Introduction *

Welcome to the December issue of Keeping in Touch

The last number of months has been a busy time for this office.

On the 20th of November Richard Grogan of this firm presented a paper to the Southern Law Association and Employment Law Association Joint Seminar in Cork on the new Workplace Relations Act and its practical application for employers, employees and those representing employers and employees before the Workplace Relations Commission and the Labour Court.

On the 9th of November the Department of Jobs Enterprise and Innovation published the consultation document undertaken by the University of Limerick study on the prevalence of Zero Hour Contracts and low hour contracts in the Irish economy. We wish to acknowledge with thanks the appreciation given by Mr. Jed Nash TD Minister for Business and Environment to Richard Grogan in his representative role within the Employment Law Association of Ireland for contributing to the study via the stakeholder interviews undertaken by the University of Limerick. In the report itself a seminar note given by Richard Grogan to the Southern Law Association and the Employment Law Association of Ireland on the presenting and defending of employment claims was acknowledged in the references referred to by the University of Limerick in preparing their report.

The Report in relation to Zero Hour and "if and when contracts of employment" did seek representations from interested parties in relation to the recommendations. This office has made its contribution in relation to the recommendations and while there are some recommendations that we do not necessarily agree with in the whole we support the recommendations. We have in addition written to the Minister setting out additional items which we believe need to be dealt with to be effective. In particular appropriate checks and balances to avoid a situation whereby employers seeks to simply categorise employees as self employed individuals when they are not so. We believe that this creates a loss to the State in tax revenue but also impacts in a negative way on compliant businesses seeking to act in accordance with the law and best practices. The issue of appropriate remedies for employees and deterrents against employers who fail to

comply with employment legislation is important for protecting compliant employers. Compliant employers face significant difficulties in competing against non compliant employers. Therefore employment awards need to have a deterrent effect particularly where there is any systematic abuse of employment legislation. This is not to punish employers but rather to protect compliant employers. We appreciate that here will always be times when an employer, for some reason has a technical breach of legislation. This is something that can of course be taken into account but serious non compliance without appropriate deterrents can undermine legitimate businesses seeking to act in a compliant fashion. A recent case in which this office was involved in concerned an employee who was being paid public holidays and annual leave on the basis of a calculation of 8 hours a day whereas her average hours were 9.5 hours per day. The employee was earning in excess of the National Minimum Wage by a significant amount. In representing the employee in dealing with the issue of compensation to be awarded we argued that even if it was on the National Minimum Wage rate of pay and was only 1 hour a day averaged for the workforce that the saving to the employer was a bottom line saving of €60,000 per annum. If it was simply a half an hour averaged it was €30,000. If her situation equated to an average within the organisation then it would have been over €90,000 per annum bottom line saving. The true figures are probably higher. This matter is going to the High Court in relation the level of compensation awarded by the Labour Court. We are of the view that the level of compensation which was awarded which was €600 would not have a deterrent effect on an employer to be compliant.

This office is involved in two other appeals on a point of law to the High Court relating to recent Decisions of the Labour Court. These Decisions refer to the interpretation of Statutory Instrument 36 of 2012 where the Labour Court has ruled that Statutory Instrument 36 of 2012 effectively revoked the equivalent provisions of the Organisation of Working Time Act even though these were only formally revoked at the end of July 2015 by SI435 of 2015.

We do not expect any of these cases to be determined until 2016.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

The Workplace Relations Commission

In October of this year the Workplace Commission came into operation.

There is clear bedding down time which will be required. Currently we have legacy Rights Commissioner cases and outstanding appeals to the Employment Appeals Tribunal along with outstanding Equality cases. These will be disposed of over time. At the same time we will be operating under the new WRC provisions.

This will cause complexity in itself for those dealing with cases to work out which set of rules apply to which proceedings.

Existing cases which are before the Labour Relations Commission and have not yet been heard or where a Decision is awaited will now all go on appeal to the Labour Court. Existing cases yet to be heard before the Employment Appeals Tribunal continued to be heard by them.

