RGA | Richard Grogan & ASSOCIATES

# Welcome to the April Edition of Keeping in Touch*

28th March 2019 was a big day in the firm. On that day Natasha Hand who joined us to complete her traineeship completed her traineeship. Natasha will now go onto the Roll of Solicitors as soon as possible. We are delighted to announce that Natasha will be joining the firm as an Associate Solicitor.

Both Richard Grogan and Michelle Loughnane are delighted that Natasha Hand has agreed to join the firm. Natasha will be working primarily in the area of Employment Law.

On 5th April next Richard Grogan will be presenting one of the segments at the Employment Law Masterclass organised by the Law Society of Ireland. Richard will be speaking on the issue of Redundancy and the Taxation of Employment Law Awards.

Between the 3rd and 6th April Michelle Loughnane will be acting as a judge in the Brown Mosten International Client Counselling Competition being run by the Law Society of Ireland this year. There are times when this firm does take up various challenges. We have been asked to assist Senator Lynn Ruane in relation to her proposal to bring forward a Bill in the Seanad dealing with the issue of Non-Disclosure Agreements. The proposal is to effectively limit the use of Non-Disclosure Agreements in cases following Sexual Harassment and Sexual Discrimination. We are delighted and honoured that we have been approached to assist in this project and look forward to the challenge of helping put the relevant Bill together for presenting to the Seanad.

In this edition we are changing the format. With the whole issue of insurance premiums and workplace accidents we thought it useful to look at this issue from the perspective of preventing accidents and a review of recent cases. As many HR/IR Professionals along with Solicitors receive our newsletter we thought this would enhance our publications.

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## Out and About in March 2019

On 5th March Richard Grogan presented a paper to the Employment Law Association of Ireland on the Taxation of Employment Law Awards and Settlements.

On 6th March Richard Grogan was interviewed on the Hard Shoulder on NewstalkFM with Ivan Yates on the issue of dress codes in the workplace. This interview arose because of a decision by Aerlingus to follow the example of Virgin Atlantic to cease the requirement that women wear makeup. Also it was announced that going forward women will be entitled to wear trousers rather than a skirt. Aerlingus had announced that instead of having to request trousers that these will now be automatically made available.

On 11th March Richard Grogan with the firm was quoted in the Irish Independent in relation to a case where the office acted for an employee in the WRC where the employee lost this is a case which is under appeal to the Labour Court and therefore the comments which Richard could make were limited.

On 26th March Richard Grogan met with Senator Lynn Ruane to discuss the use and abuse of Non-Disclosure Agreements in cases of Sexual Harassment. We have as a firm agreed to assist Senator Ruane in clarifying a Bill on this issue.

On 27th March we had an article on the Payment of Wages Act covered in Legal News.

## Workplace Injuries and the Duty to Train Employees

A lack of training, instruction and supervision of employees are big contributing factors to successful personal injury claims for workplace injuries against employers and their insurers. Section 10 of the Safety, Health & Welfare at Work Act, and 2005 sets out an employer's statutory obligation to provide training, instruction and supervision of employees. The section is broken down in detail below: -

- Section 10 (1) (a): The training must be provided in a form, manner and language that is likely to be understood by the employee. This is very important if, for example, an employee does not speak English very well.

- Section 10 (1) (b): Employees must receive time off work, with no loss of pay, for adequate task specific training and training in relation to emergency measures.

- Section 10 (1) (c): The employer must take into account the capabilities of an employee in relation to safety, health and welfare for any specific task assigned to him/her.

- Section 10 (1) (d): The employer must protect against the dangers that specifically affect a certain class of particularly sensitive employees and / or any group of employee(s) exposed to risks expressly provided for under statute.

- Section 10 (2): The employer shall adapt training to take account of any new risks or changes to health, safety and welfare and training will be repeated periodically, as appropriate.

- Section 10 (3) (a), (b), (c) and (d): The employer shall provide training to the employee on recruitment, where an employee has been transferred or the employee's tasks have been changed, on the introduction of new equipment, a new system of work or new technology.

- Section 10 (4): The employer must ensure that persons in the workplace who are employees of another employer receive instructions in relation to safety, health and welfare as necessary or where appropriate.

- Section 10 (5): The employer must give training to fixed term employees or temporary employees, having regard to their qualifications and experience, who will be working in the workplace.

Back injuries and/or repetitive strain injuries usually arise among employees who have not been properly trained. If an employee has not been properly trained or has not received proper instruction or is not properly supervised, then it is reasonably foreseeable that the employee

could become injured. In those circumstances, these injured employees usually have quite strong personal injury claims. Compliance with the Safety, Health and Welfare at Work Act 2005 and the regulations applicable thereunder will make for a better, more productive and lucrative work environment.

## Safety Statement

Pursuant to Section 20 (1) of the Safety, Health and Welfare at Work Act 2005, employers must have a safety statement. This statement will be based on the identification of hazards and the risk assessment carried out pursuant to Section 19 of the 2005 Act. It is a protective and preventative measure specifying the manner in which the safety, health and welfare at work of employees shall be secured and managed.

