Welcome to the September issue of our newsletter Keeping in Touch*

There is an issue which is currently arising in the Workplace Relations Commission concerning submissions. The Commission in their Annual Report stated that delays in the WRC, are arising due to the fact that submissions have not been put in in time. It is interesting that this comment would be put in the Annual Report when the WRC procedures state that failure to lodge a submission will not delay the case being listed, except where an employee fails to do so. We make this point in that either the WRC in writing their report never looked at their own procedures, were unaware of them, or, simply decided to put this down as an excuse for the delay in the cases coming on for hearing.

The WRC procedures and the procedures for the hearings themselves have serious defects. In relation to the procedures, they provide that in Equality cases and Unfair Dismissal cases submissions must be made within 21 days. This is not happening. In cases where statutory records are required such as under the Organisation of Working Time Act the records are supposed to be provided in advance. This is not happening. In cases where technical arguments are being raised in relation to the jurisdiction of the WRC which are supposed to be raised in advance by of submission, again, these are not being raised. The procedures provide for any submissions relating to technical issues having to be provided in advance. This is not happening.

At the present time, there appears to be a free for all, in the WRC, for both employers and employees to involve in wholesale ambushing of each other. We have to say at the outset that this does not happen in the Labour Court. The Labour Court do not allow ambushing. The Labour Court insist upon submissions being put in, in time, and that documents and records are produced in advance. In the WRC, it is now becoming common place that submissions are not produced until the day of the hearing.

The employer representative or the employee representative, and it applies to both, who do not get a submission, where submissions are lodged on the day, are usually given about 15 or 30 minutes to review the submission from the other side and then for the case to proceed. This is shambolic. There is no reasonable way that anybody can reasonably review documentation particularly where there is a lot of documentation within that period of time. Representatives in those circumstances are advised that the are entitled to have the case adjourned. That equally has problems in that accepting cases where the representative is extremely strong on opposing adjournments and wishing the case to proceed and be dealt with on the day where the Adjudication Officer decides that despite these objections an adjournment is going to be granted that the Adjudication Officer in those cases may push to have an early hearing scheduled. Otherwise you could be waiting months. It has now become a well-known delaying tactic to produce submissions or documentation only on the day. The WRC has not sought to apply their own Rules.

There is an approach that can be taken in relation to same. If the WRC Rules are not being applied and the WRC themselves are not applying their own Rules then in those circumstances a representative is entitled to rely on the Act and in particular Section 41 (5) which sets out the procedures for hearings. That does allow the representative to present the case on behalf of the employee. It does allow the Adjudication Officer to inquire into the case. It does not allow for cross examination. That is in the legislation. Equally, either party can insist on the Supreme Court decision being applied as an inquisitorial process. The WRC are not set up for this as Adjudication Officers are not given paid time to read submissions in advance.

This office has taken a hard line in relation to cases where submissions are not being put in. We have never failed to put in submission in advance. There have been times where no information has been provided and where we have had to seek information and, even then, as regards some particulars nothing has been furnished. This would not apply in Unfair Dismissal cases where we act for an employer but

may apply in cases where there is a claim under the Payment of Wages Act, for example, where no figure has been specified or as figure has been specified and it is not set out what it relates to. However, the approach in the office is always that a submission is going to be put in, in advance, when acting for employers. When acting for employees the usual practice is that a submission is put in at the very start to set out the claim. We do not do ambushing as it is not ethical. Others unfortunately see ambushing as legitimate.

It is important that ambushing is not allowed in cases. The WRC commenced with great fanfare of having procedures that were simpler, more effective and cheaper. Adjournments in the WRC on the day are now quite common. This is a cost to the employee and to the employer. In the Labour Relations Commission, in the Employment Appeals Tribunal and in the Equality Tribunal adjournments on the day rarely if ever happened. In the EAT, to be fair, it may happen where a case was settled or alternatively where all the evidence could not be given within the time allocated. However, cases opened, they proceeded and they moved on. In the Labour Court there is no questions of them allowing ambushing. There is no question of people turning up on the day with a submission. They apply their Rules fairly and consistently. In the WRC the Rules and Procedures relating to lodging of submissions are being ignored.

We do need a degree of honesty in the WRC. Either the procedures are to be applied or they should be scrapped. Where a party does not provide a submission in advance setting out the claim or the defence, or statutory records, then this is something that Adjudication Officers should be commenting on.

