Introduction

Welcome to the March issue of Keeping in Touch.

In February we made a submission to the Minister for Employment Affairs and Social Protection concerning the Employment (Miscellaneous Provisions) Bill 2017. The Irish Human Rights and Equality Commission also issued a submission. Our submission picked up some other technical issues and in particular some practical issue which, we believe, will impact on employees being able to pursue claims for not having received appropriate documentation when they commence work and in particular could undermine the effectiveness of a claim for a Banded Hours Contract. A copy of the letter to the Minister is included in this newsletter.

We are seeing quite a lot of discussion about the issue of the Gig Economy and even Bills being produced as to how to deal with this matter. The issue of the Gig Economy is one which can be very easily dealt with. The Gig Economy has a negative impact on compliant employers. Compliant employers who comply with the law as regards employees are put at a competitive disadvantage. There is an easy way to deal with matters which nobody wishes to address. That is that you combine the Workplace Relations Commission Inspectors with nominated and dedicated staff from the Revenue Commissioners and Social Protection when it comes to investigations. In the UK for example the National Minimum Wage Legislation is actually monitored by the UK Revenue. There is a simple reason for this. Where an entity incorrectly pays less than the National Minimum Wage Act or incorrectly classify somebody as self-employed then in those circumstances the loss of employers PRSI to the State is significant. Where you have dedicated individuals from the Revenue and Social Protection they have a clear and defined benefit to seriously review issues in relation to persons who are classified as self-employed working for any organisation as there is a significant benefit to them if they find a person was not properly classified. In addition, unlike the Workplace Relations Commission Inspectors the Revenue and Social

Protection can go back six years. In addition, they can impose fines of up to 100% of the unpaid tax or social welfare. These are substantial powers. They would have a real impact on stopping entities classifying individuals incorrectly as self-employed. Equally, where individuals were properly classified as self-employed, employers, companies and those working for those companies would have the benefit of knowing that this was reviewed by real specialists in this particular area of law. The Inspector Service may claim that they have this expertise but the Revenue and Social Protection have the real expertise in this area and dedicated, combines units would have a significant impact in ensuring that entities did not improperly classify individuals as self-employed.

There is also a worrying trend emerging in certain industries and in particular in the hospitality industry. It appears that some entities are putting individuals on “training”, which involves the individuals working for a couple of hours or a shift for a particular entity, to see are they suitable for working for them for no pay. This is clearly in breach of the National Minimum Wage Act. Somebody who works a shift is entitled to be paid for that shift. There are other entities who are effectively paying below the National Minimum Wage at the start as they claim the individuals have to be trained in. There are specific exemptions under the National Minimum Wage Act but they do not include a training period. Equally some employers claim the employee is at their first job. This usually relates to non-Irish Nationals. If they worked abroad this counts for prior working and so the full National Minimum Wage must be paid.

The vast majority of employers in this country are compliant and seek at all times to be compliant with Employment Law, Tax and Social Security. Those entities are placed at a competitive disadvantage if non-compliant employers are allowed operated with impunity. It is important that there is a robust and effective policing of employments in Ireland so as to ensure that compliant employers are not placed at a competitive disadvantage.

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Out and About

In February Richard Grogan on this firm was interviewed by Drivetime on the issue of discussing of political issues in the workplace. This arose around the context of the Abortion Referendum which will take place later this year. This is an issue which Richard pointed out occurred during the last Referendum. In the interview Richard pointed out that the upcoming Referendum is one which is extremely personal to individuals and that it was important in the workplace that this issue was recognised. At the same time Richard pointed out that there was no right to ban any discussion in the workplace but that employers were entitled to point out the fact that this is a very sensitive subject. Of course employers, as Richard pointed out in the interview, are entitled to state that canvassing or the handing out of literature in the workplace would not be allowed.

In February Richard spoke at conference organised by the IOSH in Cork on the interaction of Health and Safety Legislation and the Organisation of Working Time Act. A copy of this lecture is available on our website in the Publication section.

On the 9th of March Richard will be presenting as one of the speakers at the Employment Law Masterclass organised by the Law Society of Ireland in association of Finuas.

In February Richard was also asked to speak to the Waterford CPD Cluster event which will take place on the 13th and 14th April. Richard will be speaking on Friday, the 13th April in Waterford and the topic will be "Employment Law - Walking the Walk not Talking the Talk".

This course will deal with the practical aspects of presenting and defending claims in the WRC and the Labour Court and is primarily designed for the non-specialists.

Richard will be speaking at the Law Society Cluster event in Carrick-on-Shannon on 10th May next. Richard's talk will be "Termination of Employment".

Letter to the Minister

Private & Confidential
Minister for Employment Affairs
and Social Protection
Aras Mhic Dhiarmada
Store Street
Dublin 1

19 February 2018

RG/REC/RIC2/1

Richard Grogan

Re: Employment (Miscellaneous Provisions) Bill 2017

Dear Minister,

I am writing to you in connection with the said Bill and wish to raise some issues with you concerning same as regards how it is going to work in practice.

A new subsection 1 of Section 3 is introduced which provides for information to be provided within 5 days of commencement.

The Bill as proposed provides that if an employee does not provide such a statement within 1 month the employee shall be guilty of an offence. This would be a Class A fine and imprisonment for term not exceeding 12 months or both. The Bill proposes that such prosecution can only commence within 12 months from the date of the offence. The difficulty with this is that many employees, because of the provisions of the Unfair Dismissal Legislation, will be extremely slow to issue such complaints to the Workplace Relations Commission which could result in a prosecution until they have had at least 12 months service. While there are provisions in the Bill to prevent penalisation which I will deal with later on it would be better if there was a longer period for commencing a prosecution.

Section 10 of the Bill provides for a protection against penalisation. The Bill helpfully provides that an employee is protected from being penalised or being threatened with penalisation. Where an employee is penalised or threatened with penalisation then in those circumstances compensation can be awarded. However, the level of compensation under Section 11 is a maximum of 4 weeks remuneration.

Let me take a situation of an employee who commences work and raises a complaint with the employee and has been with the employment for say 6 months. They have no protection under the Unfair Dismissal Legislation. In those circumstances, let us say the employer simply dismisses the employee. The maximum compensation the employee can obtain in those circumstances will then be 8 weeks being 4 weeks for not having got the statement and a further 4 weeks for penalisation. In the area of penalisation this a significant issue where employees need to be properly protected. In these kinds of situations a compensation of 2 years or 5 years would be more appropriate.

There are significant issues with those of us who act in bringing claims to the WRC in properly identifying employers.

We would ask that Section 11 would be amended from the current provision of 4 weeks to instead be a figure of up to 2 years remuneration.

As matters stand at the moment, this protection is effectively toothless.

