing to expand our client base of other Solicitor Firms who are referring employment work to us. We greatly enjoy

working with these firms. In some cases we act simply ourselves for the client who is referred to us. In other cases we act as a "correspondent law firm" where we work very much as the representative of that firm in representing their client or alternatively in assisting them in putting in place appropriate submissions with the relevant legal back up documentation to assist them in presenting the case themselves.

In other cases we assist colleague firms in putting in place appropriate documentation for their clients. We particularly appreciate the fact that colleague firms feel comfortable in referring clients to us and are happy to do so.

The first quarter of 2018 has been a challenging time. We are finding we are taking on more and more complex cases whether acting for employers or employees. We have found that our business is changing considerably in that the number of middle management and senior executives within organisations now seeking legal assistance in the area of employment law has risen dramatically and we believe this will continue into the future.

Our Litigation and Contentious Business practice is continuing to expand. This includes not only personal injury cases arising from accidents but also significant cases for senior and middle management executives who have disputes with their employers, involving breach of contract issues, injunctions and employment law statutory appeals.

On 22nd March Richard was interviewed for the Sean O'Rourke Show on RTE to discuss the issue of ageism and the WRC Decision in the case of Valerie Cox and RTE.

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INAUGURAL EMPLOYMENT LAW MASTERCLASS 9 MARCH 2018

Richard Grogan of this firm was delighted to be asked to assist in putting in place the inaugural employment law masterclass in the Law Society which was held on 9 March.

The course was fully booked out and because of the level of interest additional places were made available. Even so, there was still a waiting list.

This firm was delighted to be asked to assist in setting up the inaugural employment law masterclass and also that Richard Grogan of this firm was asked to speak on the presenting of cases for employees before the WRC and the Labour Court.

We would like to acknowledge the fantastic support and assistance along with advice given by Katherine Kane of the Law Society who was so supportive and assisted greatly in ensuring that there was a great mix of speakers with practical knowledge. We believe the course was a great success from the feedback we have received so far and hopefully this will become an annual event. We are only delighted to pass the baton over to somebody else for 2019 and wish them well.

We are very pleased and honoured that we were asked to assist the Society in setting up this course.

OUT AND ABOUT AND ON SOCIAL MEDIA AND THE MEDIA

We were somewhat surprised and delighted when we saw the response which we received to just three posts which we put on LinkedIn.

During the recent beast from the east two major employment law issues arose. The first was that some employers were seeking to deduct wages for employees who did not turn up for work.

The second was that some employers were in the alternative seeking to have employees take the days as holidays. We posted three posts on LinkedIn dealing with Section 20 Organisation of Working Time Act 1997 relating to the issue of holidays being forced to be taken. We also

posted in relation to Section 5 of the Payment of Wages Act 1991 concerning deductions from wages of employees who did not turn up for work. The third was an omnibus post which dealt with the two other posts in a combination.

These went up on the Thursday of the first of the "snow days". By close of business on Monday 5th March we had over 37,000 views between these three posts. We had over 300 "likes" and a significant number of comments. For a firm such as ours it is quite staggering that we would get this number of views. One of the posts had slightly over 18,000 views. One had over 10,000 views and the omnibus post made up the balance. We are delighted that this is clear evidence to us that we are putting forward information which is interesting to those reading Social Media. These were also of course posted on facebook, twitter and Google+.

Our approach to Social Media is very simple. We do not put up ads. What we do is we say that relevant information which we hope will be of interest and will provide real information to those reading our posts. We believe that this is the best form of marketing this firm can be involved in.

In Social Media there are a lot of ads which go up. There are businesses and organisations which provide real tangible advice documentation dealing with detailed issues in detail. This is what we try to do. We believe that providing the information it is the best method of us attracting new business.

Some say that we are giving away the shop by giving this information. We believe that by giving information we show the specialist areas of expertise which we have and that this is our marketing communications. The fact that we educate others who may be in competition with us is not a reason for us not posting relevant information in a way which can be easily understood.

It is like this newsletter. It is detailed. It provides we believe a lot of technical information.

We believe that only by providing relevant comprehensive information in an easy to understand format will our social media be effective. This is our approach to social media communications and marketing.

However we don't call it marketing. We call it communications. We believe that the best communication is in fact the best marketing we as a firm can do and the better the communication is the better our marketing is.

On 22nd March Richard was interviewed on the Sean O'Rourke Show on RTE dealing with the case of Valerie Cox and RTE. We did not deal with this case for either party. We were simply asked to comment as Employment Law Solicitors. We are simply clearing up in this publication any misunderstanding as this case was made public before the Decision was published.

Richard Grogan was interviewed for an article in Independent.ie on 27th March - "Sex abuse claims 'on rise in Ireland since Weinstein allegations' - says top employment lawyer.

On 27th March Richard was interviewed on Lunchtime Live with Richard Chambers discussing Sexual Harassment in the workplace.

REDUNDANCY DECISIONS

We are delighted to note that decisions from the AO's in relation to redundancy are now providing in the decisions that the decision is subject to the employee having been in "insurable employment".

There had been some issues relating to this as to decisions in the past. It is great to see that decisions on this sort of issue are now becoming standardised within the WRC and they must be congratulated for this.

SEXUAL HARASSMENT AT WORK – ZERO HOUR CONTRACTS

A quite disturbing but true article was written by Laura Bates of the Guardian on 19th March of this year. A significant number of the issues raised in that article are issues which those of us involved in employment law, as Solicitors, will regularly come across. Few of these cases ever get to full hearing because they are settled. But we believe it is important that articles such as the one written by Laura Bates are published to highlight the issues.

While the articles written from the perspective of UK workers the same issues arise here in Ireland. In one case an individual who worked for a large pub chain in central London claimed that workplace harassment was so widespread that she described it as "continuous". These include incidents of being groped by a customer while carrying plates of food past a table and even being asked to go to a hotel by a man who tipped £20 pounds during the course of the evening.

The particular worker who was interviewed claimed that because she was working on a zero hour contract she felt unable to report what was happening due to a fear that making too much fuss would result in a reduction of her hours where she was already struggling to support herself.

In another case a carer working on a zero hour contract was shown completely inappropriate photographs. That particular worker was afraid to report matters for fear of not receiving shifts.