The current situation in the WRC is putting additional costs on everybody. The costs are coming because the WRC are not applying their own Rules. Adjudication Officers will tell you that the Rules are not Statutory Rules. Nobody has ever contended successfully that we have not complied with the Rules of the WRC. We always have on behalf of our clients. However, there is a great degree of frustration that when

you comply others will seek to use that as a method to ambush you. That is not going to happen going forward.

The approach we are taking at the present time is one we do not wish to take. It is being taken out of utter frustration with the WRC failing to apply their own procedures. There is utter frustration that nothing is being done to make sure that, in particular employees, who do not have the resources for additional hearings, are not being prejudiced. In cases where an employee has had to have a case adjourned because of ambushing and where matters are covered under the European Legislation Adjudication Officers are not applying the Von Colson and Kamann Rules to take account of the economic costs to the employee, particularly where they are represented, of having to come back for a second day.

We have huge sympathy for Adjudication Officers who are being put in a difficult position where they equally are not getting submissions in advance and do not have the time to read them in advance. We do not blame the staff of the WRC as the WRC is so badly under resourced as regards staff numbers there is no way they reach the targets that they wish to achieve. There does have to be a criticism of the Senior Management in the WRC and the Board of the WRC as regards being less than forthright in relation to the problems in the WRC due to lack of resources and in addition being less than forthright in applying their own rules and procedures. Where an entity does not apply its own rules and procedures and make sure that they are applied then the credibility of that organisation and their rules and procedures are completely undermined. At the present time, most representatives appearing in the WRC regard the rules and procedures of the WRC as a joke and a bad one at that.

This office was a supporter of the concept of the WRC. We spoke in favour of it. We were criticised for being in favour. We have to accept that we were wrong as the promised world class service has not materialised.

We are sad we have to go public on this issue but those reading it will see the frustration that we are currently enduring with a system that is so dysfunctional it would be laughable if it was not so serious. We are happy to meet with the WRC to see if some of these issues can be resolved. Meeting representative bodies is fine but sometimes you have to meet those who work at the coalface.

We do not wish to be critical of the WRC. However, at times it is necessary to speak out.

As Winston Churchill once said:

"There is only one duty, only one safe course, and that is to try to be right and not to fear to do or say what you believe to be right."

Index:

Out and About in August

On Friday, the 2nd August Richard Grogan of this firm was quoted in relation to a case involving an employee who was receiving emails out of hours. Richard Grogan was quoted in articles by Gordon Deegan which were in the Irish Examiner, the Irish Independent and on the front page of the Irish Times. On the same day, Richard was interviewed by Newstalk on the Pat Kenny Show by Jonathan Healy. On the same day Richard was interviewed on the same topic on the Matt Cooper Show.

The issue of excessive working hours and people receiving emails after hours did received a considerable amount of traction. Subsequently, on the following Tuesday, being the 7th August Richard was interviewed on Highland Radio on the issue of excessive hours of work and the issue of rest and break periods for employees.

On 23 August Richard was interviewed on the Ciara Kelly Lunchtime Live show on Newstalk FM discussing accident in playgrounds and insurance costs.

Richard is due to be interviewed on the Pat Kenny Show on Monday the 1st October where he will be answering listeners questions.

On 5th October Richard will be speaking to the Limerick Solicitors Bar Association on the issues of bringing and defending claims in the

Workplace Relations Commission and the Taxation of Employment Law Awards and Settlements.

Unpaid Internships

At the end of July Richard Grogan of this firm raised the issue of unpaid internships as a result of which he was interviewed on Today FM. We decided to put a post on LinkedIn in relation to our stand in relation to unpaid internships and the pro bono scheme which we were proposing. We were delighted on two fronts. The first was the number of responses we received from people we hoped being in a position to assist. The second was in relation to the Social Media reaction we received. Over 22,000 views of our posts were recorded in just 6 days. It highlights to us that the issue of unpaid internships is a problem and we will be taking cases for a number of individuals absolutely free to hopefully highlight this exploitation of individuals. We actually believe that it is unfair to compliant employers who have to try to compete against those who seek to obtain free labour.

Making a Complaint to the Workplace Relations Commission

In case UDD1841 being a case of Anna Gavin T/A Cloud 9 Creche and Sharon Dunleavy the Labour Court had to consider an issue relating to whether a claim had been made.