An alternative would be to amend the provisions of Section 6 of the Unfair Dismissal Legislation to provide that bringing a claim for Unfair Dismissal where an employee has been dismissed for having requested the statement that in those circumstances the requirement to have 12 month service would not apply. However, I think it would be much easier if the compensation level was set within the Act rather than as part of amending the Unfair Dismissal Legislation.

Banded Hour Contract

The issue in relation to Zero Hour Contract is being creating difficulties. The provisions of Section 14 of the Bill provide that a contract for a certain number of hours must be greater than zero. Where an employee is not required to work in a particular week, payment would be 25% of the contracted hours or if the employee is required to make themselves available to work 25% of the hours on such work that was done for the employer previously. Where the employee is not required to work then it would be the lower of either of the above or 15 hours.

The issue of Banded Hours are helpful but there are some issues in respect of same.

1. Where an employee believes that they should be placed on such a banded hour they must inform the employer and request same in writing to be so placed.

2. Where a claim is brought an Adjudication Officer or the Labour Court on appeal may declare the complaint well or not well founded and where the decision is made that the complaint is well founded require the employer to comply with the Section and place the employee on the appropriate banded hours.

The legislation does not, however, provide that the employee is entitled to be back dated to the time where they put the complaint in. It means that the employee will only get these banded hours going forward and would not be compensated in a period between the time that they put the complaint to the WRC and the decision of the WRC issuing or in the case of an appeal, the appeal being dealt with by the Labour Court. Currently the delays in the WRC are such that between issuing a claim and getting a hearing and getting a decision is now running well over 6 months. We have cases in the office where waiting for a decision from the WRC is at this stage is now 9 months. Let us state the position of it being 6 months currently. Then taking appeal to the Labour Court. The employer, if appealing, can wait for 42 days before appealing. The appeal then has to be listed. Where the employee is based in Dublin the appeal is normally listed fairly quickly. Where however the employee is based down the country, because of the resources in the Labour Court they only sit in down the country on a limited number of days during the year. When a decision issues from the Labour Court then there is effectively a period of 52 days from the date of the decision before it becoming effective.

In reality this means that it could be 9 months before an employee would actually be placed on one of the bands. In fact, and without setting it out in an open correspondence to you, there are a few tricks which an employer could legitimately use to delay any case coming on in the Labour Court for a minimum of 12 months.

There is an argument that there should be a provision in the Bill to allow for compensation in addition to being placed on banded hours.

In relation to the banded hours themselves, there are difficulties. The bands of, for example, between 1 to 10 hours and 11 to 24 hours, as just two examples. If you have an employee who was working 9 hours a week and they get an order directing that they have been put on the bands then it would appear the way the legislation is currently drafted that the employer can reduce them to simply 1 hour. Equally, if somebody was working 22 hours a week they could be reduced to 11 hours. They would still have a contract within the banded hours but it would have been less than what they had previously been working. I think it would be much more beneficial if the bands were tightened or alternatively that it was provided that it would be within one or two

hours of the hours normally worked as determined by an Adjudication Officer or the Labour Court.

I do see that there are significant issue with this Legislation that need to be addressed.
I would ask that you would consider same.

Kind regards,

Yours sincerely,

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Richard Grogan
Richard Grogan & Associates
Solicitors
9 Herbert Place
Dublin 2

Review of WRC and Labour Court cases

In reviewing cases we come across very interesting cases. Many of the more interesting or newsworthy ones may well be covered in various articles in newspapers. In our newsletter we try to limit comments to cases where there is an issue which arises of a legal issue or where we believe a comment is required or which is a guideline for employers or employees rather than the ones which might be, what we could term, newsworthy or "interesting". There are many cases which are interesting on their facts but where, for example, it would be quite clear that the law had been broken and there is no real precedent value in the case as regards the law or the issues decided. This does not mean that they are not interesting cases in themselves which warrant being read but in a publication like this we have to limit our comments to cases which we believe are the most important.

We would strongly recommend anybody who has an interest in Employment Law to take the time to read the decisions from the

Workplace Relations and the Labour Court as many of these are extremely interesting and useful as precedents going forward.

Dismissal of an employee on the basis of capacity

The case of Dublin Bus and McEvitt, 2018 IEHC78 is a case which has attracted a lot of attention in the newspapers. The judgment is extremely helpful in restating the law relating to dismissal.

In this case the High Court pointed out that under Section 6 (4) (a) of the Unfair Dismissals Act 1977, a dismissal is deemed to be unfair if it results wholly and mainly from an employee's capacity to perform work of the kind they were employed to do.

The legal team for Ms McEvitt sought to rely on Statutory Instrument 146 of 2000 being the Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration Order 2000). The High Court at Paragraph 52 of the Decision stated:

*"It seems to me entirely clear from these provisions that they are concerned with matter of an entirely different nature to the sickness of an employee, which in no sense could be described as a disciplinary matter. I think it would also be strange and artificial interpretation of the term "*grievance*" as is used throughout the Statutory Instrument to interpret it as applying to an employee's "*grievance*" at being retired on the grounds of capacity due to sickness."*

The High Court went on to state:

"Therefore, it seems to me that Ms McEvitt is not entitled to rely on the procedure set out in Section 6 of the Statutory Instrument."

The High Court went on to state that it is clearly relevant to this case that the decision of the High Court in Bolger -v- Showerings [1990] ELR 184 applies where it was held that in a case involving dismissal for incapacity the onus is on the employer to show:

1. That it was the incapacity that was the reason for the dismissal;
2. The reason was substantial;
3. The employee received fair notice that the question of his dismissal for incapacity was being considered; and
4. The employee was afforded an opportunity of being heard.

In this case the High Court stated that there could be no doubt but that the incapacity of Ms McEvitt was the only reason for her dismissal and the reason was a substantial one. The Court went on to state that the key issue in the case was whether she received adequate notices and whether she has a fair opportunity to be heard on whether or not she should be retired on the grounds of incapacity. Ultimately the decision of the EAT which had been reduced in the High Court was set aside and the High Court vacating the Order of the Circuit Court and allowing the appeal by Dublin Bus.

This case is important for restating the law relating to a dismissal by reason of incapacity. The Court has confirmed that the normal disciplinary procedures do not apply and that the procedure is that set out in the Bolger -v- Showerings case only.

Unfair Dismissal - Lack of Representation - An issue yet to be finally resolved?

The issue of an employee not having representation at disciplinary hearings is now coming to the fore in decisions from Adjudication Officer's. This is clearly evident from the case of ADJ-6562.

In disciplinary matters it is now important, following the High Court decision which is being followed by Adjudication Officer's, that employees are given the right of representation and this would include the right to be legally represented following the High Court recent decision.

An award of compensation was made in this case. This case then has to be considered with case ADJ-6768.