The article refers to another woman who worked at a five star hotel and golf resort who was pressured by managers to accept behaviour including unwanted touching and groping to keep wealthy customers happy. She was told to look after the important customers.

In 2016 the Everyday Sexism Project and the TUC surveyed a number of women. The results revealed that more than half of women had experienced workplace sexual harassment. However, that figure was 67% of women in hospitality and leisure.

Many women, in our view, who are on zero hour contracts or work on a casual basis, are concerned that if they make a report of sexual harassment that their hours or shifts could be reduced. They are equally concerned that they could be dismissed.

For those women who find themselves in this type of dreadful situation they need to know that the Employment Equality Legislation in Ireland protects such workers from any form of victimisation for having made a complaint. This includes reducing their hours of work, not giving them shifts, and, in the worst case scenario dismissing them. They do not need any service period with an employer to get those protections.

Where any woman has suffered sexual harassment it is vitally important that a complaint is made. Unfortunately because some will deny ever having received the complaint it is always our advice that the complaint is set out in writing and is given to the employer. It is advisable that it is also sent by registered post and by email and that the receipts for the registered post and the email are retained.

In 2017 in the UK a ComRes survey of over 6000 people being men and women found that people employed by an organisation were significantly less likely being 29% to have suffered unwelcome sexual behaviour at work where they are on full time contracts. However, those engaged as freelancers, gig workers or on zero hour contracts saw the figure rise to 43%.

As in Ireland as in the UK unfortunately the attitude towards some women by employers is completely inappropriate. Now some employers, to be fair to them, simply see this as being part of the job or jovial banter where comments are made. The reality is that this is not acceptable. The revelations about sexual harassment in Hollywood, Westminster and elsewhere have triggered significant conversations about women's rights to respect and safety at work. A lot of the spotlight has been on high profile women. It is important to remember that the sexual harassment of women penetrates deeper. Those in less glamorous jobs are equally subjected to inappropriate sexual harassment. Those who are in precarious working situations often feel less able to raise issues.

Unfortunately sexual harassment occurs in every level of business. It affects both high profile women in the public spotlight, professional women and those in senior positions in major companies and professional firms are subjected to sexual harassment. Women in lower paid jobs are as equally vulnerable to sexual harassment. However, those in lower paid jobs often feel less able to speak out.

There are many Solicitors who undertake employment work in Ireland. We are simply one of them. Those who do are Solicitors to whom any woman can go who feels she has been subjected to sexual harassment. It does not matter whether they are high profile women in the public eye, professional woman or even national minimum wage workers. The legal profession and in particular the Solicitors

profession is there to protect such women and to act for and advocate on their behalf. Sexual harassment of women is never acceptable. There is no excuse for an employer not putting in place sufficient safe guards to protect his or her staff from sexual harassment. The law protects women who have been subjected to sexual harassment. A claim of being sexually harassed can lead to an award of up to 2 years compensation of wages / salary. If however an employee has been victimised for having made a complaint such as being dismissed, having their hours reduced, having their pay reduced, not being given shifts or not being given work or even put under pressure to stop the claim proceeding then in those circumstances a claim to the Workplace Relations Commission or on appeal to the Labour Court gives them authority to award unlimited compensation for the act of victimisation. The Labour Court recently in a case, which did not involve sexual harassment of an employee, pointed out that victimisation of an employee for making a complaint under the Equality Legislation is one which the Labour Court takes extremely seriously. In the particular case the act of victimisation itself lead to an award of over one and a half years wages to the relevant employee.

This firm does find sexual harassment particularly abhorrent.

Some believe it is solely the role of women to speak out about this. We do not accept that proposition. We believe that it is the role of men and women to work together to highlight the fact that that sexual harassment in the workplace occurs and to work together to eradicate same.

This firm does issue many claims for sexual harassment. It is an area of our practice that we would quite happily see become redundant because of a change in attitude in businesses so sexual harassment becomes a thing of the past. We will work to highlight the fact that sexual harassment occurs and to work to see its eradication in the workplace. Some will say that it is a pipedream of ours that that would happen but we firmly believe that there is a role for men and women joining together to highlight the problem and to work to eradicate it in the workplace.

For employers we say to you that it is very bad business to have sexual harassment in the workplace. It affects the mental health of workers. It affects productivity. It affects morale not only with regard

to the person or persons who are subject to harassment but others as well particularly when they see no action being taken to protect fellow colleagues and workers.

A workplace organised by an employer where the employer has a very clear policy of not accepting sexual harassment of any employee whether from customers or from other workers is going to create a more positive working environment with staff who are more likely to be supportive of the employer and ultimately happier and more content. Staff, who feel the employer will protect them from sexual harassment are likely to be more productive workers and therefore benefit the employer by increased productivity and through increased productivity and increased profits.

It is therefore simply good business for any employer to act to outlaw sexual harassment in the workplace.

To do this, the first step is to put in place an anti-harassment policy. The second step is to communicate it. The third step is to educate staff whether at management or support level within the organisation as to what the policy is and why it is there and the fourth is that the owner and managers in any business apply the policy.

There is another benefit for employers. Where an employer gets a complaint and is seen to act on it immediately and to take appropriate remedial action then in those circumstances where this is a first instance the employer can often avoid any award where they have been shown to be proactive in dealing with the complaint and addressing the issues. That is another good business reason for employers to have a policy in place so as to avoid claims going to the Workplace Relations Commission or on appeal to the Labour Court. This firm works with employees bringing claims. We also work with employers seeking to put procedures in place not only on paper but actually in practice to avoid claims ever arising. No employee should be afraid of bringing a complaint of sexual harassment to an employer because they should know that there will be legal representation if they need it if their complaint is not dealt with. Equally employers must know and recognise that sexual harassment does occur but if they put in place the proper policies and procedures and implement those regardless as to whom the complaint is against in a fair and consistent manner and that this is known within the organisation that

this would be done that they are more likely to completely eradicate sexual harassment in their workplace and therefore avoid any claims.