The Court reviewed the relevant legislation and in particular Section 41 (6) of the Act of 2015. The Court found that the alleged contravention occurred on the 20th July 2015 and accordingly the latest date on which a complaint could have been lodged was 19th January 2016. It appears on the 16th January 2016 the employee wrote a letter to the WRC enclosing documents relating to the termination of her employment. She subsequently maintained that that constituted the complaint within the meaning of the Act. The Court found no merit in that argument. The Court stated that the letter of the 16th January

contained no reference to a complaint under this or under the Unfair Dismissal Legislation or any other Act.

The Court pointed out that the Court does not stand on ceremony in determining what constitutes the complaint under an Act. The Court has helpfully set out that what is required is that the written complaint, on which the Complainant relies, makes reference to both a complaint and a relevant Act. In this case the Court held neither was referenced in the letter of the 16th January.

This is a very useful decision by the Labour Court. Effectively, it confirms that a complaint will have been made if a person writes, to the WRC and states, in our opinion, for example, "*I was dismissed on (date) and I wish to bring a claim under the Unfair Dismissal Acts 1977-2015. The name of my employer is XX and his/their address is XX.*"

That would probably be sufficient.

It is important that the Labour Court clarified what constitutes a complaint. The Court has confirmed that the Court will not stand on ceremony. This is in line with the Court's own procedures in relation to appeals and the Courts in the past has accepted a faxed letter from a Solicitor setting out the names of the parties, saying that the one or other party wished to appeal and attaching a copy of the decision. There is no statutory claim form in the WRC nor a statutory appeal form in the Labour Court and therefore the Court has properly, in our view, set out that provided the particulars of the claim are set out, effectively in broadest terms, but indicating the Act and the relevant parties, that in those circumstances a claim will be properly before the WRC.

Constructive Dismissal

The Labour Court in the case of Cedarglade Limited and Tina Hliban UDD1843 had to deal with the issue of a Constructive Dismissal.

In this case the employee had not gone through the grievance procedure. The Court pointed out that they have to decide was the Respondent's conduct so unreasonable that the Complainant could not be expected to put up with it any longer. The second question, that the Court would examine, was whether the Complainant acted reasonably in not providing the Respondent employer with an opportunity to address her grievance before taking the decision to resign.

The Court helpfully has set out that they accept that there can be situations in which a failure to give prior formal notice of a grievance will not be fatal and quoted a case of Liz Allen -v- Independent Newspapers [2002] 13 ELR 84, Moy -v- Moog Limited [2002[13 ELR 261 and Monaghan -v- Sherry Brothers [2013] 14 ELR 293. They also referred to their own determination in the case of New Era Packaging -v- A Worker [2001] ELR 122. In this case the Court held there was a number of factors which could not excuse the Complainant. They pointed out that the employer had a grievance procedure in place and have received it and signed for a copy of the procedure at the commencement of her employment and her Solicitor was supplied with a copy. Secondly, despite being legally represented she never made a complaint under either a grievance procedure or anti-bullying policy. In addition, she would have been informed that her appeal would be dealt with on her return to work and this was accepted by her legal representative as the normal practice. The Court held that following her resignation the employer offered her an opportunity to withdraw her resignation and allow the appeal to be pursued. While the employee did not pick up the registered letter from An Post a copy of it have been forwarded to her legal representatives at the time. The Court set out that they failed to see how any of the assertions made met the standard of reasonableness required to substantiate a claim constructive dismissal.

This case is again an interesting case for the fact that the Court has taken the time and set out, in some length, the issue relating to the importance of employees going through the grievance procedure before resigning.

Unfair Dismissal - Calculation of Weekly Rate of Pay

In an unusual case the case of Anglo Beef Processors Ireland Limited T/A APB Rathkeale and Laurie Lancu UDD1844.

This case before the Labour Court was unusual in that the appeal was very narrow. It related to what the employees weekly wage was for the purposes of the legislation.

The employee in this case contended that his average week was €472.91. The respondent contended that it was €361.17. The Labour Court determined that it was €512.13.

The employer in this case contended that there was a statutory precedent for using 13 weeks as the relevant reference period and referred to the Minimum Notice and Terms of Employment Act provisions in this regard. However, this is a calculation to be undertaken in relation to the Unfair Dismissal legislation and the Court referred to Statutory Instrument 287/1977 being the Unfair Dismissals (Calculation of Weekly Remuneration) Regulations, 1977. The relevant provisions are 4, 5 and 6. In calculating the rate of pay Regulation 4 provides where an employee is paid an hourly rate or by a fixed wage or salary the rate of pay is in the latest week before the date of the relevant dismissal in which he worked the number of hours which was normal for that employment together with if he was normally required to work overtime in the relevant employment his average weekly overtime. However, this is calculated in accordance with Regulation 5. For the purposes of Regulation 5 the average weekly overtime earnings of an employee is the amount obtained by dividing 26 into the total amount of overtime earnings in the period of 26 weeks ending and this is the unusual provision 13 weeks before the date of the dismissal. In addition, any week during which the employee did not work is disregarded or a different week can be taken.