Section 20 (2) sets out what the safety statement must specify. The specifications are as follows: -

- the hazards and risks assessed;
- the protective and preventative measures taken and the resources provided for protecting safety, health and welfare at the place of work to which the safety statement relates;
- the plans and procedures to be followed and the measures to be taken in the event of an emergency or serious and imminent danger, in compliance with Sections 8 and 11 of the 2005 Act;
- the duties of employees regarding safety, health and welfare at work, including co-operation with the employer and any persons who have responsibility under the relevant statutory provisions in matters relating to safety, health and welfare at work;
- the names and, where applicable, the job title or position held of each person responsible for performing tasks assigned to him or her pursuant to the safety statement;
- the arrangements made regarding the appointment of safety representatives, and consultation with and participation by employees and safety representatives, in compliance with Sections 25 and 26 of the 2005 Act, including the names of the safety representative and the members of the safety committee, if appointed.

In relation to the usage of the safety statement, Section 3 specifies that the employer must bring the safety statement to the attention of it's

employees, at least annually and, at any other time, following it's amendment in accordance with this section. It must also be brought to the attention of newly-recruited employees upon commencement of employment as well as to the attention of any other persons at the place of work who may be exposed to any specific risk to which the safety statement applies. Section 3 also specifies that the safety statement must be in a form, manner and language that is reasonably likely to be understood. This is very important if employees are non-English speaking or if employees have difficulty with reading, etc. There is no obligation to record the communication of the safety statement to employees and those affected. However, it is preferable that an employer do so in the event of a personal injuries* action arising.

Section 20 (4) deals with specific tasks being performed at the place of work that pose a serious risk to safety, health or welfare. In these circumstances, the employer shall bring to the attention of those affected extracts of the safety statement setting out the risk identified, the risk assessment and the protective and preventative measures taken in accordance with relevant statutory provisions in relation to that risk.

Section 20 (5) imposes an obligation on the employer to review the safety statement, taking into account the risk assessment carried out in accordance with Section 19 of the 2005 Act, where there have been significant changes in relation to what the safety statement refers, there is another reason to believe that the safety statement is no longer valid or an inspector, during the course of an inspection, investigation, examination or inquiry directs that the safety statement be amended within 30 days of the giving of that direction and following review, the employer must amend the safety statement, as appropriate.

Section 20 (6) deals with a scenario where an employer contracts another employer for services. In those circumstances, the employer shall require that the contracted employer be in possession of an up to date safety statement, as required under this section.

Section 20 (7) requires a copy of the safety statement to be kept available for inspection at or near every place of work to which it relates while work is being carried out there.

Section 20 (8) specifies that it shall be sufficient for an employer employing 3 or less employees to observe the terms of the code of practice, if any, relating to safety statements which applies to the class

of employment covering the type of work activity carried on by the employer.

Section 20 (9) sets out that every person to whom Sections 12 or 15 of the 2005 Act applies shall prepare a safety statement in accordance with this section to the extent that his or her duties under those sections may apply to persons other than his or her employees. This relates to the general duties of an employer to persons other than it's employees and the general duties of a person in control of a place of work.

It is imperative than an employer with more than 3 employees have a written safety statement containing all of the requirements specified under Section 20 (2) of the 2005 Act, as set out above. It must be communicated to employees and it must be communicated in a manner and form that is likely to be understood by employees. It should be kept under review and updated when appropriate. As set out above, there is no requirement to record the communication of the safety statement to employees. However, it is advisable to do so as, in the event of a personal injury claim arising, it will assist your insurers with your Defence.

## Finger Injuries from Work

Finger injuries suffered in the work place are common. They can range from sprains, deep lacerations or cuts, crush type injuries and, in more serious cases, partial amputations and full amputations.

Finger injuries can range from mild to moderate to severe. They can be painful injuries. Permanent symptoms can include pain, tenderness, reduced dexterity, numbness, arthritis and a reduction in the function of the hand. In addition, depending on the type of finger injury suffered, a worker can be left with permanent disfigurement and cosmetic issues. In more severe cases, this can cause some psychological symptoms while adjusting to these permanent symptoms. These are symptoms that also need to be included in your case.

In more severe cases and depending on a worker's occupation, a finger injury can have an impact on a person's ability to earn a living. If your work involves working with your hands and this has been impacted by the finger injury, this cannot be ignored. An experienced personal

injury solicitor will be able to advise you whether or not you can pursue a claim for loss of employment opportunity or future loss of earnings. Expert reports from a hand surgeon and vocational assessor will assist with this aspect of your case.

Most finger injuries at work can be avoided. They very often arise as a result of some negligent or unsafe work practice at work such as a missing guard from a machine or a lack of training, hazard identification or risk assessment for the task involved. If your employer is disputing liability for your injury, it may be necessary to obtain an expert report from an engineer to deal with all of the health and safety issues. Again, this is something which an experienced personal injury solicitor will help you with.