CONSTRUCTIVE DISMISSAL

In Case ADJ8488 the AO in this case has helpfully set out the Law Relating to constructive Dismissal and has helpfully quoted the book "Dismissal law in Ireland" by the late Doctor Mary Redmond at page 340 where it is stated;

"There is something of a mirror image between constructive dismissal and ordinary dismissal. Just as an employer for reasons of fairness and natural justice must go through disciplinary procedures before dismissing, so to an employee should invoke the employer's grievance procedure in an effort to resolve his grievance. The duty is an imperative in employee resignations. Where grievance procedures exist they should be followed. Conway –v- Ulster Bank Limited. In Conway the EAT considered that the claimant did not act reasonably in resigning without first having "substantially utilised a grievance procedure to attempt to remedy her complaint".

In Berber –v- Dunnes Stores 2009 E.L.R.61 Mr. Justice Finnegan stated;

"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 as such that the employee cannot be expected to put up with it".

There are therefore two issues in relation to constructive dismissal. The first of course is that the actions complained of must be such as would justify an employee resigning.

Equally important is that before resigning the employee must go through the internal grievance procedures if there is such a grievance procedure in place. This is absolutely necessary for an employee to be able to avail of bringing a constructive dismissal case. This is most certainly our view. The AO in this case also quoted the case of Patricia Barry–Relph –v- HSE 2016 27ELR 268 where the EAT stated;

"The Tribunal finds that the claimant did not give her employer an opportunity to deal with her complaints. The Tribunal further notes that the claimant resigned on obtaining alternative employment in January 2014. Her resignation was rendered in circumstances where she failed to use any of the several avenues open to her".

The AO quoted the case of Zabiello –v- Ashgrove Facility Management Limited UD1106/2008 where the EAT stated;

"For a claim of constructive dismissal to succeed the claimant needs to satisfy the Tribunal that her working conditions were such that she had no choice but to resign. The Tribunal is satisfied that the claimant had difficulties with her line manager however for a period of six months she did not attempt to resolve the issues".

We are constantly coming across cases where employees for one reason or another resign without going through the grievance procedures. It would be our view that failure to do so is an extremely difficult hurdle for an employee to be able to surmount. It does not mean that it cannot be surmounted. However, in our view the actions of the employer must be so bad that effectively any person seeing what happened would say of course the employee had no alternative but to leave immediately. Of course there are situations where this can arise for example in the case of say serious sexual harassment which may border on sexual assault. An extremely serious breach of health and safety which could put the employees in danger, or possibly a culmination of events which are so serious as to warrant an employee leaving. It could also include for example even comments made to an employee which would be seen as seriously undermining the employee's employment rights. However, it is always advisable that the employee goes through the grievance procedure. We constantly come across employees telling us that going through the grievance procedure would have had no effect. That may well be true. However, that is making an assumption rather than having gone through the grievance procedure and finding that nothing was done which would then be a ground for the employee being in a stronger position to be able to resign.

EUROPEAN COMMUNITIES (PROTECTION OF EMPLOYEES IN TRANSFER OF UNDERTAKINGS) REGULATIONS 2003 – WHO ARE CLAIMS AGAINST?

In the case of TUD183 being a case of J Donohue Beverages Limited and Elizabeth Collins the employee brought claims. The AO held that the AO did not have jurisdiction to hear the case where the complaint was that the respondent had failed in its obligation pursuant to Regulation 8 of the Regulations to engage in a 30 day process of information and consultation prior to the transfer of her employment to a company called Knockton Limited.

The Court helpfully set out the provisions of the rights and obligations and the provisions of Section 8. There was a detailed submission in relation to the provisions of Section 8 and how Directive 2001/23/EC was transposed into domestic law.

It was pointed out that Article 3 of the Directive provides that Member States may provide that the transferor and transferee shall be jointly and severely liable in respect of obligations which arose before the date of the transfer from a contract of employment or employment relationship existing on the date of the transfer. It was pointed out in that submission that the State had not chosen to transpose into our domestic legislation this optional provision. It was argued that following a Transfer of Undertakings within the meaning of the Regulations the liability for the rights and obligations arising from a contract of employment existing on the date of a transfer rest with the transferee. This means the new employer. The Court in this case held that Regulation 8 implies a term into an employee's contract of employment that entitles the employee to a period of information and consultation through her chosen representatives prior to the occurrence of a transfer within the meaning of the Regulations. The Court pointed out that the remedy for the failure of her employer as transferor to fulfil its obligations under Regulation 8 can only be against the transferee being the new employer.

This case has significant implications for both employers and employees. It has particular implications also for those advisors and companies who are acquiring a business under the Transfer of Undertaking Regulations.

For any new business acquiring an existing business under the Transfer of Undertaking Regulations it is now absolutely imperative that that company as part of its due diligence makes sure that the transferor company being the existing company where the employees are situated complies fully with the Transfer of Undertaking Regulations.

Effectively evidence of same will need to be furnished. Where the new company does not then the employees can sue the new employer for the failure of their previous employer in respect of any breach of the Transfer of Undertaking Regulations. Equally, if there are outstanding wages or holiday entitlements or any other breach of employment law which arises, the new employer becomes liable for same even if they know nothing about them. On that basis again it is absolutely imperative that appropriate due diligence is put in place.

For employees it is important to ensure that if they are issuing proceedings that they are issued against the correct entity. Because of the complications under the Transfer of Undertaking Regulation and the arguments that can be raised it is not unusual to have a situation where the employee sues in identical proceedings both the transferor and the transferee. Sometimes this can be the safest method of protecting the employee. This can arise for example where there may be a breach of equality legislation. The new employer is going to argue that they know nothing about the previous complaint. The old employer is going to argue that the new employer is responsible under the Transfer of Undertaking regulations. Where the employee has issued proceedings against both then in those circumstances the employee can effectively sit back and let the WRC or the Labour Court on appeal decide who has responsibility. The decision of the Labour Court in this case is extremely helpful in setting out the law in no uncertain terms. However, because this type of legislation is complex it will often be that different arguments will be raised by the old and new employer and therefore it is useful for the employee to protect themselves to issue proceedings against everybody.

For those acting for employers it is necessary to particularly those acting for new employers to be very careful to ensure that all claims that could possibly be made against the old employer are signed off on, identified and valued prior to any transfer taking place and if

necessary that the appropriate cooperation to defend any such claim is obtained in advance of any transfer.

The Transfer of Undertaking Regulations are a very short piece of legislation. They are however one of the most complex pieces of legislation to deal with.