This is an extremely interesting decision but what it does indicate is the complexity of employment law in simply calculating a rate of pay.

Unfair Dismissal – Taxation of any Award

In case 11288 the AO in this case in awarding compensation directed that the parties will discuss the taxation of same with the Revenue Commissioners.

The taxation of an Unfair Dismissal award is covered by the Taxes Consolidation Act. The exemption in Section 192 A TCA 97 does not apply in relation to an Unfair Dismissal award. Therefore, the entire award is subject to tax, employer's PRSI and USC.

It is interesting, however, that if this award rather than having been an award had been agreed as the settlement between the employer and the employee then in those circumstances the entire sum which was €10,000 would be exempt from tax, USC and employer's PRSI because of the fact that it is covered by one of the exemptions.

There is an anomaly in the Tax Code so that effectively an award of €10,000 is now subject to tax of 48% being tax at 40% plus USC at 8%. The employee can of course put in a reclaim of tax but the USC cannot be reclaimed. The reasoning in that why the top rate of tax applies is that the employee is no longer in employment and therefore there is no weekly cut off.

Taxation of Employment Law Awards

An interesting case arose in ADJ-11753.

In this case the AO awarded compensation of €3,000 under the Unfair Dismissal Act. The AO in this case has stated that the redress is in respect of an award concerning statutory rights and therefore not subject to income tax under Section 192 A TCA, 1997.

We disagree with this.

All awards under the Unfair Dismissal Legislation are subject to tax. The reason for this is that the Unfair Dismissal Legislation relates to

net loss. It is therefore classified as income under Section 192 A. We therefore have to disagree with the AO as regards the tax treatment.

The reason we say this is that Section 123 TCA, 1997 applies and the exemption in Section 192 A TCA, 97' do not apply.

Setting Compensation in Unfair Dismissal Cases

In case AADJ11023 the AO in this case has very helpfully set out how the calculation of the compensation was made up.

In this case the AO set out that there was a significant reduction of 75% in the level of compensation which would otherwise have been awarded. What is helpful in this case that the AO that the value of 100% of the claim would have been and how same was calculated being on the basis of a monthly salary and then set out the reduction that was being applied and then the reduced figure.

It is helpful that this is being done in cases.

Rest Breaks

In case ADJ-12067 the AO had to deal with an issue of rest breaks. The AO in this case quoted the case of the Labour Court in the case of Nutweave Ltd and Kumar DWT1537 relying on the dictum of Peter Gibson LJ and Gallagher -v- Alpha Catering Services 2005 IRLR 1020 which determined that:

"For the purposes of the Act a break is a period which the worker knows in advance will be uninterrupted which is not working time and which he or she can use as she pleases."

The employer in this case quoted the case of Stasaitas -v- Noonan Services Group Limited 2014 ILR 173 and argued that this was authority for the argument that the Act does not require breaks to be specified in all circumstances. The argument was that the Complainant

could take breaks at quitter times and was employed in an industry which was exempted provided certain conditions were met. The AO in this case held that the Complainant was not employed in an industry that comes within the scope of the exemption and so the application of that case was questionable. The AO then importantly relied on Section 25 of the Act where when records are not produced places the burden on the employer. The AO quoted the Labour Court DWT1627 which held that

"The Respondent did not provide the Court with records of the breaks taken by the Appellant during the cognisable period."

The AO pointed out that the Court in that case found that the Respondent breached the Act in relation to Section 12 in the cognisable period.

The AO held that in the absence of records the AO found the complaint well founded.

We believe that the AO in this case got the case absolutely right.

The issue of the absence of records is now becoming a significant issue.

Sunday Premium

There has been a recent case in the Labour Court under PWD1828.