If you have any questions in relation to finger injury claims, get in contact with us and we will let you know whether or not we can help you.

## Recent Judgements in Personal Injuries Cases

### Conor Askin (A Minor Suing by His Mother and Next Friend, Tracie Askin) –v- Green Property Investment Fund 1 plc 2018/00767

This case involved a seven year old boy who suffered a laceration to his left eyebrow when he hit off a bollard at Blanchardstown Shopping Centre when walking with his mother. He was taken to the Accident & Emergency Department of Temple Street Children's University Hospital where the laceration was treated with glue and paper stitches. The boy, who is now 13 years old, has been left with a scar approximately one inch in length which is partly hidden by his eyebrow.

The liability aspect of this case was based on the inadequacy of lighting in the taxi rank area where the bollard was situated beside a footpath. The court indicated that it had to decide if reasonable care had been taken to ensure that all users of the footpath were alerted to the fact that there was a bollard present. The court was satisfied that there was an edge to the bollard and a child coming into contact with the bollard was likely to sustain an injury.

President Raymond Groarke awarded damages to the young boy in the sum of €20,000.00.

## Claire Stephens –v- An Post 2014/9643P

While at the time of writing this case is still ongoing, it is noteworthy as an example of how employment law and personal injuries litigation can overlap.

The Plaintiff in this case is a former employee of the Defendant. She is a 56 year old married woman. Her case is that her former employer failed to deal with bullying by her colleagues which took place over a number of years and that she suffered personal injuries as a result.

The wrongful treatment at work commenced in 2006 after a female colleague tried to kiss the Plaintiff at work. The female colleague put this down to a joke after she saw the Plaintiff's reaction. Despite same, this female colleague continued to come over to her work bench.

The Plaintiff stated that another female worker, who later joined the organisation, seemed to pick up that the Plaintiff had difficulty making eye contact and always seemed to be whispering to others and looking to her.

In 2008, the female colleague who had previously tried to kiss her began hitting off the Plaintiff with her breasts when at her work bench. On one occasion, she was admiring the Plaintiff's necklace which she was wearing and rubbed her arm up and down against her breast.

In 2012, a male colleague left a post card on the Plaintiff's workbench. It showed a picture of a vagina with two fingers inserted in it. This followed by colleagues *"skitting and laughing"* in the days subsequent as well as colleagues making *"pussy cat"* comments and singing. The Plaintiff had reported the incident to her HR Department but it took five weeks for any action to be taken. During this time, the skitting, laughing and jeering continued.

Another incident involved a male colleague talking about the length of the Plaintiff's fingers and whether or not her fingers were bent which the Plaintiff believed was in reference to the pornographic photograph on the postcard.

The Plaintiff's health suffered as a result of this treatment. She was suicidal. She lost weight. She was unable to sleep.

The case continues.

## Ian Coughlan –v- The Minister for Defence, Ireland and The Attorney General [2019] IEHC 118

The Plaintiff in this case was a former member of the Irish Defence Forces, employed as an aircraft mechanic. During the course of his employment, he alleges that he was exposed to various dangerous chemicals and solvents on an ongoing basis which resulted in him suffering skin rashes, sleep disturbance, fatigue, mood changes, and short term memory difficulties, yellowness of the skin and eyes and bloody diarrhoea on a number of occasions. The Plaintiff maintains that he was discharged from the Defence Forces because of these health difficulties and is now on an invalidity pension. He is 42 years old.

The Plaintiff's claim was that the Defendants failed to provide him with a safe system of work, failed to provide him with appropriate training for the safe handling of chemicals and solvents that he was required to work with and that necessary safety measures to protect him from the ill – effects of these chemicals and solvents were not implemented.

The Defendants filed a full Defence which pleaded, *inter alia*, that the Plaintiff's claim was statute barred. The Defendant's also issued a Notice of Motion seeking the following reliefs: -

(i) An Order striking out and/or dismissing the proceedings pursuant to the Statute of Limitations Act 1957 – 1991 (as amended) and/or the inherent jurisdiction of this Honourable Court on the grounds that the Plaintiff's claim is statute barred as against the Defendants and is bound to fail.

(ii) In the alternative, an order pursuant to Order 25 and/or Order 35 and/or Order 36 of the Rules of the Superior Courts and/or the inherent jurisdiction of this Honourable Court directing that the questions, as to whether the Plaintiff's action as against the Defendants is barred by the provision of the Statute of Limitations 1957 as amended, be adjudicated upon by this Honourable Court as a preliminary matter.

Mr. Justice Meenan was satisfied that as of January 2009, the Plaintiff had the knowledge required under Section 2 of the Statute of Limitations (Amendment) Act 1991 to start the two year limitation

period running and that this period expired in January 2011. As the proceedings were not issued within that period, he ruled that the Defendants were entitled to the reliefs as sought in their Notice of Motion. Accordingly, the reliefs were granted.