PROTECTION OF EMPLOYEES (FIXED-TERM WORK) ACT 2003

In the case of Liebherr Container Cranes Limited and Mark Roche the Court had to deal with the issue of whether the employee was entitled to a contract of indefinite duration.

The case dealt with the issue of the objective grounds for additional fixed term contracts. The court helpfully set out the provisions of Section 7 of the Act and also referred to the judgement of the Court of Justice in case C-307-05 being a case where the European Court of Justice held;

"The Court held that the concept of "objective reasons" must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable, in that particular context, of justifying the use of successive fixed-term employment contracts. Those circumstances may result, in particular, from the specific nature of the tasks where the performance of which such contracts had been concluded and from the inherent characteristics of those tasks, or, as the case may be, from pursuit of a legitimate social policy objective of a Member State".

The employer in this case contended that each time the contract was renewed clearly identified objective ground for renewal were set out.

The Court in this case held that the application of Section 8 of the Act is of central relevance in the particular case. That section the Court held placed an obligation on an employer to specify in writing the objective grounds for the renewal of a contract of employment for a fixed term and not offering the employee concerned a contract of indefinite duration.

The Court has helpfully pointed out that a contravention of Section 8 may render the employer liable to compensation to the employee. The Court held that unlike a contravention of subsections (1) or (2) of Section 9 of the Act a failure to comply with Section 8(1) of the Act does not result in the contract concerned being transmuted to one of indefinite duration. The Court pointed out that what is provided by that Section is that where an obligation that is imposed is not complied with the Court may draw such inferences from the employer's failure as are fair and equitable in the circumstances.

This is an important restatement of the law.

For employers it is vitally important that the provisions of Section 8 are complied with to specify the objective grounds for the renewal. While it will not automatically mean that a failure to do so will result in the employee getting a contract of indefinite duration it is a factor that can be taken into account.

This case was concerned with a particular provision of the Act.

The case is important for both employers and employees. We have set out what the position is as regards employers. In the case of an employee where objective grounds have not been set out or objective grounds are set out which can be challenged and proved to be incorrect this may be a significant assistance to an employee obtaining a contact of indefinite duration. That may not automatically apply but the Labour Court or an AO can draw an inference from a failure to comply with Section 8.

PROTECTION OF EMPLOYEES (FIXED –TERM WORK ACT) 2003

The issue of the date of dismissal which can be very relevant for the purposes of bringing a claim was brought into sharp focus in the case of Houses of the Oireachtas Service and Hanlon FTD182.

The employee in this case brought a claim under the 2003 Act. As regards the date of dismissal the employee referred to the definition in the Unfair Dismissals Legislation where it defines the date of dismissal as the latest date on compliance with the minimum notice of the Terms of Employment Act 1973 applies.

The Court in this case pointed out that that particular definition in Section 2 of that Act is specific to that Act. The claim was brought under the 2003 Act. The Court pointed out that there were no powers for the Court. That definition had not been included in the 2003 Act to adopt that definition.

The Court pointed out that the claim had been submitted outside the six month time limit.

ORGANISATION OF WORKING TIME – WHAT IS WORKING TIME AND REST PERIODS

Case C-518/15 being a case of Ville De Nivelles and Matzak is a judgement of the European Court of Justice which issued on 21st February 2018.

The case dealt with the issue of fire personnel. They were required to reside in a place so as not to exceed a maximum of 8 minutes to reach the appropriate fire station. They were required to remain at all times within a distance of the fire station so that the period necessary to reach it when traffic is running normally does not exceed a maximum of 8 minutes.

The issue in this case was what was working time and what was a rest period. The Court helpfully pointed out the issue as to who is a worker. The Court pointed out the case of Union Syndicale Solidaires Isere being case C-428-09 and in particular paragraph 8 that in accordance with settled case law on the matter any person who pursues real genuine activities with the exception of activities on such a small scale as to be regarded as purely marginal or ancillary must be regarded as a worker. The Court pointed out that the defining feature of an employment relationship resides in the fact that for a certain period of time a person performs for and under the direction of another person services in return for which he/she received remuneration. The Court referred to Case C-316/13.

Importantly the Court pointed out that the legal nature of an employment relationship under national law cannot have any

consequence in regard to whether or not the person is a worker for the purposes of EU law and referred to cases C-116-06.

The Court pointed out that while the relevant employee did not have the status of a professional fire fighter but was that of a voluntary fire fighter this was irrelevant for his classification as a worker within the meaning of Directive 2003/88.

The Court pointed out that the first issue was whether under Article 17 of Directive 2003/88 it was whether it was possible for a Member State to derogate with regard to certain categories of fire fighters recruited by the public fire service.

The Court pointed out that a Member State may derogate from articles 3-6 and 8-16 of the Directive but the wording of Article 17 of the Directive does not allow derogation from Article 2 which defines the main concepts contained in the Directive. The Court pointed out that any derogations under national law must be strictly limited to what is strictly necessary to safe guard the interests which those derogations enable to be protected.

The Court pointed out that in relation to the definition of working time within the meaning of Article 2 of Directive 2003/88 national legislation provisions may provide for more favourable treatment to workers than those laid down in the Directive but cannot amend the definition of working time to be less favourable and cannot apply legislation which is more restrictive.

In relation to the issue of rest periods the Court in their decision set out a considerable amount of case law but effectively held that under Article 2 of the Directive it must be interpreted as meaning that stand by time which a worker spends at home with a duty to respond to calls from his employer within 8 minutes very significantly restricts the opportunity for other activities and must be regarded as working time.

This case dealt with a situation where the employee had to be in a particular place and had to be able to get to the fire station within 8 minutes. The case is interesting in that as part of the decision the Court held that the situation is different where a worker performs a stand by duty according to a standby system which requires that that

the worker be permanently accessible without being required to be present at the place of work. The Court pointed out that even if an employee is at the disposal of an employer since it must be possible to contact him, in that situation the worker may manage his time with fewer constraints and pursue his own interests. In those circumstances only time linked to the actual provision of services would be regarded as working time. This case therefore effectively determines that where you have a simple on call provision then that will not be working time. However, if the employee has to be available to get to the place of employment or as directed by the employer within a certain period of time then the issue becomes more difficult. Certainly if it is within 8 minutes it is clearly working time all the time that the employee is on standby. The issue is whether it is 10, 15 or 30 minutes what is the cut off time. That is going to be an issue which will probably have to be addressed in later decisions. It would however in our opinion be hard to limit the application of this case to only situations where the employee had to get there within 8 minutes.