In that case the AO has taken a considerable length of time to set out the legislation dealing with the role of an AO and also helpfully set out the issue relating to CCTV. However, in relation to the issue of representation the AO in this particular case has pointed out that the disciplinary procedure provided that the employee could bring a colleague of their choice as a witness. It was argued that the disciplinary procedure was not given to the employee. The AO held that as the employee had 10 years of service, that the employee would have had no difficulty in getting copy of the disciplinary procedure and nothing hangs on the failure of the respondent to provide him with a copy during the disciplinary process. We would be of the view, we could well be wrong that it is necessary for an employer where there is a disciplinary process to take place that a copy of the disciplinary procedure would be furnished. If it is in the Handbook, if the Handbook had been given to the employee at some previous stage, that might be sufficient but it is always in our view best practice that a copy of any disciplinary process is given to the employee.

The Barrister representing the employee in this case complained that the employee had not been advised that they could bring a Solicitor to the disciplinary procedure. The AO pointed out that the company policy is clear and allows to be accompanied by colleague “of your choice”. The AO took the view that because the employee had previously been represented by a Solicitor that it was up to the employee to request the attendance of his Solicitor. We would disagree with this taking account of the case of Lyons -v- Longford Westmeath Education and Training Board [2017] IEHC 272 which was quoted by the AO. The employee also contended that he should have been permitted to cross examine a particular manager. The AO held the issue of cross examination in a process that is not supported by legal or trade union representatives is not clear cut. Again, we would be of the view that following the case of Lyons case referred to previously that an employee is entitled to be advised of his or her right to

representation and entitled to be advised of their entitlement to cross examine any witness. The AO in this case has stated:

"*In my view that, particularly where a dismissal is alleged, an employee can only benefit from the support of a Solicitor or Trade Union representative. In this case however, the Complainant did not request any such representation."*

Again, we would be of the view that it is for the employer to advise rather than for the employee to request.

The fact that an employee may have gone to a Solicitor about a Personal Injury matter, as in this case, in our view, does not mean that the employee would necessarily understand their right to legal representation particularly where the particular disciplinary policy actually did not allow representation and only allowed a colleague to be brought as a witness which would appear to preclude examination, cross examination and legal representation or even Trade Union representation.

Our comment in relation to this case is that one or other of the AO's is wrong as to their interpretation of the law. This is not a criticism of either. Both cannot be right.

For those dealing with these types of cases it is preferable that there would be a standard approach by all AO's in relation to these cases. Whether all will be right or all will be wrong is an issue that will be determined elsewhere but at least there will be consistency.

One of the advantages of the cases going online now is of course that inconsistencies are there which enables comments to be made.

It is likely that the Labour Court is going to give a definitive ruling on this issue sooner rather than later. That will be welcomed. Once the Labour Court gives a ruling then the position in the Labour Court is that they have consistently followed the decisions of other divisions in the Labour Court. This brings consistency at that level. In addition,

once the Labour Court have ruled all AO's will be required to follow the ruling by the Labour Court. That will bring consistency.

There have been a lot of discussions about the Lyons case. The reality of matters is that this issue at some stage may well head back to the High Court. Arguments have been made that there are other cases which give a different approach to disciplinary hearings. In the case of employers relating to disciplinary hearings it is our view at the present time, pending clarification of matters by the Labour Court who consistently have been very strong in reviewing legislation in giving reasoned decisions, that it is best practice currently and the safest practice to:-

1. Ensure that all issues relating to a disciplinary process are fully set out to an employee and that the company disciplinary policy will be furnished.

2. That the policy is looked at in light of the Code or Practice on Grievance and Disciplinary Procedures and if any amendments need to be made to comply with same as additional safeguards to the employee in the process. That the employee is advised of any such amendments to the disciplinary policy procedures which would be more beneficial to him.

3. That following the Lyons case referred above that an employee will be advised of their right to be represented by a Solicitor or Trade Union official along with any other person who might be referred to in an existing disciplinary policy.

4. That the employee would be advised of their right to cross examine witnesses.

5. That all allegations against an employee are clearly set out in writing.

6. That all witness statements are furnished to the employee.

7. That the employee is advised of their entitlement to call any witnesses or to put forward any evidence or arguments or statements in support of the employee's position either personally or by their representative.

8. That the employee is advised at all stages of their right to appeal any disciplinary matter.

9. That on any appeal that the employee is given effectively a restatement of all relevant matters and all appropriate rights.

10. That those conducting any investigation, disciplinary process or appeal are independent of the process that is under investigation by which we mean that they are not themselves witnesses or a party in the case against the employee.

It is important for employers to take comfort from the fact that a disciplinary hearing in the WRC or the Labour Court is not there for the WRC or the Labour Court to determine whether the decision of the employer was correct or not. Case law such as the case of Looney and Co Limited -v- Looney UD843/1984 has been quoted often, namely that it is not for the Tribunal to seek to establish the guilt or innocence of the Claimant nor is it for the Tribunal to indicate or consider whether the Tribunal in the employer's position would have acted as the employer did in the investigation or concluded as his did or decided as he did as to what would substitute a Tribunal's mind for that of the employer. The responsibility of the Tribunal is to consider against the facts what a reasonable employer in the same position and circumstances at that time would have done and decided and to set this up against the standard against which the employer's actions and decisions be judged. Effectively, this means that in our view once the employer applies fair procedures the employer is effectively 90% there to successfully defend any unfair dismissal case. Of course there is the issue then of the sanction and the case of Bank of Ireland and Reilly [2015] 26ILR 229 is a decision of Mr Justice Noonan which is

helpful that in assessing the reasonableness of the employer's conduct in relation to the dismissal he pointed out that it seemed that such an assessment must have regard to the surrounding circumstances including the impact on the employer as against the impact of the dismissal on the employee to determine the proportionality of the employer's response. That, we will take it, goes to the issue of, effectively, the penalty as opposed to the procedures. Where an employer has applied clear, precise and fair procedures in line with best practice it is extremely difficult for an employee to win an unfair dismissal case.

Again, that is simply our view.

The issue as to what exactly are fair procedures and particularly the issues of representation and the right to cross examination is an issue where hopefully the Labour Court will give a definitive judgement at the first available opportunity. The Labour Court's decision will be beneficial to both, employers, employees, the representatives of both and AO's in setting of what the law in this area is.

We want to be very clear. We are not saying that the Labour Court has failed to do this. In fact the contrary is the position. The Labour Court has been very clear on the issue of fair procedures and what this entails. However, the WRC and there is no criticism of the AO's in these particular cases as we could have picked other cases and mention them instead. We believe that a further clear and definitive from the Labour Court which to an extent is going to be restating other decisions of the Court are set out and that then all Adjudication Officer's will follow that ruling so that this issue of diversity as to what fair procedures are is avoided. The current uncertainty caused by the WRC is neither fair to employers, employees or their representatives. The great advantage of the Labour Court is that their decisions are binding on the WRC and to an extent it is unsatisfactory that existing decisions of the Labour Court are not being followed.