Two new deputy chairs have been appointed to the Labour Court along with an Employer and an Employee Representative. There will now be four divisions of the Labour Court with one additional Deputy Chair available to take up cases. Effectively there will be Chairman and four Deputy Chairmen available to act as the Chairman in any case. It is unusual in a publication like this that we would pick out any particular individual. We would however say that the role of Mr. Kevin Duffy as Chairman of the Labour Court has been central in the whole process. The position of Mr. Duffy as Chairman of the Labour Court continues up until June of 2016. It would be our view that as his role has been so central and because of the requirement for the new system to be bedded down and that the transition would run smoothly that hopefully the Minister will extend Mr. Duffys remit of Chairman of the Court for a further period and that Mr. Duffy as Chairman, will consent to same. While there are many extremely qualified individuals within the Labour Court and outside of it the status and standing Mr. Kevin Duffy, as Chairman, and the respect which he is held in by Employment Law practitioners is such that it would be desirable that he would remain in situ at a very minimum until the transition is completed.

When in years to come the review of the process moving to the new WRC and the enhanced roll of the Labour Court is reviewed the central and driving roll of individual like Mr. Duffy will be recognised for the significant input he made to the entire process. He is a central role and figure in the transition process and it is our hope that he will see the transition process through fully.

There is still a lot of work to be done in relation to the WRC. New procedures are now in place. There will be challenges for the Labour Court, Adjudicators, practitioners, employers and employees in applying the new procedures. They will take time to bed down.

There are still areas of work to be completed. The original proposals included having a detailed website with all relevant information on it. We do not have consolidated legislation available on the DJEI website in consolidated format. This makes access to the relevant legislation difficult. We appreciate that a Consolidated Employment Act would be preferable but accept that economic cost of doing so would be substantial. However, consolidated legislation even if not there as an Act which can be referred to would assist everybody.

The original consultation proposed that there would be a detailed website with detailed guides on the legislation. This is not in place. This is work that hopefully will be addressed. Because the interpretation of the law changes this does require resources to be provided to ensure that the work is undertaken on a regular basis and that the information is updated. We do accept that there is a resource issue in the current economic climate which may mitigate against this.

The current claim form is not user friendly. Employer and employee representatives continue to complain that the complaint forms are difficult to negotiate and navigate. There have been tinkering with the system as regards to complaint forms but they still are difficult.

There are however and we must be fair on this, significant improvements which have been proposed. We are now promised early hearing dates. We are now promised that Decisions will issue within 28 days of a hearing. This is a significant improvement as regards cases which will be heard by the Adjudicators in the WRC. There has

never been any issue with delays before the Labour Court. Cases that are appealed to the Labour Court are dealt with extremely quickly.

There will be significant challenges for those dealing with the new procedures. It will be a period of learning for everybody. However with cooperation from all the stakeholders hopefully the new process will be more effective, more efficient and less costly for all involved.

Seminar on the Workplace Relations Act

On the 20th of November Richard Grogan of this firm presented to the Southern Law Association, in association with the Employment Law Association of Ireland, a seminar on the Workplace Relations Act. This is the third time that Richard has presented a seminar in Cork to the Southern Law Association.

As is usual the event was extremely well organised by Terance O Sullivan who is a leading Employment Law Solicitor in Cork.

There was a very high attendance by Cork solicitors and non solicitors who are members of the Employment Law Association of Ireland.

Copy of the lecture notes can be obtained from the Southern Law Association, are available on the Employment Law Association of Ireland website and a copy is also available on our website, www.grogansolicitors.ie in the Publications Section.

Technology in the Workplace

The reality of matters is that technology has changed the way we all communicate with each other.

The difficulty with technology is that it is immediate. There is no opportunity to review. Often the button is simply pushed and something is sent.

There are risks for employers because of the technology.

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The use of Email

Email is immediate. It tends to be short. The tone can sometimes be quite chatty. However, an email can effectively create an entitlement for a company to perform a contract or can be the cause of a claim against the company. For example in sexual harassment cases where an inappropriate email is sent.

Remote Working

Because people in all business now have mobile phones with email on them and laptops in many business the lines between personal and working time are becoming blurred. Employees are receiving and sending emails late in the night. In such cases the entitlements under for example Section 11 Organisation of Working Time Act to an 11 hour uninterrupted rest period are being breached. Employees are receiving emails while on holidays and are being requested to reply to them. This can mean that the employee does not receive two weeks uninterrupted leave as is required under the Organisation of Working Time Act. Employers need to be careful to ensure that breaches of the Organisation of Working Time Act do not arise because of the use of technology. In fact the technology itself will be the evidence used in a case against the employer.

The Proper Use of Technology

Access to the internet itself in the workplace can create a distraction which is a cost to employers.