There are some important issues which come out which favour employers in this case and that is that the issue of working time has no relevance to the issue of payment. Therefore the fact that an employee is on standby does not under this particular Directive require that the employee is paid. Under Irish law if however the time is treated as working time then the employee may well be able to claim under the National Minimum Wage Act.

This case is extremely important.

When this case is looked at in association with the TYCO case it indicates how the European Court of Justice is interpreting the relevant Directive. In the TYCO case the Court held that time spent travelling from home to a place designated by the employer was working time.

These decisions have significant impact on some employers.

We can see it particularly as regards those in the security industry that this decision is going to be extremely important. There will be some businesses which because of the way they operate various employees will have to be on call and again these are cases which may well have a significant impact for certain businesses.

Employers are going to seriously need to review issues concerning on call time of such workers.

EMPLOYMENT EQUALITY ACTS 1998–2011 – TIME LIMIT TO SUBMIT A CLAIM

The rule in employment equality claims is that the case must be presented within six months though this can be extended to twelve months. An extremely important decision has issued from the Labour Court in the case of Dublin Port Company and Robert Kiernan EDA1814 from the Labour Court.

In this case there was an appeal by Mr. Kiernan to the Labour Court from a decision of an AO dismissing the claim on the basis that it was out of time. The time issue is extremely relevant here.

The employee commenced employment as a marine pilot on 4 October 2004. His employment terminated on 15 March 2016.

On 29 January 2016 the employee had been written to advising that they had decided to retire the employee with effect from 15th March upon his reaching the age of 65. The employment terminated on the 15th March. A complaint issued on the age ground on 22 August 2016.

The employee contended that the AO had considered the decision of the Labour Court in the case of Calor Teoranta –v- McCarthy EDA089 and that the AO had concluded that the date of communication of the decision of the respondent to terminate the employees employment by reason of age was to be taken as the date of the act of alleged discrimination and not the date of the actual termination.

In this case the Court reviewed the relevant case law and the legislation.

The Labour Court helpfully set out that the Court could not accept that because the employee had been communicated to on 29th January 2016 of an intention to retire the claimant that the claimant was precluded from contending that the termination of employment which took place on 15th March was an act of discrimination. The

Labour Court referred the matter back to the Workplace Relations Commission for a new investigation. This is an extremely important decision of the Court in clarifying the law.

ORGANISATION OF WORKING TIME ACT – BURDEN OF PROOF

In Case ADJ9906 the AO in this case has helpfully set out the law relating to the burden of proof where records are not kept. The AO in the case referred to the cases of Nurendale Trading as Panda Waste and Suvac DWT1419 and Antanas –v- Nolan Transport 2011 22 ELR 311.

TIME LIMIT FOR CLAIMS

In ADJ9155 the AO had to deal with a situation where it was agreed that the employment of the employee terminated on the 4th October 2016. A complaint was lodged on 6th April 2017 which was outside the six month period. The employee at all times was represented by a Solicitor.

The respondent in this case relied on the decision of Mr. Justice Charleton in Adigun and the Equality Tribunal record number 356/2011. It was submitted by the respondent that it was a pure question of law.

The AO in this case declined jurisdiction. The AO found that there was no reasonable cause for extending time.

This case is a timely reminder of the importance of issuing claims within the six month time limit.

UNFAIR DISMISSAL CLAIMS – THE IMPORTANCE OF USING FULL APPEAL PROCEDURES BY EMPLOYEES

In the case of Aryzta Bakeries and Vilnis Cacs UDD1812 is a decision of the Labour Court which has clarified the law relating to appeal procedures which employees must utilise.

The facts of the case themselves are interesting but the determination makes two important points. The Court found that there is an obligation on an employee to exhaust available internal procedures which the employee had failed to do.

The Court found that the failure to exercise a right of internal appeal was an issue to be taken into account effectively in determining whether an employee had been unfairly dismissed.

This is an important statement of the law. While the facts of this case are interesting the conclusions of the Labour Court are extremely important. This is a case which those interested in employment law do need to read.

Published in Irish Legal News

FAIR PROCEDURES IN UNFAIR DISMISSAL CASES

The case of a Commercial State Body and a Worker being UDD1815 is one where the Labour Court considered this issue. While the Court pointed out that the three principles they were quoting effectively related to the particular circumstances. They quoted the case of Kilsaran International Limited –v- Vet UDD1611 where the Court referred to the Supreme Court decision in Glover –v BLN Limited 1973 IR338 as the three relevant principles being;

1. That there was a requirement to make the employee who is the subject of an investigation aware of all the allegations against him or her at the outset of the process.
2. The requirement that the employer who has published a disciplinary procedure to its employees follows those procedures scrupulously when conducting a disciplinary process and;
3. In the event that an allegation against an employee is upheld any disciplinary sanction imposed is proportionate to the complaint that had been substantiated.

In Case UDD1814 being a case of Lagan Cement and James Hilton is another case where this issue arose and where the Respondent did not dispute that there were flaws in the process. The Respondent

company accepted that they had not complied with the principles of natural justice as set out by Samuel J in Frizelle –v- New Ross Credit Union 1997 IEHC137. In this case compensation also was awarded.

MITIGATION OF LOSS

Case UDD1816 is an interesting case in that it deals solely with the issue of mitigation of loss in a case before the Labour Court.

Normally an appeal to the Labour Court is a De Nova appeal. In this case the employer admitted that there had been a dismissal which was not fair and therefore the only issue related to the mitigation of loss.

The case is useful in that the employer quoted a number of cases on the issue of an employee being required to mitigate their loss. The case is further interesting in that the employer in this case through there representative contended that compensation of a little of €3000 should be paid on the basis that the employee could have mitigated here loss within 8 weeks. On the other side the representative of the employee contended that the compensation should be a little over €25,000 taking into account the mitigation of loss that had already been made by the employee.

The Labour Court in this case held that an award of €15,000 would be made on the basis that the employee had not fully sought to mitigate her loss.

This is a very interesting case to read on the basis that it deals in some detail with the issue of mitigation of loss.