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Unfair Dismissal and the preferred options of employers and employees

Case ADJ-6406 is an interesting case on this issue.

The AO in this case has helpfully set out the case of Doyle and Pat the Baker UD/862/15 when Mr McCarthy SC found in respect of an Unfair Dismissal that

"*When an employee gives notice and the employer says leave now, that is technically a dismissal, as the employer is therefore bringing the contract to an end earlier than the employee intended. The Tribunal notes that the employment contract did not allow the employer to pay in lieu on notice but despite that provision the fact remains that the employer brought the employment to an end instantly rather than at the end of the notice period.*"

The AO then set out what the provisions of the legislation is in relation to what a dismissal is.

It was helpful that this was set out.

However, when looking at the decision the position in relation to matters is that the employee sought reinstatement.

The Respondent was prepared to accommodate the Complainant which we presume would mean reengagement.

The AO in this case found that this was not a practical option and instead awarded the employee €15,000.

This is interesting in that the legislation does provide that an AO must ask the parties what their preferred remedy is. However, the AO is not bound by the views of the employer and the employee and can decide themselves what the appropriate remedy is. However, where you have the situation where both, the employer and the employee, are happy to recommence the arrangement then in those circumstances whether

there is reinstatement or reengagement it is always more preferable, in our view, that this is accommodated if at all possible.

If one party seeks reinstatement and the other is agreeable only to reengagement then it is possible to find a middle ground somewhere where there would be effectively reinstatement but that only part of the time for example would be treated as subject to not being paid.

There can be disagreements between employers and employees. However, if it is possible to get the employment relationship back on line we would regard this as better practice than simply compensation being awarded. Saying that, we only read the decision in its published format and there may well be other issues not set out in the decision which would have a significant bearing on the decision of the AO.

Unfair Dismissal - Disciplinary Procedures

Case ADJ-7065 is a further timely reminder of the importance of employers, at a very minimum, following their own procedures. In this case the AO found that the company had failed to follow their own procedures. An award of €9,500 was made. It is in our view absolutely imperative that employers follow at a minimum their own procedures. Of course those procedures must be in writing. If the employer does not have procedures in writing then the employer should review the Code of Practice in Grievance and Disciplinary Procedures and ensure that the employee is notified in writing, before any disciplinary action as to what procedure will apply and that at a very minimum the procedure set out in the Code of Practice will be applied to the employee.

Unfair Dismissal - an employee looking for other work

In case ADJ-7413 there is an unusual set of circumstances but not one which would necessarily be unique.

The employee in this case was out ill. For the purposes of claiming Social Welfare the employee requested a P45. This is quite usual as a P45 can be required to show to the Department of Employment Affairs and Social Protection that payment has ceased. An employer can do it in a different way, namely, by giving a letter confirming that the employee is out on sick leave and is not being paid but even still sometimes the Department looks for the P45. The employee arranged to return to work which was agreed and on his return to work it appears that an issue arose because of the fact that the employer had found out that the employee was looking for other work. The employment effectively terminated at that stage. The AO in this case awarded compensation of €7,500.

There are a couple of lessons that can be learned from this case, namely:-

1. The fact that a P45 issues does not mean that this is a termination of employment. It is a cessation of payment. There can be many circumstances where an employee can receive a P45 sometimes every year particularly in seasonal employment where it will always be accepted that the employee will be returning to work subsequently.

2. Just because an employer finds out that an employee is looking to change employment is not a ground for terminating an employment.

This is a useful decision for employers to read.

Unfair Dismissal Procedures

In UDD182 being a case of Limerick City and County Council and Richard Moore the Court very helpfully set out a particularly important view in relation to dismissal procedures. The Court in this case stated that a basic requirement of fair procedures is that where a

procedure is set out in writing as being the applicable procedure in a particular circumstance the published procedure is in fact a procedure that is followed when such circumstance arises. The Court held that the procedures advised that if a staff member continues to fail to achieve the required work standard a sequential process will be followed as necessary. The Court then set out what that was. The Court then stated that it was satisfied that this procedure was not followed at all by the Respondent. This is an extremely important reminder by the Court of the importance of the employer following their own procedures. We appreciate in this issue of this newsletter we have previously commented in relation to the issue of fair procedures but this case is important in its own facts. If an employer has stated written procedures, whether these are good or bad procedures, if the employer does not follow at a minimum those requirements then in those circumstances, following the decision of the Labour Court which is absolutely correct, the dismissal will be unfair.

While it is not set out in the decision, if an employer has a procedure which may be defective and advises an employee of a more beneficial procedure then, provided that procedure is followed, the employer will not be restricted to following a procedure which has a known breach of fair procedures in it.

It is a fact that regularly comes across cases that this office is involved in, is that employer will have procedures which they do not follow. It is quite interesting that when these cases go for hearing it is quite usual that employers will have very little knowledge of their own procedures. Where an employer has a policy set out in a Staff Handbook, it is vitally important that the employer is aware of that policy and ensures that the policy is applied at a very minimum.

Redundancy and Unfair Dismissal

An interesting case on this is case ADJ-6787 where the AO in this case has very helpfully set out the legislation. It was set out that quite

clearly an employee cannot seek compensation both under the Unfair Dismissal and Redundancy Legislation and that this was addressed in the case of Cusack -v- Dejay Alarms Limited UD1157/2004 which held the compensation may not be awarded twice on the grounds that the employee was dismissed by reason of Redundancy and for Unfair Dismissal. This was reinforced in the case UD1114/2012. However in these cases as the AO pointed out the Redundancy can be awarded as part of the employee's compensation for Unfair Dismissal.

In this case the AO held that there had not been a Redundancy and awarded compensation for Unfair Dismissal.

You can have a situation where an employee is dismissed and subsequently the company goes into liquidation. In those situations the loss would have terminated once the company went into liquidation and effectively it may then become at that stage a Redundancy situation. There are certain benefits for an employee from having the case deemed to be partly Redundancy and partly Unfair Dismissal. A Redundancy award is exempt from tax whereas an Unfair Dismissal award is subject to tax.

This is an interesting case on its facts and on setting out the law on this issue which does come up on a regular basis but not that regularly.

Redundancy Payment Acts, 1967 - 2014

A very useful decision issued from the Labour Court under RPD181 being a case of DNT Forkan Construction Limited and Michael Diamond.

The case itself is very useful in relation to setting out the law as regards claiming redundancy.