Privacy

One issue which is constantly coming up in the area of employment is the issue of the monitoring of employees. Employees have a fundamental right to privacy protected by legislation, the Constitution and the European Convention of Human Rights. Normally it is inappropriate to use CCTV to monitor employees and equally to read employees personal emails.

What Steps Should Employers Take

1. It is important for employers to train employees to be careful in relation to the tone and content of their communications
2. There should be a policy and procedure in place to deal with bullying, harassment and sexual harassment to include where such issues arise in a virtual sense.
3. Employers should ensure confidential information and personal data are kept securely and that there is adequate protection and encryption on mobile devices.
4. Employers should ensure that the working time of employees is properly recorded and that employers ensure that employees take the appropriate breaks and rest intervals.
5. An acceptable technology usage policy is vital for any employer.
6. Employers should ensure that rules relating to the use of social media are told to employees. Employees must be advised as to what they can and cannot share, who owns their work related contacts and this should be set out in the employers Social Media Policy. It is important to keep this area under review and to update it regularly to comply with changes in the law. As technology and the use of it is ever changing employers do need to be aware of such obligations.

The Taxation of Employment Law Awards

The Finance Bill 2015 in Section 5 amends the definition of a relevant authority for the purposes of Section 192 A TCA. This has been made to reflect the changes introduced by the Workplace Relations Act 2015. The Section corrects the name of the Director of the Equality Tribunal and adds the following to the definitions being an Adjudicating Officer of the Workplace Relations Commission, the Workplace Relations Commission and the District Court. The title of the Director of the Equality Tribunal has also been amended to the Equality Tribunal whereas previously it referred to the Director of Equality Investigations.

The effect of this amendment is that awards which will now be made by an Adjudication Officer or mediation agreements put in place through the Workplace Relations Commission will be subject to the

normal exemptions which previously applied. It will also apply to decisions of the District Court. The reason for this is that the District Court will be the implementing body for decisions and it was important therefore that this exemption would also apply to the District Court.

This is a matter which this office had made submissions to the Minister for Finance and the Minister for Jobs Enterprise and Innovation last year but unfortunately it was not introduced on time for the introduction of the new Workplace Relations Act. This is why decisions which issued after 2nd October had the name Rights Commissioner / Adjudication Officer so that the exemption in this legislation would continue to apply. This is the reason why some decisions issued later in October because of the fact that decisions that had already been written up and signed had to be re-done so as to avail of the existing exemption and this is why the name "Rights Commissioner" has been added to a number of those decisions.

Gifts to Employees

Section 10 of the Bill provides an exemption from Income Tax, PRSI and USC where an employer gives a qualifying voucher to an employee in a year of assessment. The voucher cannot exceed €500 in value. It may not be exchanged in part of in full for cash or be part of any salary sacrifice arrangement between the employer and the employee. Only one voucher can be given in a year.

Currently the Revenue practice is that a voucher of up to €250 can be given. Unfortunately this new provision is unlikely to take effect until 2016 so will not be in place to provide for what could often be a Christmas bonus this year. The current level of €250 will apply.

This extension is an important benefit for employees. It is also a very tax efficient way for employers. Provided the voucher is a voucher for goods and cannot be exchanged for cash then the exemption will apply.

The Minister for Finance must be congratulated on introducing this new provision which will apply from next year.

Paternity Leave

From September 2016, fathers will be entitled to two weeks paid paternity leave. This will not be paid by the employers. The eligibility for Paternity Benefit payable by the Department of Social Protection will be subject to PRSI contributions and that the employee has sufficient contributions. The payment from the Department will be €230 per week.

The issue which employers will need to look to address is the procedures for applying for paternity leave.

It is reasonably straight forward where the employee is married. Where the employee is not married then the issue is equally going to be what evidence is going to have to be produced to the employer to show that the employee is entitled to the Paternity Leave.

We believe that a lot of this will be covered by way of the requirements of the Department of Social Protection as to what needs to be done. It will be important for employers going forward to have an appropriate policy in place which sets out how to apply for Paternity Leave, what the entitlements are and what will need to be done. Equally employers will need to understand the Department of Social Protection requirements to assist the employee in being able to claim same.

Ex Turpi Causa

The doctrine of Ex Turpi Causa is an issue which has recently be raised in the Labour Court.