APPEALS TO THE LABOUR COURT – GETTING THE NAMES RIGHT

An interesting case is the case of MWD183 being a case of Serghei Groppa trading as Humdings and Vitali Saveljev.

In this case the appeals were brought in the name of Quick Service Rest System Limited, a limited company of which Mr. Groppa is a director.

It appears that Mr. Groppa did not appear before the AO nor was the company represented at the hearing.

The Court stated that it was clear that Mr. Groppa was a named respondent in those proceedings and was notified. It appears that Mr. Groppa did not raise any issue with the WRC as to the identity of the Respondent which should have been named in the proceedings. The Court pointed out that the Notice of Appeal received by the Court named the company as the Appellant in the within proceedings. The submissions to the Court were on the basis that Mr. Groppa was not the employer.

The Court pointed out that it is trite law that a company has a separate legal personality distinct from that of its shareholders. The Court pointed out that it followed that the company has no locus standi to maintain the within appeal. The Court held that it had no statutory jurisdiction to retrospectively substitute one party for another in any proceedings.

This is an important case for highlighting that sometimes employees may sue a Director of the company who they regard as the "boss". If that happens it is important that the employer company appears and certainly deals with the matter before the WRC as failure to do so can result in an award against a Director. This case highlights the importance of employers making it very clear to employees who their employer is, by which we mean the legal entity. This can be done in a contract of employment.

When acting for an employer if proceedings come in the name of a Director it is vitally important that the WRC are written to and advised as to who the correct employer is so as to avoid a claims going against the said Director. The alternative is to appear before the WRC and set out that issue. In this case if Mr. Groppa had appealed in his own name he may well have been able to run the defence that he was not the employer.

CONSTRUCTION OF CONTRACTS AND SICK PAY

In the case ADJ3367 the case involved a claim by an employee for sick pay while out ill.

The contract which the employee originally had provided for the payment of sick pay.

Subsequently, the company due to financial circumstances sought to issue new contracts of employment to all employees whereby sick pay was not paid. It is noted by the AO in this case that as a measure of good will sick pay was paid for a period of time.

The employee in this case did not sign the revised contract of employment. The AO points out that the employee did not raise any grievance during the period of his employment relating to the issue. In relation to a contract of employment where the employer seeks to amend the contract of employment then in those circumstances it is our view that this is a matter of contract. It cannot be unilaterally changed. Where as in this case it is clear that the employee did not consent to the change in the terms and conditions of his employment as he had been called to many meetings and had not signed the contract it would be our view that in those circumstances the existing contract of employment remains in place and that the AO in this case was not entitled to look at the fact that the employee had not raised a grievance and had continued to work for the employer.

An interesting case on the whole issue of the construction of contracts is the case of First Glass Limited which is a High Court case arising on a Point of law from the Labour Court where the issue of the construction of a contract was raised as was the issue that the employee for a number of years has raised no grievance in respect of the issue. In that case the High Court looked at the terms of the contract. The High Court overturned the decision of the Labour Court and effectively provided that the employee was entitled to the full terms of his contract of employment.

No employee has to raise a formal grievance in respect of a change in the terms and conditions of his employment. If it is a signed contractual document and the employer wishes to change it then unless the employee agrees the employer then if they are relying on financial circumstances really has to look at the issue of a redundancy situation arising.

There is a clear issue in relation to this case as to whether or not the AO was correct or not. We would have a lot of sympathy for an employer in this situation but there cannot be a unilateral change in the terms and conditions of employment. The issue of acquiescence was raised in the case of the HSE and McDermot being a decision of Mr. Justice Hogan where an employee had effectively not raised any complaint in relation to an underpayment of wages for a considerable period of time had held that the employee could be in an extremely difficult situation to raise same and allowed the employees claim to proceed.

WHY HAVE A CONTRACT OF EMPLOYMENT SIGNED

While it can be down to the very simple fact that under the Terms of Employment (Information) Act and there is an obligation on an employer within two months of an employee commencing employment to furnish them with a statement that complies with Section three.

The provisions of Section three are the very basic terms.

It is often vitally important that an employer has an appropriate contract of employment in place. If you are dealing with confidential information to your organisation an appropriate confidentiality clause is needed.

You may need restrictive covenants. You may need a provision that an employee be placed on garden leave. Depending on the type of business you have you may need longer or shorter periods of notice to the employee and from the employee. Because of issues relating to data from the 25th May it may be important to have appropriate clauses in your contracts providing for you to obtain relevant date from your employee which is legitimately obtained. You will need to cover retirement dates properly as seen in the case of Cox and RTE ADJ6972.

It is always our advice that an employer will ensure that an employee signs a contract of employment before they start working. This means that the contract will be in place. The employer will have a copy signed by the employee. The employee will have a copy signed for or on behalf of an employer. The clauses then in the contract can be enforced.

There can be no issue then with an employee failing to sign the contract and not being bound by its terms. It makes good business sense to make sure that appropriate contracts of employment are in place at the earliest date possible.

JUDICIAL REVIEW IN RELATION TO THE SECTORAL EMPLOYMENT ORDER FOR THE ELECTRICAL CONTRACTING BUSINESS

A hearing by way of a Judicial Review being a challenge by the NECI being the electrical contractor body to the Labour Court conduct of a Sectoral Employment Order will now be heard on 6th June.

The hearing is going ahead even though the application for the SEO in this sector has been withdrawn.

NATIONAL MINIMUM WAGE ACT

The decision of the Labour Court in MWD182 is interesting.

While it is not absolutely evident from the decision it is clear that no request under Section 23 of the National Minimum Wage Act had been requested.

The AO had declined jurisdiction. An AO cannot hear a minimum wage claim unless an appropriate request under Section 23 of the National Minimum Wage Act has been furnished.

The Labour Court has helpfully stated that a fundamental condition of a contract of employment is that a rate of pay is specified. We would agree with this. However, for the purpose of the National Minimum Wage Act the argument put forward that there is a gentleman's agreement that it would be unpaid work experience. In our view when the National Minimum Wage Act is looked at does not stand up.

If an employee performs any work for an employer then in those circumstances they are at a minimum entitled to be paid the National Minimum Wage Act and the issue of it being an unpaid gentleman's Agreement as unpaid work experience would in our view not be a

defence. However, the very fact that no Section 23 request was put in is enough to mean that the Labour Court did not have jurisdiction to hear the case as was the position as regards the AO.