The Court pointed out that there was no dispute between the parties as regards the facts. The employee was employed by them and was

placed on temporary layoff on the 4th January 2017. Some 4 weeks later, on the 2nd February 2017, pursuant to Section 12 (1) of the Act the employee served a duly completed Form RP9 on the employer. The employer subsequently issued a counter notice dated the 7th March pursuant to Section 13 (2) of the Act. The Court pointed out that Section 13 (2) permits an employer who has received a notice from an employee of the intention to claims a redundancy payment in a layoff situation to serve on that employee a counter notice within 7 days of receipt of the original notice. In this case that counter notice to be effective should have been served by the employer on the employee no later than the 10th February. Further it was pointed out that the Respondent was unable as it transpired to provide the Complainant with 13 weeks continuous full time work commencing no later than 4 weeks from the date of the Complainant's notice.

The Court helpfully set out the provisions of Section 11 and 13 of the Act in full.

The Court determined that the Court could not take into account issues such as the employer believing that the employee was not interested in returning to work and had declined to accept formal office of work made to him on the 6th June 2017 and on the 1st August 2017. The Court correctly pointed out that these are not matters that can be taken into account in making the decision in respect of the claim. The employee, the Court pointed out, had fulfilled the requirements specified in the Act. The employer had failed to do so. The Court pointed out in the circumstances having regards to the strict wording of Sections 11 to 13 of the Act that the Court was obliged to confirm the Adjudicator's decision which was that the employee was entitled to redundancy.

This is an important case for reinstating the law.

It is a reminder that employers need to ensure that they serve the appropriate counter notices within the appropriate 7 days of receipt of the original notice. For employee serving such a notice it is very useful to have same served by way of Registered Post and to obtain

confirmation of the delivery date. The time limit in the Redundancy Payment Legislation for the employer to give a counter notice is 7 days. It is not 7 working days. It is 7 days. Where employers receive an RP9 then in those circumstances they must make an immediate decision as to whether to serve a counter notice.

There is a further issue that if an employer does serve the counter notice within the 7 day period and does not provide 13 week continuous work within 4 weeks of them serving the counter notice then in those circumstances there is a strong argument that the employee is entitled to claim redundancy and the 13 weeks wages. This is an issue which may well have to be addressed before an Adjudication Officer or the Labour Court into the future.

Claiming Redundancy

In ADJ-7720 the AO in that case has helpfully set out that where an employee is on lay off they are entitled to claim Redundancy where they have been on lay off. The AO pointed out that same can be claimed under Section 12 of the Act. One of the requirements is that the employee has been laid off or kept on short time for 4 or more consecutive weeks.

It is quite helpful that the AO in this case has restated the law on this important issue.

Pregnancy and lack of understanding about Equality Legislation

A very interesting report has been published by the UK Equality and Human Rights Commission. Various questions were put to employers about pregnancy.

The report is a result of a survey 1,106 senior decision makers in business. In line with, what we would call, normal political surveys, you can take it that there is a margin of error of plus or minus 3% but whatever way you put the figures they are quite startling and disturbing.

36% surveyed believed it was reasonable to ask female job applicants about their future plans to have children.

60% believed women should disclose if she was pregnant during the recruitment process.

46% thought it was reasonable to ask female candidates if they had young children.

44% thought women should work for an organisation for at least a year before deciding to have children. Personally we regard this as quite disturbing.

33% believed a woman who becomes pregnant and new mothers there is generally less interest in career progression than others in the company. Again, a worrying concept.

The particular survey represents a depressing reality that when it comes to the right of pregnant women and new mothers in the workplace we are still living in the dark ages.

The reality of matters is that women regularly get asked questions about family planning in interviews.

These attitudes and particularly these types of questions towards women during a selection process are simply and very easy way for an employer to run into a discrimination claim.

This attitude towards women also applies in the professions. In a report published by the Law Society of Scotland in 2015 it suggested that women Solicitors were being denied promotion because they might become pregnant.

There is no similar report in Ireland. In the UK there is a proposal that Solicitors who are found to have harassed another employee on the basis of their gender or who discriminate against an employee on the gender grounds would be subject to disciplinary action. This is simply a proposal by the UK Law Society at the present time but is likely to be passed.

This attitude towards women is one that we cannot understand. It would be our experience that those who work in this firm who have come back from Maternity Leave have a heightened ability to prioritise, to manage time effectively and to plan for every eventuality. Then again we may have a different attitude to many firms. We have a family friendly approach. This means that Richard Grogan in this firm expects those working here to put family first. It is not a question of waiting till he gets back to the office if there is a sick child. We expect those working here to simply go. We have found that when these issues arise others in the office immediately step in particularly when they are in the similar situation and where they may require the same degree of latitude.

Employers need to understand that the approach that came out in the UK survey is entirely unacceptable and is actually detrimental in creating a positive working environment in creating a productive and profitable working environment. In some professions such as the legal profession now over 50% of the Solicitors in this country are female. In the workforce generally the number of women involved is increasing. Employers who wish to progress and be profitable going are going to have to have a change of attitude. The attitudes identified in the UK survey we would believe are probably replicated here and are ones which are reprehensible. In addition, they are not good business practice. Getting sued for discrimination is bad. Having an employment practice that fails to enable you to attract and retain the best people is even worse.

Equality Legislation and Reasonable Accommodation

The Court of Appeal decision in the case of Nano Nagle School and Marie Daly under reference 2018 IECA 11 is an important decision relating to the interpretation of legislation and its application in the case of an employee with the disability.

In relation to the interpretation of legislation the Court of Appeal stated that if there is a difference between the Act and the Directive that the Labour Court and the Courts are bound by the law as enacted by the Oireachtas. The Court of Appeal pointed out that if a person maintains that the State has not properly or fully brought into effect the Directive they can raise that claim and a number of procedures but that this was not an issue for the Court of Appeal in this particular case.

In relation to the issue of accommodating an individual with the disability, the Court held that adjustment to access in workplace and hours and tasks does not mean removing all the things the person is unable to perform. The Court stated that in general it is reasonable to propose that tasks that are not essential that the position could be considered for distribution and/or exchanged. The Court pointed out that that does not mean stripping away essential task especially the precisely essential elements that the position entails. The Court held that a reasonable interpretation it is correct to demand that redistribution, however radical, must be essayed no matter how unrealistic the proposal. The Section requires full confidence as to the tasks that are the essence of the position otherwise Section 16 (1) of the Employment Equality Act would be ineffective. The Court pointed out that the fundamental provisions of Section 16 (1) must be respected. The Court pointed out that the Section does not in its terms make the process of require a ground of default and neither does a failure to consult constitute of breach of the duty imposed. This is a very important statement by the Court.

In the decision of the President he stated:

"*The point is a simple one…The statutory duty is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation. If no reasonable adjustment can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting. It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact of the process of decision is flawed does not avail the employee."*

This is an extremely important decision of the Court of Appeal in what is a complex area of law and one that is very personal to everybody involved, whether employers or employees. The Court has however pointed out the important issue that there is an issue as to whether the Directive has been properly implemented in Ireland. This is one which the Minister for Employment Affairs and Social Protection and the Minister for Justice needs to look at as a matter of urgency.