It is now the subject of an appeal on a point of Law to the High Court. The Defence of Ex Turpi Causa was raised by the Respondent company in a case before the Labour Court. The contention by the Appellant is that once Ex Turpi Causa is raised that this is effectively an admission by the Respondent company where they have an obligation to do certain things and a breach would be in fact a Criminal Offence on their own part.
The issue of Ex Turpi has been dealt with by the Supreme Court in the case of Quinn –v- Irish Bank Resolution Corporation Limited [2015] IESC29.

The Supreme Court described the outcome in each case as "statute specific but…not case specific" accordingly the outcome will depend on an analysis of the particular statute which has been breached. The Supreme Court held that policy is not an absolute rule and much will depend on the nature of the wrongdoing concerned.

The Supreme Court held that where a Statute spells out the Statutory consequences of a breach then the result if predictable. However, many Statutes do not do so. The Court held that the Court would have seen if the legislature implied that certain consequences where to follow. The Court would also bear in mind that public policy understood in the wider sense may at times be better served by upholding a contract rather than declaring it to be unenforceable. The Court will have to consider how closely connected the transaction is to the relevant illegality. The Court also stated that the absence of the provisions stipulating that the contract entered into in breach of the statute is to be rendered void or unenforceable when itsself suggests that the Court should treat it be so.

The issue is arising in the case of claims under SI36 of 2012 as amended. In that breach of the driver rules is a criminal offence both for the employer and the employee. The employee however has a defence in the criminal matter that they are under the control of the employer. The issue which was referred to, by the Labour Court in a case previously was that an employee would not be able to enforce a breach of SI36 due to their own illegality. The counter argument is that the legislature specifically has provided a civil remedy for a breach. It is interesting that in some cases now employers are specifically not raising the Defence of Ex Turpie Causa. It will be interesting to see how this issue develops into the future.

Who May Represent a Company in Legal Proceedings

This is an issue which often arises. Recently the High Court was asked to consider the question as to whether a Director of a company could represent that company in legal proceedings involving the company.

The case is Declan McDonald and McCaughey Developments Limited and Martin McCaughey. Mr. McCaughey wanted the permission of the Court to represent the company. The case involved a challenge to the

appointment of a Receiver over the assets of the company by a bank. Mr. Justice Gilligan considered both Irish and International Authorities on this issue. In particular, he referred to the Decision of the Supreme Court in Battle v Irish Art Promotion Centre [1968] IR252 and stated,

"In Battle, the Supreme Court were of the view that a company director in setting up the company availed of a separate legal persona from the company. One cannot then come before the Court and seek to reverse that and speak on the company's behalf. Fennelly J. stated that in such circumstances, the only option available to a company director, was to use his own funds to place the company in a position where it could engage legal representation".

Mr. Justice Gilligan held that in legal proceedings that a situation where a company could be represented in Court by anyone other than a qualified solicitor or barrister would be very rare.

The reference on this case is [2014]IEHC455

A Quick Overview for Running a Disciplinary Case

1. The employee should receive details of the precise charges and allegations against the employee in writing and the procedures to be followed make sure these comply with the Employers Disciplinary Policy or the Code of Practice on Grievance and Disciplinary Hearings which is more beneficial to the employee.
2. The employee should receive all particulars of all allegations against the employee and the basis under which they are being made.
3. The employee should receive copies of any witness statements.
4. The employee should receive copies of any other documentation or evidence which will be relied upon such as CCTV.
5. There should be a clear distinction and separation between an investigation and a disciplinary process. Where it is possible the person who is investigating whether or not disciplinary action should be taken should not then be part of the disciplinary process.
6. The decision maker must be able to show that they acted independently. This means that they are without influence by

those who conducted the investigation and the disciplinary process.

7. Make sure that all evidence against an employee is furnished to the employee in advance.
8. There should be a clear agenda of meetings. The employee must be made aware of the topics which the employee will be required to address and to answer.
9. Minutes of meetings whether or not agreed should be made available to the employee. This means that proper records of the employees responses to any allegations are fully recorded.
10. The employee should be given an opportunity to comment on the minutes and to make any amendments that the employee feels are appropriate or at least to have them recorded.
11. Where possible an independent party should hear any appeal. It is important in every case following any disciplinary sanction that the employee is given an opportunity to appeal and is advised of same in writing.
12. The employee should be offered the right to be accompanied at any meeting.
13. Where dismissal may be an option the employee should always be advised of this at the earliest opportunity. Where an employee is being advised that the disciplinary process may include dismissal it is advisable that if the employee requests legal representation that this is granted.
14. In any disciplinary matter an employee should always be allowed cross examine witnesses (or their representative on their behalf).