SETANTA INSURANCE UPDATE

On 25th May 2017, the Supreme Court ruled in favour of the Motor Insurers Bureau of Ireland. The result being that the MIBI will not be liable for the approximate 2000 outstanding claims against Setanta Insurance. Under the rules governing the Insurance Compensation Fund, claimants would only have been recovering 65% of their claims up to a limit of €830,000.

After the Supreme Court decision in May 2017, the Government did announce that they were moving on the reform of the Insurance Compensation Fund to ensure that all future third party claims arising from insolvent insurers are 100% covered. Many were of the opinion that such a limit would raise questions in relation to constitutional validity. Following the Supreme Court judgment, the Law Society of Ireland was instrumental in lobbying the Government to right this wrong. On 30th January 2018, the Government announced that in principle the State will be responsible for this shortfall in the cover and will ensure that all third party claimants are compensated in full.

This is a welcomed approach by the Government. It ensures that victims are fully compensated. However, it also provides greater protection to the policy holders, who may have been subjected to costly proceedings involving their personal assets in order to collect the outstanding 35% balance on claims.

Overall, this is a very good result and any future cases similar to Setanta will be dealt with by the insurance compensation fund.

MANUAL HANDLING CLAIMS

We often act for people in manual handling claims where a person has injured his/her back, neck, hand, wrist or arm. These types of cases

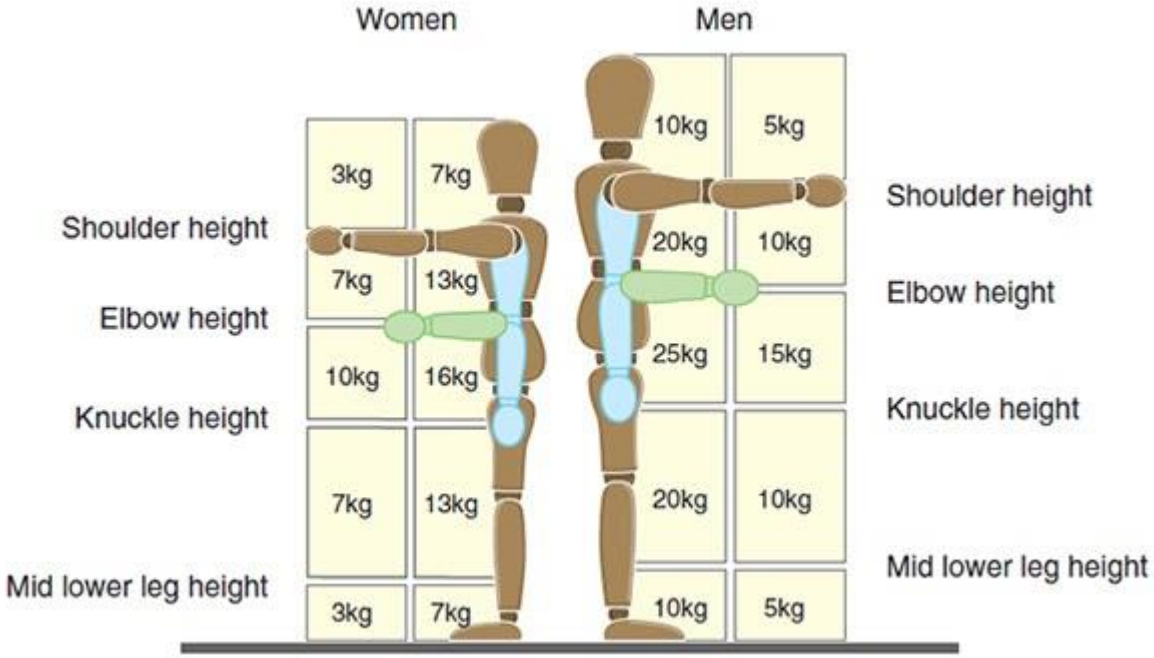
usually occur in the workplace and can be anywhere from moderate to severe injuries which result in serious losses for the injured party.

The most common contributing factors to these type of injuries are: -

- Repetitive work with no job rotation or job variety, i.e. doing the same task over and over again;
- Lifting loads which are too heavy and are unsafe;
- A lack of training or adequate training;
- A failure on behalf of an employer to carry out a risk assessment for the task in question;
- Working in a confined workspace;
- Failing to supply the employee with the appropriate machinery and/or equipment for lifting loads.

Employers should address the above factors in order to avoid employees becoming injured during the course of employment.

Below is a guide in relation to lifting loads and following these guidelines in itself will reduce the risk of injuries.



KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

HOW IS MY PERSONAL INJURY CLAIM VALUED?

We are often asked what is included in the value of a personal injury claim? What legal fees will I have to pay? Can I include my medical expenses? We thought it would be useful to give some simple answers to these important questions.

1. General Damages

General damages is the compensation for your pain and suffering. The amount of money you are awarded for your compensation will depend on the contents of the medical report from your doctor. The value will be based on the type of injury you have suffered, how long the injury lasted, whether or not you have made a full recovery and the treatment you have received.

2. Special Damages

Special damages is the legal term for your out of pocket expenses. These will include doctors' consultation fees, fees for scans/xrays, pharmacy expenses, travel expenses, damage to a motor vehicle and any other expenses paid by you. It is important that you retain all bills/invoices/receipts and give them to your solicitor so that all expenses can be included in your claim.

3. Loss of earnings

If you have lost wages/earnings because of injuries suffered in an accident, this loss can also be included in your personal injuries claim. More serious personal injury claims with serious injuries can include a claim for future lost wages/lost earnings or loss of future employment opportunity. There are various expert reports which are needed to support this aspect of your personal injuries claim and your solicitor will advise you, if they are required.

4. Legal costs

Legal costs are not included in a claim which has been assessed by the Injuries Board. This means that you will be responsible for the discharge of your legal costs. Generally when a case proceeds to court, a lot of your legal costs will be recovered from the other side, if

you are successful with your case. Before any case is taken, we will discuss with you what the likely fees will be or how they will be calculated. We never charge percentage fees. This is illegal.

INJURED IN A SLIP, TRIP OR FALL ……. WHAT DO I DO?