Targeted Advertising and Employment Law

Online recruiting is giving rights to concerns in relation to Employment Equality Legislation. The targeted job advertisements are going on social media sites.

There is no problem with doing it online recruiting. However, the problem arises when the promotion is set to appear only on such items as Facebook feeds of users in a particular age category. This means that a number of potential individuals who might apply for employment will not get this add. The defence of some employers is that it is an accepted industry practice which helps employers recruit and help people of all ages find work. It most definitely is not an accepted industry practice. It may be a practice but it is one that is completely contrary to Employment Legislation in Ireland.

You cannot advertise in Ireland and specify, for example, that only those aged 25-35 can apply for a job. You cannot in Ireland put in an

advertisement in a newspaper which states that you are looking for employees in the age category 25 - 35. You cannot even use the word "young".

In Ireland the Employment Equality Act 1998 - 2015 prohibits discrimination in employment placed on any of the nine protected characteristics. These include age. Targeting employees in a particular age category is discriminatory against those who are either younger or older.

The circumstances which are now pertaining are quite invidious. It is micro targeting a limited section of the population who will receive or see the advertisement itself. It is our view that a prospective employer and an advertiser/recruitment agency could potentially fail to follow the Equality Legislation when advertisements like this for jobs are posted.

Any advertisement which seeks to limit the access to the advertisement to particular individuals in a particular age category or on any of the other age protected grounds is one which is more like than not to fail to comply with the Equality Legislation. For employers who undertake this micro-targeting the potential number of claims which could be made against them is quite staggering.

It is in our view an example as to how the enforcement of the Equality Legislation needs to be updated to ensure that we take account of changes in social media. This would be a substantial additional workload for the Workplace Relations Commission or the Human Rights and Equality Commission. We will see will they get the resources to target this micro-targeting of jobs. We would doubt that they will. It is however likely that employers who undertake micro-targeting will be on the wrong end of equality claim sooner rather than later.

Disability under the Employment Equality Acts, 1998 - 2011

An important decision issued from the Labour Court in EDA1810 being a case of Swan O'Sullivan Accountants and Registered Auditors and Seamus Counihan. The Court had very helpfully set out the provision of the legislation as to what a disability means and dealt in some depth with the issue of the burden of proof quoting in particular the case of Mitchell -v- Southern Health Board 2001 ELR 201 and the test which would be involved.

In this case the Court helpfully set out the fact that they took the view following the case of Sawers -v- Cambridgeshire County Council 2006 EWHC 2029 that this can be looked at in the context also of the case of Somers -v- W 1979 IR 94 where Henchy J set out the concept as follows:

"When the facts at his command beckoned him to look and enquire further, and he refrained from doing so, equity will fix him with constructive notice of what he should have ascertained if he had pursued the further investigation which a person with reasonable care and skill would have felt proper to make in the circumstances."

In this case the Court pointed out that the Complainant had not been diagnosed with epilepsy, had failed to provide certification to his employers of his absence, at a meeting in May 2015 when enquires were made about his health he gave assurances that there was no further issues from an incident in April 2015 and was reluctant to discuss it further and at a meeting on the 17th June 2015 when he was reminded once again that he has not provided the medical certification he stated that he felt "tip top".

In the circumstances the Court was of the view that without reasonable excuse that the employee had failed to produce medical certificate or to clarify other than that the absence was once off seizure and that he was in fact suffering from conditions, illness or disease which affects a person's processes, perception of reality,

emotions or judgment or which could result in disturbed behaviour. It would be inequitable to fix the Respondent with knowledge of such. The Court held that constructive notice of the disability should not apply. The Court held that the employee had failed to establish facts to indicate he was suffering from a disability.

This case is important. It does highlight the very relevant issue that employees should notify employers of any medical conditions they suffer from, particularly if there is a disability. Of course employees are going to be wary of same because of fear of losing their jobs. However, failure to do so and to notify the employee in itself can result in a situation where an employee may have had protections which they now lose because of their failure to notify their employer.

Reasonable accommodation of a person with a disability

Case EDA184 being a case of Occipital Limited and Joseph Hayes is a recent decision of The Labour Court which has issued. This is a very fine decision of the Court which will be useful for anybody having to consider the issue of a reasonable accommodation. The Court has at great length set out the law. Two particular aspects of the decision relating to the law are particularly noteworthy of review by those interested in Employment Law. Namely, the issue as to whether the claim was statute barred and the issue as to the scope of the duty on an employer to provide a reasonable accommodation. The Court also dealt with the issue of whether there had been a Constructive Dismissal which is useful but in particular the issue of reasonable accommodation is a particularly helpful and useful decision. It is effectively done where if we were to review the case, it would simply be republishing the entire decision. We will therefore simply state that this is one which colleagues may well wish to read and we would encourage you to do so.

Retirement Age

The issue of retirement age is now becoming a hot topic. On the 7th February the ECJ in cases C-142/17 and C-143/17 had to deal with a case involving dancers. The issue arose that when individuals came to the age of 45 years of age that they could apply to extend their working life. The 45 age limit applied to both man and woman equally. However, it provided that where the request was made that in the case of women they could continue until 47 but for men it was to 52 years of age. The ECJ held that in accordance with Article 14 (1) (c) of Directive 2006/54/EC that this amounted to direct discrimination.

The case is interesting. The Court pointed out that in case C-356/09 the Court had already pointed out that a general policy concerning dismissal involving the dismissal of a female employee solely because she had attained or passed the qualifying age for retirement, pension which age was different under National Legislation for men and women constitutes discrimination on the grounds of sex contrary to the Directive 76/2007.

The Court helpfully also held that the provisions of Article 2 (1)(a) of Directive 2006/54 as to whether the female worker of 45 years of age was in a comparable situation to that of a male worker are the same (within the meaning of the said Directive). The Court held that no factors capable of confirming specific characteristics on the situation of female workers as compared to those male workers could be identified and therefore the female workers were not in a comparable situation within the meaning of Article 2 to that of a male worker of the same age as regards the conditions for terminating the employment relationship. The Court held that as a consequence such a provision established the difference based directly on the grounds of sex.

This is an important case for restating the law on this issue.

Transfer of Undertaking Regulations

An interesting issue arises in case ADJ-8684. In this case there was a transfer under the Transfer of Undertaking Regulations. The employee was owed some holiday pay. Proceedings issued. However, it appears that the employee had sued the wrong company. She issued the claim against the transferor not against the transferee (being a new owner). Her excuse was that she did not know who the new owner was.

This is not unusual. It is quite usual in some circumstances where the company transferring the employees to the new owner of the business does not fully notify them.