## Anne Kurtz –v- Dunnes Stores [2019] IEHC 44

This matter involves a Plaintiff's motion for discovery documentation. Ms. Kurtz has brought a claim for personal injuries* suffered as a result of a trip and fall in a store of the Defendant. The Defendant made discovery of the accident report form but refused to make discovery of an internal investigation form and certain witness statements on the basis of litigation privilege. Ms. Kurtz brought a motion seeking an order compelling discovery of the refused documentation.

Mr. Justice Max Barrett refused the relief sought. In his judgement, he referred to the issues raised in the case of *Artisan Glass Studio Ltd –v- The Liffey Trust Ltd [2018] IEHC 278* and the four matters of relevance when it comes to assessing whether litigation privilege arises over particular documents: -

1. **Was litigation reasonably apprehended at the time the documents in question were brought into being?**

   In this case, the court's answer to this question was yes.

2. **Were the documents in question brought into being for the purpose of the action now comprised in this litigation?**

   In this case, the court's answer to this question was yes.

3. **Were the documents created for more than one purpose?**

   In this case, the court's answer was no. However, if the documents were created for more than one purpose, the documents will be protected by litigation privilege if litigation was the dominant purpose for the creation of the documents.

4. **Has the party claiming privilege discharged the onus of proving that the documents are protected by privilege?**

   The Defendant had placed affidavit evidence before the court that discharged this onus.

This case is a good reminder of the principals applicable to litigation privilege.

## A Minor –v- The Irish Prison Service and The Minister for Justice and Equality Dublin Circuit Court Record Number: 2017/01605

This case illustrates how injuries suffered during the course of employment are not always physical injuries as a result of some sort of accident. It is also an unusual case in that it is a personal injuries matter which affected an employee's family, as well as the employee himself.

This case involved an 11 year old schoolboy who had become a carrier of latent tuberculosis as a result of an infection suffered by his father during the course of his employment as a prison officer in Cloverhill Prison. The prison had an outbreak of tuberculosis in 2010 and the schoolboy's father had been diagnosed with tuberculosis in 2015. The boy himself was diagnosed with tuberculosis in 2016 and had to undergo treatment for a period of 6 months. He made a full recovery but he remains at risk of developing full tuberculosis. The young boy's mother also developed tuberculosis. The matter was listed for ruling of a settlement offer of €35,000.00 which Judge Eoin Garavan approved.

## Geraldine O'Grady –v- Abbott Ireland [2019] IEHC 79

The Plaintiff in this case brought a personal injuries case for injuries suffered during the course of her employment. Ms. Justice Eileen Creedon dismissed the case, the court being satisfied that the incident was caused by inadvertence on the part of the Plaintiff.

On or about 24th July 2014, the Plaintiff was at work when she stepped into a lift and the door of the lift struck her on the head. She suffered a right haematoma to the right temporal area of her head. She also suffered with tenderness over the right temporal area, post-concussion syndrome, post-traumatic stress disorder, flashbacks and sleep disturbance. The Plaintiff claimed that the Defendant failed to provide her with a safe place and/or safe system of work. The Plaintiff claimed that the lift did not emit a verbal warning or some other type of warning that the doors were closing, that the doors were an excessive width and a danger to users and that the sensors of the lift were not properly placed and/or did not function correctly. However, after extensive engineering evidence, the court noted that there was no malfunction of the lift and that it had been accepted by both sides that the voiceovers on lifts are not a legal or industry requirement and that only about 40% of lifts nationally have voiceover warnings.

The court gave great consideration to the Occupiers Liability Act 1995 and the Safety, Health and Welfare at Work Act 2005 and the regulations applicable thereunder.

It was noted that the Plaintiff was classified as a visitor for the purposes of Section 3 of the Occupiers Liability Act 1995 and that in order to succeed in an action for breach of Section 3, the Plaintiff must establish that the feature on which she came to harm was a danger in respect of which the Defendant failed to take reasonable care in all of the circumstances. The court was satisfied that the Defendant in this case had discharged it's obligations to exercise reasonable care to ensure that the Plaintiff did not suffer injury by reason of any danger on it's premises.

Having considered the duties of the Defendant as an employer under Section 8 of the Safety, Health and Welfare at Work Act 2005 as well as the reasonably practicable test under Section 2 and the relevant regulations, the court was satisfied that the Defendant had fully discharged it's duties as an employer and was not in breach of the reasonably practicable test by it's failure to maintain voiceover warnings for the lift.

This judgement is a good read for it's analysis of the principles of prevention, risk elimination and risk reduction in the workplace.

# Notice for Particulars in Personal Injury Cases

When a Personal Injuries Summons has been issued and served, the Plaintiff's solicitors will then be served with the Memorandum of Appearance and, most likely, a Notice for Particulars by the solicitors for the Defendant(s). A Notice for Particulars is essentially a long list of questions seeking further information about the Plaintiff's claim for injuries.