1. **Report**

Report the accident to the owner / manager of the property, e.g. owner / manager of a supermarket, shop, hotel, restaurant. If the slip, trip or fall happened in a public place, you should report it to the local authority in charge of that area. You should report how the accident occurred and your injuries.

2. **Medical attention**

Go to your GP/A&E Department and get treatment for your injuries, as soon as possible.

3. **Gather evidence**

Record the names and addresses of any witnesses, take photographs of your injuries and the location of the accident and record any other relevant information.

4. **Speak to a specialist personal injury solicitor.**

If you have been injured in an accident at work, please contact our office on 01 9695781 and speak with Michelle Loughnane.

INJURED AT WORK……. WHAT DO I DO?

1. **Report**

Report the accident to your direct line manager. Report how the accident occurred and your injuries. If there is an accident report book or procedure, you should follow same.

2. **Medical attention**

Go to your GP/A&E Department and get treatment for your injuries, as soon as possible.

3. **Gather evidence**

Record the names and addresses of any witnesses, the make & model of machinery you were using at the time of accident, if applicable, take photographs of your injury, take photographs of the location of the accident, if possible, and record any other relevant information.

4. **Speak to a specialist personal injury solicitor.**

If you have been injured in an accident at work, please contact our office on 01 9695781 and speak with Michelle Loughnane.

INJURED IN A ROAD TRAFFIC ACCIDENT ……. WHAT DO I DO?

1. **Report**

Report the accident to An Garda Síochána. Report how the accident occurred and your injuries. You should also report the accident to your own insurance company, even if you are not at fault for the accident.

2. **Medical attention**

Go to your GP/A&E Department and get treatment for your injuries, as soon as possible.

3. **Gather evidence**

Record the name and address of the other driver, record his / her vehicle registration number and insurance details, record the names and addresses of any witnesses, take photographs of the damage to

the motor vehicles, your injuries and the location of the accident and record any other relevant information.

4. Speak to a specialist personal injury solicitor.

If you have been injured in an accident at work, please contact our office on 01 9695781 and speak with Michelle Loughnane.

RECENT JUDGEMENTS IN PERSONAL INJURIES CASES

The case of Pamela Phoenix and Dunnes Stores attracted a lot of media attention in March 2018. Ms. Phoenix worked for Dunnes Stores and suffered injuries when she was trying to maneuver a pallet truck in a cold room when she slipped and fell with force on her bottom and back. Her injuries involved both physical and non physical injuries which affected her in her occupational, domestic and recreational activities. She continues to be affected by the accident. The High Court awarded her €105,929.00 and found that she was a credible witness who did not exaggerate her injuries.

Dunnes Stores subsequently appealed the decision of the High Court to the Court of Appeal and argued that the High Court award was excessive and disproportionate. However, the Court of Appeal upheld the award but did acknowledge that the award was probably in the upper range of damages of what is appropriate.

This is a very good result given by the Court of Appeal, who always take an excellent approach in assessing the value of personal injuries cases. We are reminded that in the case of Payne –v- Nugent [2015] IECA 268, the Court of Appeal highlighted that "modest injuries should attract moderate damages" and saw the Court of Appeal reduce a High Court award of general damages by 46% from €65,000.00 to €35,000.00. This judgement highlighted that in assessing the award of compensation, the trial judge should have regard to where the injury falls on the scale or spectrum of damages which ends at €400,000.00 for the catastrophically injured. The judgement also highlighted that the damages must be reasonable and proportionate. The Court of Appeal did highlight that this was not a

formula to be adopted but that it was more of a benchmark by which the appropriateness of an award could be evaluated.

A recent Circuit Court case involving a young boy, who is now aged 10 years, recommended a settlement offer of €20,000.00 for physical and psychological injuries suffered when a laptop he was using at his mother's dining room table exploded in flames. His mother threw the burning laptop out onto the patio where it continued to burn. The young boy was only aged 6 years at the time.

A case was brought on his behalf for personal injuries against Hewlett Packard. He suffered a darting pain going up his arm at the time of the accident. He became very anxious around all electrical appliances and would insist on all electrical plugs being plugged out at night time and was fretful about the safety of Christmas lights. He was noted to have suffered post traumatic stress as a result of the incident. He was now noted to have made a good recovery apart from some nervousness around electrical appliances and is now participating in sports and usual childhood activities.

President Groarke, noting how frightening the incident was for the then 6 year old boy, said "You have put the heart cross-ways in me" to Counsel for the young boy. He also added, "That's scary. You're telling me that none of us are safe leaving out lap tops plugged in overnight".

President Groarke felt that the sum of €20,000.00 was a good offer in the circumstances and approved it with costs.

It should be noted that all settlement offers involving children's injuries must be approved by a Judge before the case can be finalised. If the Judge is happy that the sum is adequate compensation for the child's injuries, he/she will approve it. If he/she is not happy that the sum of money is adequate compensation for the injuries, the case will continue. In this case where the sum of €20,000.00 was approved by the Judge as adequate compensation for the injuries, the money will now be lodged in court for the young boy's benefit until he has reached the age of 18 years. Once he reaches 18 years of age, he can apply for it to be paid out to him. Before he reaches the age of 18 years, applications can be made to the court for the payment out of money but, in order to be successful with such an application, the

reason why the money is required must be for the child's benefit and for something substantial such as education or health.

Another recent Circuit Court case involving a child was one where an 8 month old child pulled a bowl of boiling water over her upper and lower body at a Chinese restaurant in Dublin. The bowl of water had been placed by waiter in front of the child who accidentally pulled it down on top of herself before her parents had an opportunity to react. Pieces of the scalded skin came away from the child's right arm as cold water was being poured on the wounds and the clothes were being removed. She was taken to the Accident & Emergency Department of Temple Street Children's University Hospital. She was noted to have 1% burns which were dressed and she was prescribed pain killing medication. She was obliged to undergo painful re-dressings before she healed. She has been left with a small indentation scar of a permanent nature on her right arm.

The Injuries Board assessed the value of the case at €12,000.00. However, this assessment was not approved by a Judge as it was deemed to be inadequate for the injuries suffered. This meant that the case needed to go through the court process in order to continue. A settlement offer of €27,500.00 was subsequently made to the child and was approved by President Groarke in the Circuit Court. The monies will be lodged in court for the child's benefit until she attains the age of 18 years.

***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.**