There was an alternative which the employee could have taken in this case and that was to bring a claim against the transferor company for not having informed her in relation to the transfer. She would have been able to obtain compensation under that provision as clearly would not have been advised as to who the new owner was.

In such circumstances also where the employee has not been able to ascertain whom the new owner is because they have not been advised then in those circumstances other possible claims can be brought against the transferor company.

For those who are selling a business or where the business is transferring to a new owner, it is imperative for the person transferring the business to ensure that appropriate documentation is given to the employee so that they know who the new owner is. Because of the way the legislation works any rights automatically transfer to the new owner. It is therefore beneficial to the owner or entity departing, if we can call it that, to make sure that the employees know whom the new owner of the business is as all rights and liabilities transfer to this new owner from the existing transferring owner.

Payment of Wages Act claim - what is not included?

Case ADJ-10088 is a prime example of the type of claim which cannot be brought to the WRC. In that case the employee claimed expenses for a period of three months relating to mileage costs incurred by the employee in visiting various construction sites. The AO in this case helpfully set out the legislation which confirms that such matters are not within the provisions of the Payment of Wages Act and therefore declined jurisdiction.

This is again an important clarification as to what is and is not covered in a claim to the WRC. Even though the right to mileage or other expenses may be included in a contract of employment, these cannot be claimed in the WRC. The claim has to be made to the District Court.

Section 1 of the Payment of Wages Act 1991 is very clear on this point.

As an aside, it is very unfortunate that member of the public are bringing these types of claims to the wrong place.

There is always an issue when such a claim is brought and dealt with that if it is subsequently brought to the District Court that a defence can be raised under the case Henderson -and- Henderson which effectively held that you cannot litigate twice in relation to the same matter. It is a further remainder of the importance of issuing the proper claim in the proper form.

The WRC was intended to be one where individuals could bring claims themselves. However, there are approximately 700+ pieces of Legislation, Statutory Instruments and Regulations that apply in Employment Law. Where individuals bring the claims themselves then they are presumed to understand what the law is. This of course is something that is in practice not correct but the law has always been that “ignorance of the law is no defence.” It is a further remainder on the importance of individuals being represented by solicitors and barristers in the WRC.

Payment of Wages - deduction due to a strike

Case ADJ-8365 is an interesting case. It dealt with a deduction from the payment of a teacher as a result of withdrawing from supervision duties. This was as a result of industrial action taken by the Union. The AO in this case pointed out that under the Payment of Wages Act, namely Section 5, such a deduction is allowed to be made by an employer.

Payment of Wages Cases

In ADJ-7467 the AO had to deal with a situation where a hotel leisure centre had issued a payslip to an employee but had not paid the monies. The AO in this case determined that it was reasonable to award twice the net loss of wages to the employee.

There is a provision in the Payment of Wages Act which specifically allows an AO or The Labour Court on appeal to award effectively twice the net loss. It is an issue which is being raised more often and one where a number of AO's have applied the particular provisions of Section 6 of the Payment of Wages Act.

Temporary Agency Workers

There is a procedure known as a Swedish Derogation which applied to Temporary Agency Workers. An issue in relation to this arose in a recent case in The Labour Court of Noel Recruitment and Glemza DWT182. In that case The Labour Court held that the Organisation of Working Time Act was not amended by the 2012 Act and that therefore an employee who is a Temporary Agency Worker is entitled to a Sunday Premium. While the compensation was small the particular decision on this point is important for specifying the rights of such workers.

Furnishing a Contract of Employment

In ADJ-8188 the AO in this case held that the employee had received a contract in 2005 and that as no complaint was made until 2017 that the AO had no jurisdiction to hear the case as the claim was not brought with six months of the relevant date.

This argument regularly arises and we would have a difficulty with the decision of the AO. In these cases the failure to furnish a document which complies with Section 3 is a continuing breach and, unless the breach has been rectified, then in those circumstances the entitlement to bring the claim in our view continues and there is no time limit within it can be brought provided it is done within 6 months of the employment ceasing. There are differing views in relation to this matter. We are simply setting out our opinion. Some AO's work on the basis as set out in this decision. Some work on the basis that it is a continuing breach.

Special Leave for Employees

This is one of these issues where issues split between the legal entitlements of employees and what an employer might do to create a positive working environment.

There is no such thing as Compassionate Leave in Ireland.

The Parental Leave Act 1998 brought in the concept of Force Majeure Leave into Irish Employment Law for the first time.

Force Majeure Leave is a helpful provision for employees. It provides that an employee is entitled to this Leave where for urgent family reasons arising from injury or illness of certain persons the immediate presence of the employee at the place where that person is, either at home or elsewhere, is indispensable. The Leave applies in circumstances where the injury or illness occurs to a child, spouse, sibling (brother or sister), parent/grandparent or any other person

who resides with the employee "in a relationship" which generally will be a partner or person they are in a long term relationship with." The Leave is quite limited. It is three days in any period of 12 consecutive months or 5 days in any period of 36 consecutive months.

The Leave however is quite limited. For example, a parent or grandparent who falls ill who does not live with the employee is not a person whom the employee can claim Force Majeure Leave for.

The death of a family member is not covered by this provision.

Even claiming it in respect of a child who is ill is difficult unless the employee can show that the immediate presence of the employee is indispensable.

Where Force Majeure Leave applies it is paid leave. Many employers will have Compassionate Leave. This does not have to be paid.

It is very useful to have a Compassionate Leave policy which will cover the normal emergencies in life which may well include such issues as a break in to a home or damage to a person's home. These are not covered by Force Majeure. Issue such as a death in the family again is a matter that is not covered by Force Majeure Leave but can be covered by a Compassionate Leave Policy. It is useful for employers to have in place a Compassionate Leave policy. There is no provision or requirement that this has to be paid leave.

It is useful to have reasonable rules in place in relation to such a policy and to provide that if there are any suspicions of it being abused then in those circumstances the employer is entitled to put the employee through the disciplinary process.

The advantage of having a Compassionate Leave policy is that it does assist employers in creating a more positive environment.

Annual Leave carryover in the case of an employee who is sick

In ADJ-9834 the AO had to deal with a situation where an employee had been out sick and subsequently terminated the employment. The AO found that the employee was entitled to some 15 months holiday pay.

This is the first I have seen from the WRC relating to this issue of legislation which was introduced in 2015 to cover a right to up to 15 months holiday pay after the Leave Year in which the Sick Leave commenced in line with the EU Decision on this point.

The Gig Economy

The issue of who is and who is not an employee is now becoming a significant issue going before AO's this was seen in case ADJ-3763. In this case the AO has given a very considered and reasoned opinion as to why the relevant individual was not an employee. In this case the AO found that the individual had actively sought to be a self-employed individual. The decision makes absolute sense to us.

There is however a wider picture.