Failure to follow fair procedures will more often than not result in a dismissal being declared an Unfair Dismissal.

Defending an Unfair Dismissal Claim

The Workplace Relations Commission has new procedures in relation to, in particular, Unfair Dismissal cases which employers and there representatives must be aware of.

When you receive an Unfair Dismissal Claim form you will be asked to make a submission.

This will not be a mere denial or a statement that the employee was fairly dismissed.

For employers it is going to mean,

1. Furnishing a copy of their disciplinary procedure.
2. Furnishing evidence to show how the disciplinary procedure was applied to the employee.
3. Furnishing copies of all notes, documents and letters to the employee about the disciplinary procedure.
4. Evidence that the employee was given the right to appeal.
5. Full particulars in relation to any appeal hearing.
6. An outline of whom the employer will be calling as witnesses and what their evidence will be.
7. This information is going to be needed within 21 days of receipt of the claim form. This means that considerable amount of work is going to have to be done very quickly.

Where an employer does not do so, an Adjudication Officer can draw an inference. I would expect that they will.

Where an employer receives a notification under Section 14 of the Unfair Dismissal Acts requesting statements setting out the grounds on which the employee was dismissed the employer has 14 days to respond to this. There is no provision for an extension of time. This will be used by employees. If you receive such a notice it is important that it is responded to immediately.

Employees will not be able to simply put in a claim stating,

“I was unfairly dismissed”

In constructive dismissal cases the employee is going to have to go and set out a detailed statement setting out the grounds on which the employee states that there were justified in leaving the employment. I do envisage that in many cases, employers, to avoid having to try and do the work will simply try to claim that the employee left themselves. If the employee has served a notification under Section 14 of the Unfair Dismissal legislation and the employer has not responded within the 14 days then an employer may have significant difficulties in running of a Defence that the employee left themselves.

In a case where the employee is dismissed they will still have to set out particulars as to their claim. If they have served a notification under Section 14 of the Unfair Dismissals Acts and it has not been responded to then the employee may well be able to argue that simply stating,

"I was unfairly dismissed. I issued a request under Section 14 of the Unfair Dismissal Acts which was not responded to. I do not know the grounds under which I was dismissed".

In those circumstances this may well be sufficient to ground an Unfair Dismissal claim and that an Adjudicator or the Director General of WRC will not be able to dismiss the appeal as not setting out sufficient grounds.

In other cases clearly the employee will have to set out the grounds on which they say that they were dismissed and how they claim it was unfair. They will have to furnish particulars as to how they have sought to mitigate their loss. They will be required to submit this in advance of any hearing.

It is envisaged that the process between lodging a claim and the case coming on for hearing will be approximately 12 weeks. Either party who is dissatisfied will have 42 days to appeal. If an appeal is lodged the party appealing will have 3 weeks in which to lodge details ground including witness statements with the Labour Court. They will have to prepare six copies and will have to send one copy to the other side and five copies to the Labour Court. The other side will then be called upon to lodge their documentation.

Failure to lodge documentation will be held by the Labour Court as either an abandonment or the claim or an admission effectively of the claim.

In the new procedures which were designed to minimise costs are going to front load costs to employers and employees. There will be a considerable amount of work which is going to have to be done very quickly. Employers will need to get their representatives briefed very quickly. Only in exceptional circumstances will there be extensions of time.

In Unfair Dismissal cases employers are now going to have to address the issue at the very start as to whether or not this is a case where they should be seeking to settle. If it is a case which should be settled then those settlement negotiations need to start immediately you receive the claim. The time limit of 21 days will not be extended because the parties are undertaking negotiations.

If the employee has opted for mediation this may give the employer an option to consent to mediation and obtain some time extension. However mediation will be undertaken quickly. If the matter is not going to get resolved at mediation then the 21 days will effectively start to run once matters are referred back to the Adjudication Service.

Employers will not have the option of putting off entering into settlement negotiations until the morning of the case. The employee representative will know whether documentation has been lodged and what has been lodged. If full documentation has not been lodged the representative of the employee will be in a significantly stronger position in negotiations.