The employee brought a claim saying that the employee had not received her appropriate Sunday premium payment as set out in an Employment Regulation Order which if it had been paid during the period of the employment would have provided that the employee received time and 1/3 for Sundays. As this would have been a term and condition of her employment the Court held that the employee for the relevant period of the claim that she was now bringing which was limited to six months was entitled to be paid for 21 Sunday's in respect of the shortfall of €2 being a total of €42. What is interesting from our

perspective is that if this case had been taken under the Organisation of Working Time Act the employee would not have been limited simply to the economic loss. As it was under the Payment of Wages Act the claim is limited to the economic loss.

The employee in this case was not represented.

It is an issue which is constantly coming up that employees are bringing claims themselves but not always under the Act which is most beneficial for them.

Setting Compensation

In case ADJ-11165 the AO in this case helpfully set out a figure in relation to holiday pay due and then separately awarded on top of that a separate figure as compensation.

It is very helpful that the AO has done so. The holiday pay element is of course subject to tax. The compensation element is not. If the AO had simply awarded a compensation figure for, for example, not having received holiday pay without specifying what the holiday pay was then in those circumstances the full award would be exempt from tax. If the AO had set out what the outstanding holiday pay was and added the compensation figure on top as a global figure then in those circumstances the entire sum would be taxable.

This is one of the nuances of the tax law as it applies to cases.

The manner in which the AO in this case set out the decision means that the properly taxable element being the outstanding holiday pay is taxed but the compensation is not and the AO must be commended for setting the decision out this way.

Payment of Wages Act, 1991 and Collective Agreements

In a case of Dublin and Dun Laoghaire Education and Training Board and Ronan Flynn under PWD1825 the Labour Court pointed out in their determination that there has been no deduction in the employee's salary. The Court stated that it was satisfied that there had been a Collective Agreement between the Government and the Public Services Committee of ICTU and its terms applied to members of Affiliate Unions. The employee in this case was not a member of such a Union and therefore was a stranger to the Collective Agreement. In such circumstances the Court held that therefore the terms of the agreement were not properly payable to him.

What is interesting in this case is that the employee would have come full square within the terms of the entitlement to receive the payment but not being a member of the relevant Union was a fatal flaw in his case.

An interesting side effect of this is the question that if there is a Collective Agreement in place in a workplace and an employee is not a member of it by which we mean a member of the Union is the employee in such circumstances still a stranger to the Collective Agreement and effectively not bound by its terms. This would be also for issues other than the Payment of Wages cases such as situations where there was an allowed exemption from a particular provision of legislation where it was covered by Collective Agreement. This might be an interesting area that may develop into the future.

Sick Pay Schemes and claims under Section 6 of the Payment of Wages Act, 1991

In ADJ-12241 the AO in this case had to deal with a situation where an employer withdrew a Sick Leave Benefit which was available to the employee under a Sick Pay Policy.

The AO found that the Sick Leave Policy applied to employees with certain length of service. The employee had this. The employer relied on the unsatisfactory Sick Leave and abuse of Sick Pay Policy Clause. The AO found that there was no ambiguity that the Clause provides clearly for either investigation under the firms Disciplinary Procedure or Disciplinary Action respectively. The AO found that at no stage did the employer instigate a disciplinary process. The AO found that the employee was entitled to the full 20 days paid Sick Leave.

One of the issues in having a Sick Pay Policy which is not solely discretionary is that these types of issues can arise. If there is a policy in place then in those circumstances any refusal of Sick Pay must be covered in the Policy.

This may indicate to employers that it is better to have a discretionary Sick Pay Scheme. This equally has its dangers. If it is purely discretionary and then an employee claims that they did not get the payment because they claims there was discrimination under the Employment Equality Acts the employer can be in a situation of not only having to pay the outstanding sick pay but also being on the wrong side of an Equality claim for compensation can be awarded.

If a company plans to have a Sick Pay Scheme then effectively it should be written out and the basis under which a claim for Sick Pay may be refused needs to be clearly set out. The methods of claiming the Sick Pay needs to be set out. The method of refusing to pay the Sick Pay needs to be set out. Employers then need to ensure that the comply fully with the Policy.

Redundancy – Layoff – Payment of Wages

In ADJ12693 the AO in this case held that where an employee who is on layoff gives notice of resignation under the terms of their contract (or effectively under the redundancy legislation) that in that period of notice the employees contract continues and in those circumstances the employee is entitled to be paid.

This is an interesting decision.