Order 19 Rule 7 of the Rules of the Superior Courts sets out the procedure for raising further particulars: -

- Order 19 Rule 7 (1) sets out that further and better particulars may be ordered.
- Order 19 Rule 7 (2) sets out that a party may apply for particulars by letter before applying to the court for an order for same.
- Order 19 Rule 7 (3) sets out that the particulars will not be ordered to be delivered before the delivery of the Defence unless the court is of the opinion that the particulars are necessary or desirable to enable the relevant party to plead or ought to for any other special reason to be so delivered.

The Defendant will usually expect Replies to Notice for Particulars to be delivered within 21 days and once received, the Plaintiff's solicitors should set about gathering the information sought. While the Defendant solicitors are entitled to apply to the court by way of notice of motion to compel replies, it would be unusual for them to do so without first sending a warning letter to the solicitors for the Plaintiff. The Defendant solicitors will usually hold off on delivering the Defence until such time as Replies to Notice for Particulars have been received, despite Order 19 Rule 7 (3).

Replying to a Notice for Particulars is a very important part of the personal injuries litigation process. The Plaintiff must deliver correct and accurate information when replying to particulars. In the case of *Vesey –v- Bus Éireann [2001] 4 IR 192* and *Shelley-Morris –v- Bus Átha Cliath [2002] IESC 74*, the Supreme Court recognised that while a Plaintiff may rely on the advice of legal professionals and other experts for providing Replies to Particulars, none of these professionals are responsible for the factual content. Accordingly, it is the Plaintiff who is responsible for the Replies to Particulars being factually correct. In addition, it is the Plaintiff who will swear an Affidavit of Verification on oath, verifying the contents of the Replies to Particulars. Accordingly,

the Plaintiff needs to be accurate, truthful and give full disclosure in relation to previous and subsequent accident, injuries and personal injury claims. This is imperative.

Sometimes it can seem that particulars are raised and replied to in personal injuries cases, as a matter of course, rather than out of necessity. Where this is the case, it can be out of convenience to keep a case progressing through the litigation process, as quickly as possible. However, we as practitioners must remember the purpose of raising and replying to particulars. It is very clear from the cases of *Cooney –v- Browne [1984] I.R. 185*, *Mahon –v- Celbridge Spinning Company Limited [1967] I.R. 1*, *McGee –v- O'Reilly [1996] 2 I.R. 229* and *Armstrong –v- Moffatt [2013] IEHC 148* that particulars will be ordered: -

(i) In the interests of fair procedures;
(ii) To ensure that a party to the proceedings will not be surprised by the case that has to be met at trial;
(iii) To ensure that a party will know in advance, in broad outline, the case that has to be met at trial.

Accordingly, a Notice for Particulars must relate to matters specified in the Personal Injuries Summons. It is not a substitute for oral evidence and it is not an opportunity to interrogate the Plaintiff.

The Plaintiff has a statutory obligation under Section 11 of the Civil Liability and Courts Act 2004 to provide the following information to the Defendant, when requested: -

- Details of any personal injuries action brought by the Plaintiff in which a court made an award of damages.
- Details of any personal injuries action brought by the Plaintiff which was settled or withdrawn.
- Details of any injuries sustained or treatment administered to the Plaintiff that would have a bearing on the personal injuries to which the personal injuries action relates.
- The names of any persons from whom the Plaintiff received such medical treatment.
- Documents of such class relating to any earnings or other income in respect of which the Plaintiff is making a claim, e.g. documentation from the Revenue Commissioners or the Department of Social Protection.

If the Plaintiff does not comply with the above, the court may direct that the personal injuries action shall not proceed any further until the request has been complied with or dismiss the action, if it is in the interests of justice to do so. The court shall also take such failure into account when deciding whether to make any order as to the payment of costs. The court may also draw inferences as appear proper.

The judgement of Mr. Justice Hogan delivered on 28th March 2013 in the case of *Agnes Armstrong –v- Sean Moffatt and Thomas Moffatt T/A Ballina Medical Centre and Maura Irwin [2013] IEHC 148* is a very good reminder of what a plaintiff is obliged and not obliged to reply to in a Notice for Particulars. Mr. Justice Hogan makes it very clear that the Defendant is entitled to particulars pursuant to Section 11 of the Civil Liability and Courts Act 2004 as set out above. He indicates that particulars sought must relate to a matter stated in the Personal Injuries Summons. He indicates that particulars of witnesses to be called by a party will not be ordered save in exceptional circumstances. In relation to medical treatment, he also indicated that what matters rather are the consequences which the Plaintiff claims she suffered from the accident, as distinct from any hospital treatment. This is a judgement which we all should be reading time and time again to remind ourselves of the purpose of raising and replying to a Notice for Particulars.