The indications are that the new process will be applied according to the guidelines which have been set out. These guidelines are being treated by the Workplace Relations Commission and by the Labour Court as having the same standing as a Statutory Instrument. Any party wishing to challenge these procedures is going to have to serious consider the funding cost of bringing a claim to the High Court.

The potential to simply turn up on the day and deal with matters on the day is no longer going to be there.

Are Employment Rights Cases Now Becoming or Going to Become a Lawyer Only Zone

The whole basis of Employment Rights in Ireland is that going back to the creation of the EAT, was that they would be a lawyer free zone.

That was the original intention.

We now have very complex employment laws. It is questionable whether any employee or small or medium sized business owner or small or medium sized company could be properly equipped to deal with the complexities of the legislation and to be able to present or defend a case without legal representation or at a minimum without the benefit of assistance from qualified HR/IR Practitioners such as a representative body of employers or a Trade Union.

As part of the new WRC, we were promised in the original Consultation Paper, that there would be a detailed website detailing rights and obligations for both employers and employees and a comprehensive website.

We do not have a comprehensive website. We do not have the employment legislation consolidated. We do appreciate that a full consolidation of all the legislation into one Employment Rights Act would be financially not viable. However, an informal consolidation on the DJEI website is needed.

Comprehensive up to date detailed guides on how to bring a claim and how to defend a claim, on what records employees are entitled to have and what records employers are obliged to maintain under various pieces of legislation need to be put in place.

Unless this is done then the reality of matters is that individuals and companies will find it virtually impossible to properly process claims or defend claims.

There is no function currently in the WRC where employers or employees can obtain advice on the bringing and defending of claims. Such a function needs to be in place and it needs to be resourced.

This firm is involved in Employment Law. We are known for our involvement in Employment Law. That is our business. However, choosing to have a representative should be a choice rather than something which a person will need to have.

There is no criticism of the former LRC or the Labour Court. Where a party was unrepresented, Rights Commissioners and the Labour Court in the past and I presume Adjudicators in the future will assist unrepresented individuals. The EAT always did so. However, that can

only be in relation to asking the relevant employer or employee relevant questions which would be important for their Defence or claim or explaining a technical argument raised so that they could respond or a further example to ensure that leading questions were not put or to ensure fair procedures at any hearing were applied to the unrepresented party. However, they have always done so and there has been no criticism ever of the way claims have been dealt with in the past and I do not envisage it in the future as regard the running of the relevant claim before the WRC or the Labour Court.

However, I do see difficulties in that neither the WRC nor the Labour Court can advise an employee that they may have brought a claim under the wrong Act or wrong Section of the Act and that a different claim should be brought and how it should be brought. Equally there is a limit to which any Adjudication Officer or the Labour Court can go in working out possible Defences which an employer could raise to a claim. Rights Commissioners in the past and the Labour Court have always applied fair procedures to unrepresentative individuals to assist them in their claim or Defence. However, there is a lack of comprehensive documentation in place to advise employees of their rights. Equally there is a lack of comprehensive documentation in place which employers can refer to for ensuring that they are in compliance with the obligations which they have.

Let us give a very simple example. On the Workplace Relations Commission website there is a sample written terms of employment. The document is, in our view defective. Let us explain.

If an employer is employing a young person within the meaning of the Protection of Young Persons (Employment) Act 1996 they must give or cause to be given not later than one month after the commencement a copy of the abstract of the 1996 Act as prescribed by Section 12 of that Act. Neither the sample document nor the guidance notes sets this out.

SI no. 49 of 1998 provides that employees must be advised of the provisions of Sections 11, 12 and 13 of the Organisation of Working Time Act. The sample document covers Sections 11 and 12 but not Section 13. Even the notes don't set out that an employer must advise an employee of their entitlement to a weekly rest period and what that rest period is.

There is a very serious forthcoming in relation to a fixed term contract. A dismissal under the Unfair Dismissals legislation is a Dismissal for the purposes of same where a fixed term contract finishes. However, Section 2(2)(b) sets out a provision which ensures that where an employment ceases simply because a fixed term contract or a specified purpose contract expires then the provisions of the Unfair Dismissal legislation will not apply providing that the dismissal consisted only of the expiry of the terms without it being renewed under the said contract or the cessation of the purpose and the contact is in writing was signed by or on behalf of the employer and by the employee and provides that the Act shall not apply to a Dismissal consisting only of the expiry or cessation. The WRC website document at no stage provides that in the case of a fixed term contract that it must be signed by the employee and that the document must provide that the Unfair Dismissal Act shall not apply to a dismissal only of the expiry or cessation of a fixed term or the specified purpose contract.