Protection of Employees (Fixed-Term Work) Act 2003

In a case of the Department of Employment Affairs and Social Protection and Anna Concarr FTD184 an issue arose where the employee contended that having completed more than 4 years continuous Fixed-Term employment on one Fixed-Term Contract that the Respondent had contravene Section 19 (1) of the Act. Therefore, the employee claimed that by operation of Section 9(3) of the Act for Fixed-Term Contracts it became a Contract of Indefinite Duration by operation of law.

The Court in this case helpfully reviewed the legislation in some detail and in particular the provisions of Section 9.

The Court looked at the Directive, being Directive 99/70/EC and that the language of Section 9 needed to be examined carefully. The Court pointed out that the wording of Section 9 as a whole was directed at regulating circumstances in which a Fixed-Term Contract can be renewed. The Court pointed out that this complied fully with the requirements of Clause 5 of the framework agreement. The Court held that where a Fixed-Term Contract is not renewed there can be no contravention of Section 9.

This is very helpful decision of the Labour Court which confirms that to get the benefit of the Act of 2003 there must a renewal. This means that an employer can issue a Fixed-Term Contract for any number of years and the employee will not obtain a Contract of Indefinite Duration. It is only where the contracts are renewed that the provisions of Section 9 come to the benefit and protect employees.

This makes perfect sense as the Directive and the Act is there to protect employees where there are successive renewals of Fixed-Terms Contracts.

The above case has to be compared with case Donegal County Council and James Sheridan FTD 185. In this case the employee had over 4 years continuous Fixed-Term employment on a number of Fixed-Term Contracts.

In this case the employee, at the time the case came on for hearing had been provided with a Full Time Permanent Contract. The case however was appealed in relation to the relevant substantial case law and the issue of the compensation. The compensation of €5,000 was affirmed.

The case is extremely important in dealing with the issue of what happens where there is a break or lay-off. The case law in this was reviewed to a significant extent by the Court and the Court in this case held that even where the break in service exceeded 26 weeks the employee would still have been entitled to a contract of indefinite duration on the wording of the legislation and taking into account the relevant case law. This is a decision which is very worthwhile reading for its importance in setting out the relevant case law in a clear and definitive way.

Published in Irish Legal News.

Employment Regulation Orders

In case ADJ-10614 the AO in this case had to deal with an issue as to whether a Door Supervisor came within the provisions of the Security Industry ERO. The employer relied on the Labour Court Recommendation DEC101 CD/09/830.

The AO in this case referred to the fact that the Labour Court determination had been made in 2010.

The AO in this case pointed out that the Regulations in SI 231 of 2017 being the Employment Regulation Order (Security Industry Joint Labour Committee) 2017 changed the definition of a Door Supervisor to a Door Supervisor Licensed Premises. The AO in this case pointed out

that the Respondent's contract at a fast route restaurant in question was not a Door Supervisor contract. The AO in this case made a recommendation that the Employment Regulation Order SI 231 of 2017 should be applied.

The issue of these Regulations is going to be going to the Labour Court at some stage and it is important that as in this case the rationale has been very clearly set out.

Industrial Relations (Amendment) Bill, 2018

This Bill has been introduced so as to provide that members of An Garda Siochana will now be able to bring cases under the Industrial Relations Act, 1990. The Act also provides that the employer of a member of An Garda Siochana will be the Garda Commissioner.

An Interesting case has issued in the UK Supreme Court being a case of Rock Advertising Limited -v- MWB Business Exchange Centres Limited.

This is a decision by the UK Supreme Court. They have held that a clause in a contract which requires modification to that contract must be in writing and signed by the parties. They invalidated a subsequent oral agreement to vary the contract. The UK Supreme Court declined to rule on a second issue raised, namely whether the proposed variation had valid consideration and thus fulfilled one of the requirements to create a binding contract in English Law.

This case involved a license to occupy office space for a fixed period of 12 months.

The decision is interesting for those involved in Employment Law for the following reasons. In Employment cases there may be a contract of employment. The manner in which the employment then operates is

different. Arguments arise at times that the contract has been changed by virtue of custom and practice.

This case is interesting in effectively confirming that even an oral agreement to alter the terms and conditions of a license agreement and therefore a contract must be in writing and signed by the parties. In Employment Law the issue of custom and practice is more akin to how a business has and always operated. However, if a contractual term in a contract of employment is different then there is a strong argument that same cannot be changed on the basis of an argument of custom and practice.