While it may be convenient and expedient to simply furnish all replies to a Notice for Particulars, this is not best practice. Plaintiff's solicitors need to ensure that the Personal Injury Summons is pleaded properly and in accordance with Section 10 of the Civil Liability and Courts Act 2004. This will reduce extensive particulars being raised by Defendant solicitors. When drafting Replies to a Notice for Particulars, Plaintiff solicitors need to always be cognisant of Order 19 Rule 7, Section 11 of the Civil Liability and Courts Act 2004 and the principles laid down in the case law above.

## Litigation Privilege

In the case of Charmaine Colston and Dunnes Stores being a judgement of Ms. Justice Irvine delivered on the 28th February 2019 IECA 59 the issue of Litigation Privilege was considered a detail. The

case is extremely interesting in the way that the judgement looked at the issue of Litigation Privilege.

In this case paragraph 30 was carried out that the Courts have set out that more is required than a balled assertion made in an Affidavit of discovery that the document or documents were prepared in contemplation of legal proceedings or were created in the course of and for the purposes of defence within proceedings the case of Woori Bank –v- KDB Ireland Limited 2005 IEHC 451 was quoted where it was stated at paragraph 6

*"…. I accept the submission that the decision of the Supreme Court in Gallagher -v- Stanley 1988 2 IR 267 means that the purpose of the document is a matter for objective termination by the Court in all the circumstances and does not only depend on the motivation of the person who caused the document to be created. Further…… the Court should not make a finding that the dominant purpose of the document is litigation based on a balled assertion, even on Affidavit, of such motivation or intention [on the part] of the creator of the document"*
The case of Rawlinson and Hunter Trustees –v- Ackrus 2014 EWCA 136 is a case where Tomlinson L J remarked that paragraph 13.

*"The Court will look at "purpose" from an objective stand point, looking at all relevant evidence including evidence of subjective purpose….. The evidence in support must be enough to show something of the deponent's analysis for the purpose for which the documents were created, and should refer to such, contemporary material as is possible without disclosing the privilege material"*

## Personal Injury/Book of Quantum

In the case of Declan Homan and Fretemar Limited 2018 IEHC 218 Mr. Justice Cross in a judgement delivered on the 20th April 2018 expressed concerns about the revised Book of Quantum and its objectivity given that a significant proportion of the statistics that go into it are compiled from insurance company records. In the judgement he set out that it was unclear as to whether an insurance companies assessment of the amount of a reduction a defendant is allowed, given liability factors may not be the same as that which a plaintiff's advisors would suggest. His Honour pointed out that no

satisfactory explanation had been given to him of the methodology employed in the current Book of Quantum which will allow him to have great confidence in it.

## Safety Health and Welfare at Work Act 2005- Training

In a case of Declan Homman and Etmar Limited 2018 IEHC 218 Mr. Justice Cross referred to Section 8 of the Safety Health and Welfare at Work Act 2005 which requires every employer to ensure, so far as is reasonably practical the Safety Health and Welfare of his or her employees and pointed out that this duty was defined by Charlton J in Quinn –v- Bradbury 2012 IEHC 106 as being……

*"To take such measures as are reasonable and practicable in the circumstances….. in order to ensure that no employee is injured while at the work place…… the ordinary duty of care can be fulfilled by guarding against hazards; of a warning (in the rare circumstances where a warning is sufficient); by the provision of proper plant and equipment; by appropriate training; by requiring the implementation of appropriate safety measures with commensurate discipline; and by establishing and enforcing a sense of awareness as to what may occur should the procedures and precautions for avoiding accidents not be followed. The Court accepts that a matter of common law and in accordance with Section 8 (2) (i) of the Act of 2005 that some hazards can never be totally eliminated. The aim must be to make a hazardous task as safe as it can reasonably be and practicably be made."*

This is an important restatement of the law and one which employers do need to take account of for the purposes of looking to minimise exposure to accidents by their employees.

## Reviewing WRC Decisions and Decisions of the Labour Court

In this newsletter we do review various decisions of both the WRC and the Labour Court. As a matter of policy we do not look at who made the decision in giving our commentary. In reviewing the decisions to comment on we redact the names of Adjudication Officers and those of the Labour Court. Our comments should never be regarded as criticisms of any particular individual.

# Presenteesism

This is becoming an issue for many professional employees.
Billing deadlines mean that some employees are required to remain, effectively in the workplace, to clock up time so that billing deadlines can be achieved.

There is also this issue that some employees are effectively encouraged to believe that unless they are constantly available, in the workplace that it shows that they are not loyal to the company or firm. This means that employees effectively feel forced to remain in the workplace both coming in early and leaving late.
This is compounded by employees being available on the mobile phone and by e-mail very early in the morning or late at night.

It is argued by some that because in a country like Ireland we have international clients based in the Far East or the US that there is a requirement to service those clients. In the UK many firms are organised on the basis that there are employees who come in later in the day and go home after working an 8 hour or 9 hour shift so as to be available to service those clients. In Ireland the servicing on these clients invariably is by individuals who are required to be in early in the morning to service Irish and UK clients and have to be there late at night to service those in the Far East and the US.