1. There are a number of individuals who are being put into the category of self-employed by the entity with whom the work so that this entity can avoid their obligations to the individuals as employees. These can be broadly split into two categories. The first is where the relevant person is fully advised of their rights, clearly entered into a contract and has all the benefits of a self-employed contractor and is not subject to control. The second group are those who are effectively simply disguised employees. In all respect they act as employees but are told that they are self-employed. We regard the first subgroup as legitimate self-employed contractors but the second most definitely are not.

2. There seems to be particular industries where the number of individuals, who are classified as self-employed, for example the building industry, appears to us to be questionable.

3. There appears to be a situation currently where some lower paid individuals are being classified as self-employed when in reality on any of the tests they are never going to be able to have the benefits of a self-employed individual.

There are significant issues for the State where individuals are not properly specified as employees and are put into a category as self-employed. This means that there is loss of Revenue to the State particularly in employers' PRSI. This is a huge cost to the State. There will be arguments in the years to come the issue of claims being brought by persons who are classified as self-employed who are in fact employees is going to be significant and it is likely that a considerable number of these cases are going to go to the Labour Court in due course. Because of the potential downside for employers who have placed any large number of employees into the category of self-employed, the economic cost to the employer of losing a case, for example in the Labour Court, may well mean that more of these cases will go to the High Court simply because the economic cost of going to the High Court on a Point of Law will be far less for such an employer that the cost of converting any group of individuals from self-employed into employee status. This is an area of law which we see developing in the coming years and where the Labour Court is going to have a significant role to play in developing the jurisprudence in this jurisdiction.

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Protection of Employees (Fixed-Term Work) Act, 2003

The importance of employers ensuring that a fixed-term employee has in respect his or her conditions of employment been treated no less favourably than a comparable permanent employee was clearly seen in case ADJ-10004 where the AO awarded back pay of €48,153.86. In that case the employee had not been given increments whereas other employees who were not fixed-term workers were given increments. It appears that in this case the employer took the view that the employee had been incorrectly classified as a fixed-term employee or had come in at a higher rate of pay than comparator employees. That however did not change the situation that AO in this case held that the employee had not received the relevant increments. The issue of dealing with fixed-term employees seems to be a constant issue which is coming up in the WRC.

Victimisation

In EDA182 being a case of Couverture Limited and Wozniczka, The Labour Court has made an extremely important statement in relation to the issue of victimisation. In that case, and we believe that it is worth stating, the Court stated:

"To victimise a Claimant for making a complaint under the Act is a very serious matter and one which the Court cannot in any way condone. Workers must be protected from retaliatory acts of penalisation for making a complaint under the Act. To do otherwise would deprive a worker of the rights conferred on them under the Act."

In that case a sum of €25,000 was awarded.

The statement by the Court is clear and precise. It is a matter which all employers need to take into account and be aware of.

Holiday Entitlements for Part Time Workers

There are a considerable number of individuals who may work two or three days a week. Some will be, for example, bookkeepers or accountants who work part-time for small firms. Others will be, for example, nurses, teachers, secretaries and even solicitors.

The fact that a person only works two or three days a week does not mean that they are not entitled to holidays and holiday pay.

The Organisation of Working Time Act provides that such individuals are at a minimum entitled to four weeks Annual Leave in any Leave Year.

This means they would get their normal pay for the week that they have been absent on holidays. Take for example an employee who earns €200 net per week working two days a week. That individual is still entitled to four weeks paid holidays. They will, when they take a week's holiday, in those circumstances get paid €200.

For an employee who only works two days a week effectively their holidays pay in the year is going to be equal to eight days pay. They are still of course entitled to the four weeks off work. This makes absolute logical sense. The individual will receive the same pay for the week that they are off as is they had been in employment. They will receive neither more nor less than they would otherwise have received.

There is a view among some part time workers, for some reason which escapes us, that such workers are not entitled to holidays or to holiday pay. This is a fallacy. We thought that we might put a short note up about this as this is an area which is sometimes confusing to employers and employees but particularly to part time employees.

Taxation of Employment Law Awards

In ADJ-8367 the AO in this case interestingly in setting the decision in relation to the taxation of the award specified that it is a matter that the parties could get advice from the Revenue Commissioners on.

This was the position. Currently now tax is a self-assessment tax. There is a method to get a ruling as to the tax treatment. It is a matter for the employer to apply the tax code, as an award become due after 52 days. Rulings from the Revenue can take longer.

It is one thing where the parties are represented by legal entitles that it is left to them to get the appropriate tax advice. It is entirely different matter where the parties are not represented in which case it would be our view that there is a duty on the WRC to specify the tax treatment.

When the process was commencing we were very strongly of the view that dedicated staff from the Revenue should be assigned to the WRC for a number of reasons. The first was where there would be issues of tax evasion or Social Welfare fraud that they can be reported directly to individuals seconded from the Revenue to the WRC. The second would have been in relation to the tax treatment of matters that appropriate specialist opinions could be obtained by an Adjudication Officer so that the correct tax treatment could be set out.

We do not expect that Adjudication Officer should be tax experts. What we do believe is that the appropriate expertise should be within the WRC for an Adjudication Officer to obtain advice on in relation to the decision that is being given as to what the correct tax treatment is.

To have a world class service this is one of those things which really need to be there. The reality is it will not happen but then again it will not stop us calling for it to be put in place.

Taxation of Awards

An interesting issue has arisen in case ADJ-6729. In this case the AO found that there had been an underpayment of €105.20. The AO awarded compensation of €250. Under Section 6 of the Payment of Wages Act an AO is entitled to do so. However, the AO in this case held that this was compensation and was therefore exempt by virtue of the provisions of Section 192A Taxes Consolidation Act. This classification of the award being exempt from tax is not one we would agree with. In fact because of the way the decision has been written it would be our view that the entire sum of €250 is fully taxable. If the AO in this case had awarded a €105.20 as being the loss of wages, with the balance being compensation, then in those circumstances only the €105.20 would have been taxable. The provisions of Section 192A Taxes Consolidation Act are complex. If any portion of the compensation includes compensation for any element of loss of wages then in those circumstances the entire sum is taxable. If however, the award is split between the economic loss and the compensation and this is clearly set out in the decision then the compensation element is exempt.

This would equally apply for example in a case for an employee not receiving a Public Holiday. Say, the Public Holiday was worth €100. If a sum of €200 is awarded as compensation then in those circumstances the full €200 is subject to tax. Unless the decision stated that no compensation was being given for the monetary loss and it was all being classified as compensation for not having received the Public Holiday. Even then there would be a question mark over it. If however in that sort of situation the economic loss was specified with the balance being stated to be compensation then in those circumstances the compensation element is exempt from tax.

This is the case that we are referring to here relating to the Payment of Wages. Unfortunately, it would be our view that because of the way the decision has been set out the entire sum is subject to tax.