There is however an issue as to whether a contract where consideration is paid can be varied by way of an oral agreement. Let's take for example a situation where an employee is to be paid a €1,000 a week to work a 35-hour week. By agreement the salary is increased to €1,200 a week on the basis that the employee will now work a 40-hour week. Same case is going to arise at some stage as to whether an employee can insist on being paid the higher rate of pay and in the alternative whether an employer can insist upon the employee working the additional hours for the higher rate of pay.

It is advisable that where a contract of employment has been changed that it is put in writing. It means that parties can be fully agreed as to what the terms of any agreement is as it will be in writing.

Childcare

Recently Minister Ross came forward with a proposal that grandparents who look after children for more than 10 hours a week will receive a €1,000 per annum. For 48 weeks this amounts to €2,09 an hour. If grandparent who looked after a child for 30 hours in a week, the rate of pay is €0.69 per hour.

This proposal has been brought forward on the basis of helping people get back into the workplace.

Of course, it is a gimmick.

If you have two grandparents, then each get €1,000 even if they live in the same house. If you have four grandparents living, being two sets of grandparents, that would be €4,000.

If you had a person where there are four grandparents, could they get €4,000 but the couple next door whose children only have one grandparent leaving, who may actually look after those children for 40 hours a week, will they only get a €1,000? Seems so.

There is an issue with the cost of childcare. There is an issue in facilitating parents returning to work. The proposal of a €1,000 for grandparents to look after children on the basis they would look after then for 10 hours a week is a gimmick. We need a real solution. This is needed for business. It is needed for the parents. It is needed for the State. Having individuals who cannot afford to be able to go to work is not good for those individuals. It is not good for business who lose potential workers. It is a cost to the Stage of funding them under Social Welfare.

Some innovative solutions are needed. Let us consider some. We have schools. They finish at 1:30 to 3:30. Why not have a situation where people are employed to mind the children after school until say 6 or 6:30. Have a provision for children to be able to be left in earlier in the morning. Have provisions whereby the children will attend school, get a breakfast, a lunch and a tea. Of course, this is going to cost. But it is one that will facilitate parents with children who are of school-going age being able to take up paid employment. Such a scheme could be put in place for those who are in paid employment.

We have an ageing population. That means we are going to need people to take on jobs that older workers are not in a position to take on. That means we must facilitate people getting back into the workplace. That means we need to have some innovative ideas. What we do not need is gimmicks.

If Minister Ross is serious about facilitating parents getting back to work then really serious proposals need to be put on the table that enable parents to ensure their children are minded to cover the time of traveling to work, working and traveling home.

Putting the burden on grandparents is not right. It is not either a short term or long-term solution. Having effectively unpaid carers is not looking after children. Some people have the luxury of parents leaving close by. Not everybody has that.

If we are serious about facilitating people getting back into the workplace and maintaining people in the workplace then we need to seriously look at proper childcare.

Repetitive Strain Injuries

Repetitive strain injuries* (RSI) are common work-related injuries*.

An employee with RSI can experience pain in the muscles, nerves and/or joints. This can be debilitating and can result in significant sick leave from work or an employee having to consider an alternative career.

The cause of RSI at work can be overuse of the limb, no job rotation, having to adopt poor postures to do work, a lack of training, excessive speed of production lines and/or demanding targets. This is not an exhaustive list and are merely examples.

If employees have suffered RSI because of negligence on behalf of the employer or an unsafe work practice, you can bring a personal injuries claim* for compensation for the injury*, out of pocket expenses and any loss of wages.

However, prevention of injuries* at work is preferable. To prevent RSI, ensure employees take breaks, have a variety of work and are properly trained for the task at hand. A risk assessment will also identify any hazards in the workplace.

Personal Injuries claims for workplace stress

Many employees said goodbye to a defined working day with advancements and developments in technology. Smart phones, email and social media have made it impossible for workers to unplug and bring their working day to an end. The culture of organisations in how they provide a 24/7 service to their clients / customers also makes it difficult to bring an "end" to the working day. How many of you have told your partner, husband, wife, family or friends, "I'll be leaving work early today!" and what you actually mean by "early" is "on time"?

Long hours, client/customer demands, social media, unrealistic targets/deadlines and the culture of certain workplaces does lead to stress. However, it is important to note the difference between what is known as occupational stress and workplace stress. Occupational stress is not an actionable wrong. It is stress associated with the job that we all experience at some stage of our working lives. You cannot bring a personal injury* case for occupational stress. Workplace stress, however, is different. The Health and Safety Authority has defined workplace stress as stress caused or made worse by work. It is an

imbalance between the demands of the job and the working environment and a person's capacity to meet those demands.