Something is going to break. Firstly this form of engagement with employees is clearly contra to the Organisation of Working Time Act. Secondly this type of working practice can lead to serious health issues. The third matter is that employees invariably are now saying

that they are not prepared to work these hours. They are leaving for firms who are more work life balance friendly and family friendly. Even those firms who seek to have this lengthy working day (and night) are now having to change simply because employees are saying NO.

We do need to have a sensible discussion on this issue.
Employees who are constantly in the workplace, who are not taking their holidays, who are not getting proper rest breaks ultimately will not be as efficient and effective as those who get at least the minimum rest and break periods. Loyalty to a company or firm does not mean that somebody has to be present all the time.

The reality is this approach is undertaken normally by the larger companies and firms. It is particularly prevalent in the professional service industries. The reality is when these ways of requiring employees to work are challenged that these cases do not come on for hearing. The reason is that if they did the potential for the WRC inspectorate to undertake an investigation and to put in a compliance notice on the employer would be such that most employers are going to settle these cases rather than run the risk of a compliance notice.

It is going to be interesting to see in the coming months how these matters develop. Maybe one of them will run-though we doubt it. This is a problem which is consistently being swept under the carpet simply by employers throwing enough money at the claims to make them go away. The unfortunate reality is that these are serious breaches of health and safety law which are effectively just being bought off.

## Dismissal of a Senior Manager

In ADJ 11276 the AO in this case awarded the sum of €60,000 to the employee determining this was a fair figure.
The case is interesting. It appears that the AO found that there had been interpersonal difficulties. The employee was dismissed on the grounds of redundancy. The AO found that there was no redundancy. This was a Multi-National company and no redundancy situation arose.

The issue of what could be called by us Bogus Redundancy is a vehicle often used, by some employers, to terminate an employee. Where there is such a termination on the grounds of redundancy and no redundancy exists then in our view the strong argument in such circumstances that the employee should be reinstated.
While the amount awarded in this case was high the AO has not set out what level of compensation was awarded on the basis of the loss which the employee sustained. She was a customer experience manager.

The Unfair Dismissal Legislation only allows compensation to be awarded for economical loss. Equally an employee is expected to seek alternative work. However where effectively there is a Bogus termination then in those circumstances it would appear that reinstatement is a possible appropriate remedy.

The decision is a good decision. It sets out the rational but unfortunately it is a case where the basis of the calculation of the compensation has not been set out. It would have been useful if it had been done. The full economical loss of the employee with her for having to obtain new employment and one where the employee is seeking compensation rather that reinstatement then that would send out a clear message.

## Disciplinary Hearings/Fair Procedures

In the case ADJ 9113 the AO in this case was dealing with a claim against a small family business. The business did not have an external HR involvement.

The AO held that the dismissal was fundamentally unfair to the claimants as the person hearing the case had declared her antipathy towards the employee's commitment to the mediation process and been involved in a Disciplinary process where the employee had made complaints by way of a former complaint against the person hearing the disciplinary matter.

The AO pointed out that an employee was entitled to a fair, unbiased and objective process which was not afforded to her. The AO held that this made the dismissal procedurally unfair. The AO in this case held that the employee had failed to engage with the respondent and this

contributed to her dismissal and took this into account in awarding compensation of €4,000.

It is however important that employers make sure that they have Fair Procedures as otherwise claims can go against them.

## Continuity of Service for an Unfair Dismissal Claim

An employee must have 12 months continuous service to bring an Unfair Dismissal Claim.

In case ADJ 7622 the AO had to consider this issue. The AO in this case looked at the definition of Continuity of Service set out in the First Schedule of the Minimum Notice and Terms of Employment Act 1973. In particular the AO looked at the provisions of sub section 6 which provides that the continuous service of an employee in his employment should not be broken by the dismissal of the employee by his employer followed by the immediate re-employment of the employee. The AO in this case held that this is what had actually happened.

In this case compensation of €1,300 for the economic loss was awarded.
While the value of the claim is not substantial the principle set out is important.

## Absence Record – Unfair Dismissal

In case UDD 191 the Labour Court considered the case of Children's University Hospital and Mark O'Reilly. In that case the Labour Court looked at the question as to whether the decision to dismiss fell within the "band of reasonableness" and whether it was proportionate. The Court considered that the steps taken by the employer to deal with the absenteeism in particular the fact that the employer operated a clear step by step disciplinary process and that as a result the claimant was given opportunities to improve his attendance record and indeed was warned of the consequences of not doing so after he received verbal,

written and final written warnings suggested to the Court that the Respondents decision to dismiss was proportionate to the gravity of the complaint. The Court held the fact that the employee was afforded opportunities to appeal each outcome strengthens the Courts view in this regard that it fell within the band of reasonableness. The Court concluded that the decision to dismiss was fair.