In the case of mobile workers there would be a requirement to notify the mobile worker of Statutory Instrument 36 of 2012. This is not set out.

It could reasonably be argued by any employer who issues a contract in the form of the sample contract set out on the WRC website that the employer complied with the legislation. If the employer dismisses an employee at the end of a fixed term contract that the cessation date has been set out and that no unfair dismissal claim could reasonably be brought. However, in both cases this belief would be unfounded.

The provision of a document which complies with Section 3 of the Terms of Employment (Information) Act is the very basis document on which minimum requirements are required to be notified by the employer to the employee. They are there to protect the employee. They are also there to protect the employer. We are being promised a world class service. If we are to have a world class service then basic documentation should be correct.

The very basis of having Employment Rights is that both employees and employers can find out what their respective rights and

obligations are and can feel confident following guides and documentation produced by the WRC as being correct and up to date.

Setting Compensation

In Employment Rights cases an issue is often raised before what was the LRC and now will be the WRC and the Labour Court as regards the ability to pay and the financial circumstances of an employer.

An interesting case on this issue is a case of Gill Russell (a minor) suing by his Mother and Next Friend Karen Russell and HSE neutral citation [2015] IECA 236. The Judgement was delivered by Ms. Justice Irvine on the 5th November 2015. In that case at paragraph 157 it was stated,

"In calculating damages for future pecuniary loss, the Court must pursue the policy of providing the Plaintiff with compensation on a 100% basis."

The important and interesting element continued in that paragraph with,

"It is no part of the Court's function, when carrying out that task to consider the effect that any such award may have on matters such as the finances of the Defendant, on insurance premiums or on the State's resources. Policy matters are for the Oireachtas. Neither is it the Defendants likely capacity to meet any such award relevant to the Courts consideration of the sum to be awarded"

In many Employment Rights cases the issue is often raised by employers as to their ability to pay. Where the Vol Kolson and Kamann considerations apply then clearly in such cases the setting of compensation taking into account the policy of equivalence and deterrent effect is relevant and that a level of compensation awarded for a breech for a large employer would be higher to encourage compliance than it would be for a smaller employer. However the ability to pay would it appears following the Decision of the Court of Civil Appeal which admittedly related to an issue relating to compensation for an injury would be, in our view, be an irrelevant factor.

The various Directives and Regulations which have been implemented here in Ireland nowhere provide for an ability to pay as a relevant factor. The Oireachtas is of course entitled to determine issues as to how compensation will be calculated. They have not done so. In many Employment Rights cases the issue of ability to pay is being raised. It is probable that in raising such a defence the of Gill Russell (a minor) suing by his Mother and Next Friend Karen Russell and HSE case will be raised. I am not aware of any case where a Rights Commissioner or the Labour Court has directly referred to such an argument having being raised by an employer but it is probably a matter which will have to be addressed, at some stage if a Defence of an ability to pay is raised and this case referred to here is raised as a counter argument.

It is an interesting technical issue.

Increase in the Minimum Wage

From 1 January the National Minimum Wage rises from €8.65 to €9.15 per hour. This is going to result in a substantial increase in the cost of wages for employers in Ireland. For example an employee who works 37.5 hours per week will see their gross weekly wage increase from €324 to €343 from the 1st of January. In addition employers will have the employers tax on the wages to also pay.

For employees who are currently earning in excess of the National Minimum Wage by which we mean just in excess, it is likely that they will similarly start seeking increases in line with the increase in the National Minimum Wage.

The proposal for a "living wage" which has currently been set at €11.50 is going to start putting pressure on employers.

While no proposals have come forward as yet we anticipate that the next move, in relation to the issue of living wage, will be that Government Departments will seek, when giving contracts to seek confirmation that a living wage is being paid to all employees.

We anticipate that there will be significant developments in the issue of Minimum Wage over the next 12 months.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Referrals to the High Court on Points of Law

In November this firm referred three cases to the High Court for Point of Law appeals.

In the first case involving Cosgrave Transport (Limerick) Limited, appeals have been made in relation to the determination by the Labour Court that the employees were not entitled to pursue claims under both the Organisation of Working Time Act and what is known as SI36 of 2102. In addition appeals preceded on the basis that certain of the claims were held not to be claims which the employees could pursue. In addition there were claims relating to the basis of calculation of the hours worked taking into account that there were no records produced by the employer despite the fact that they were in Court.