Workplace stress can have a negative impact on an employee's health and lead to serious illness. A recent survey revealed that mental health issues are now the most common workplace illness with two out of five workers suffering from stress and anxiety. Workplace stress can manifest itself in psychological symptoms such as anxiousness, nervousness, fear, racing thoughts, upset, feeling low. However, it can also manifest itself in physical symptoms such as heart palpitations, raised blood pressure, poor sleep pattern, stomach issues. These are just some examples. Ignoring these symptoms of workplace stress can lead to serious and permanent injury*.

The Safety, Health and Welfare at Work Act 2005 places a duty on employers to ensure the safety, health and welfare of it's employees so far as is reasonable practicable. Stress is a hazard which can lead to injury*. However, a claim* for personal injuries* arising out of workplace stress is not straight forward. Before embarking on a personal injuries* case arising out of workplace stress, an employee needs to ensure the following: -

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

2. The injury* must be attributable to the workplace stress, e.g. excessive demands made of the employee such as excessive work hours or unrealistic targets and deadlines. Again, only a specialist medical practitioner such as a psychiatrist can determine the causation of the injury*.

3. The workplace stress must be wrongful and actionable in law, e.g. there must be some form of negligence or breach of duty. When determining if the behaviour towards the employee was wrong and actionable in law, the court will adopt an objective test, i.e. would any reasonable person deem this behaviour as wrong and actionable in law? In the case of *Berber –v- Dunnes Stores [2009] 20 ELR 61*, the Supreme Court set out the following test: -

" 1. The test is objective;

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

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

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

4. It must have been likely that in all of the circumstances, the employer should have foreseen that the employee would be harmed. An employer is entitled to assume that an employee can cope with the pressures of the job unless they are aware of some vulnerability, e.g. previous complaints about deadlines, excessive working hours, unusual lengthy absences from the workplace.

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

Each of the above elements must be met before embarking on a claim* for personal injuries* for workplace stress. An employee suffering with injuries* as a result of workplace stress should give great consideration to the advice of both their legal advisors and medical advisors before initiating such a claim. They are difficult cases to win with no guarantee of success. They are also costly cases. In addition, a medical

team might find that litigation will do more damage than good to the employee's health.

The solution to the problem may not be entirely a legal solution. However, good employment law practice in organisations can help to keep workplace stress at a minimum. Ensuring that employees receive their daily rest periods between finishing and starting work, rest and break periods while at work and weekly rest periods in accordance with the Organisation of Working Time Act is an important and simple health and safety measure that should be enforced by organisations. In addition, it is important for employees to take their full annual leave entitlements. A risk assessment will also help to identify any stressors in the workplace and measures can be put in place to tackle same. Unfortunately, not all employers are good employers. In those circumstances, it is extremely important that employees prioritise their mental health at work. If you are suffering with stress, it is important to report it to your employer and talk to your GP before it becomes more serious. Sometimes, employees may just need a break from work and a problem shared is a problem halved. However, if the workplace stress is manifesting itself in serious symptoms with extensive certified sick leave from work, then you should speak with a solicitor specialising in work related personal injuries*, as soon as possible.

Tips for using interpreters in personal injuries* cases

The use of interpreters in personal injuries* cases is not regulated in Ireland. Here are our top tips for client care when using interpreters in personal injuries* cases:

1. **Qualification:** Always note the distinction between an interpreter and a translator. An interpreter will interpret the spoken word. A translator will translate the written word. Ensure that you have the appropriate service for what it is your client requires, e.g. interpreting services or translating services.

2. **Confidentiality:** Introduce the interpreter to your client. Explain what he/she will be doing for your client. Advise that the interpreter is also bound by confidentiality. This is very important.

3. **Speak to your client:** Address your client, not the interpreter. This is simply good manners and not just best practice. Ensure that you speak to your client and that you ask your client the questions that need to be asked. It is simply ill mannered and rude to look at the interpreter and say "Ask him, Tell her, etc.". Similarly, when interpreting a question or answer on behalf of the client, the interpreter should use the first person, e.g. "I am ..", rather than "He said … ", "She is wondering …", etc.

4. **Plain English:** Avoid legal jargon and use short sentences in plain English. Remember, there is an interpreter present who has to listen to what you have said and interpret same into a second language. This takes a little bit of time. Keeping things simple will help a consultation run smoothly.

***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.**