In the second case against Nurendale T/A Panda Waste a claim has issued relating to the level of compensation. The employees claim relates to the fact that the Labour Court failed to take into account submissions made relating to the financial savings which the employer would have made by calculating holiday pay and public holiday on the basis of 8 hours a day worked rather than on the basis of the actual hours worked. The employees claim is that the employer before the Labour Court never contested the evidence that they paid on the basis of 8 hours rather than the actual hours worked contrary to the provisions of Statutory Instrument 475 of 1997.

In the third case which involves Ruskim Seafoods Limited, this involves the fact that a Defence of Ex Turpi Causa was raised and it has been contended that once that was raised it was effectively an admission by the employer of their own breeches of the legislation and in that case the decision of the Labour Court was not to uphold the complaint.

In all three cases there are other ancillary matters and these matters will come on for hearing some time in 2016.

Zero Hour Contracts/The UK Approach

In the UK it was announced that there would be a ban on the use of exclusivity clauses in Zero Hour Contracts. This ban came into operation in the UK in May. It renders unenforceable a contractual provision which prohibits an individual working under a zero hour contract from working elsewhere. The UK Government has recently proposed new legislation. This is designed to give effect to the ban. The new draft Exclusivity Terms of Zero Hour Contracts (Redress) Regulations 2015 provide that an individual employed under a Zero Hour Contract will have the right not to be unfair dismissed or suffer a detriment if the reason is their failure to comply with an exclusivity clause. Any dismissal will be automatically unfair and there will be no two year qualification period of service. An individual engaged as a zero hour worker who suffers a detriment for failing to comply with an exclusivity clause will also be able to bring a claim to the UK Employment Tribunal. Where the detriment is the termination of the contract any compensation award will be subject to the usual unfair compensatory award limits.

It is interesting that in the UK they actually produce the Draft Regulations for comment before they are made. The UK Draft Regulations are now available. The issue of zero hour contracts is being looked at in this country and it is hoped that the Irish Government when introducing any new legislation will consider looking at the UK Draft Regulations as a model which could be adopted and adapted here in Ireland.

Bankruptcy Term to be Reduced to one Year

The number of years during which a person is considered bankrupt is due to be cut from three year to one year before the end of the Dail term. The Taoiseach has indicated that the Department of Justice will bring legislation on the issue to the Cabinet shortly.

Reducing the Bankruptcy term to one year will bring Irish Law into line with the UK.

Public Tenders to Open up for Small Law Firms

A new system of tendering for legal services to all public bodies has been announced by the Mister of State for Finance Mr. Simon Harris. The Minister stated that the new system would involve the breaking up of large contracts into smaller lots to actively encourage participation in procurement from small and medium sized legal firms.

The estimated value for public tenders is €100 million over the next four years.

The system will involve the division of contracts into eleven lots with each lot representing a specific legal practice area. The Minister said that in advance of publishing this tender the Office of Government Procurement had undertaken extensive market engagement with the industry.

This must be welcomed by smaller law firms and will be particularly important for boutique firms in specialist areas of law.

The New Passport Card

There has been some confusion. The new credit card sized Irish passport card does not replace the passport book. The new passport card can be used for travel within the European Union. The European Economic Area (being Iceland, Liechtenstein and Norway) and Switzerland.

If you are travelling elsewhere you will need the normal passport book.

A person over 18 may apply for the new passport card. The passport card will not be available for children. Children will continue to require a passport book. If you are applying for the new passport card, you must have a current valid passport book. If the personal details you provide when applying must be exactly the same as those on your passport book. The card is valid for a maximum of five years or for the time remaining on your passport book if this is less than five years.

The application maybe made online to the Department of Foreign Affairs and Trade website being dfa.ie. You may also use the Departments passport app for smart phone and tablets. The cost of the card is €35. There is an additional delivery charge of €5 if you are applying from outside Ireland.

When making the application you will need,

- Your current valid passport book.
- Your photograph in digital form. This must meet the required passport standards
- A debit or credit card.

Before acting or refraining from acting on anything contained in this publication legal advice from a Solicitor regulated by the Law Society of Ireland should be obtained. This publication does not purport to be legal advice.

*In contentious cases a Solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.