In this case there were issues relating to the disciplinary process as regards the investigation but the Court held that the investigation consisted of nothing more than the compilation of facts which were not in dispute. The Court did however point out that if the Court had found that the claimant's right under natural justice had been breached then irrespective of any other consideration the dismissal would have been rendered unfair.

This is a useful case by the Labour Court in setting out the law in this area.

As pointed out by the Labour Court it is not desirable that a person involved in the investigation should also be involved in the disciplinary process.

## Use of CCTV and Covert Recording

Case ADJ 12455 deals with this in some length. Clearly the issue of CCTV being used other than as specified in a disciplinary code is a significant issue. It is questionable whether such CCTV can be used in a disciplinary process in such circumstances.

The second issue however is the issue of covert recording by an employee.

There is a serious issue as to whether covert recording without the consent of the persons who are being recorded can be used or referred to in proceedings in the WRC.

There is a determination from the CJEU where there was covert CCTV recording of employees which was used for the purposes of dismissing those employees for stealing. The CJEU in that case did not preclude the use of such recordings for grounding disciplinary sanctions. Therefore it may well be that both covert CCTV recordings or recording

outside the remit of anything contained in a disciplinary process or in a staff handbook along with covert recording by an employee may all be allowed to be used. Saying this in the particular case in the CJEU the CJEU awarded a sum of €5,000 to each employee for breach of their data protection rights.

Where an employer would record on CCTV and use it for a purpose outside of that specified in the staff handbook but where the recording was known to be taking place an employee may have greater difficulty in arguing against any breach of the GDPR legislation. However if an employee does record their employer or members of the employer's staff who are undertaking a disciplinary process it may well be that those individuals may well have a claim against the employee themselves for breach of their rights.

This case highlights a particular issue which is now coming up which is that effectively there is recording taking place by both employers and by employees and is being used in both disciplinary hearings and in cases.

There does need to be a lot more certainty in the law as to how these matters can be used and it would be useful, within the WRC, that there would be clear and definitive guidelines in relation to running cases.

There is no criticism of the AO in this case. What is needed is clear and definitive guidelines for all those involved in cases so that there is clarity as to what the law is in relation to these matters being referred to in cases.

## Unfair Dismissal – Fair Procedures

In ADJ 13589 the AO in this case has absolutely correctly pointed out that where there is a lack of fair procedures namely advising an employee that they could be subject to dismissal, failing to advise them as to their right of representation and failing to follow fair procedures generally that in those circumstances a dismissal will be unfair regardless as to the substantive issues. In this case the AO held that the employee had contributed to his own dismissal by his own actions but still awarded a sum of €1,500.

Unfair dismissal cases are decided on the basis of fair procedures.

If fair procedures are not followed then any defence by the employer is effectively limited to the argument that the employee either wholly or partly contributed to their own dismissal. It does not however take away from the fact that the employee will have been unfairly dismissed.

## Unfair Dismissal – Mitigating Loss

Case UDD 1911 being a case of Synergy Security Solutions and Dusa is interesting. The Court in this case held that the evidence tendered by the employee to the effect that he had been unable to find alternative work in the period to the date to be lacking in credibility and cogency. The Court pointed out that the employee was well educated and experienced. The Court pointed out that they were aware from their own knowledge that there are many current vacancies in the job market in the Security Industry.

The Court was not satisfied that the complainant had made a reasonable effort to mitigate his loss and on that basis marked the compensation payable to the complainant at nil.

This case is an important reminder for employees that they must seek to minimise their loss.

## Unfair Dismissal/Redundancy

In case ADJ 15257 the AO in this case awarded the sum of €20,000 gross being approximately 38/39 weeks of pay to the claimant. However the employee had already received the sum of €16,000 by way of Redundancy. The AO states that the final amount payable as a result of this case would therefore be €4,000 gross if the Redundancy Payment is allowed to remain with the complainant.

The AO stated that the proper taxation of the award was to be considered in consultation with the Revenue Commissioners.

In a case where the Adjudication Officer has made an award of €20,000 then in those circumstances the Redundancy Payment as it is has been taken as a credit is in fact a credit under the Unfair Dismissal Legislation and therefore would be subject to taxation in the normal way as the employee had been employed from 2003 until 2018 being a 15 year period the sum she received was Statutory Redundancy. Statutory Redundancy is exempt from tax. However that award under the Unfair Dismissal Legislation is subject to exemptions and does not get the total exemption in this case virtually all of the award would have been taken into account as to be tax free but effectively it is not the sum of €4,000 which is to be taxed but the €20,000.

When the WRC was being set up we had contended that they should be dedicated individuals, from the Revenue, available to the WRC to assist them giving rulings in relating to the tax treatment of awards. This is supposed to be a world class service. Therefore as they consistently contend that these matters can be dealt with without the benefit of legal representation Adjudication Officers should be in a position to detail the tax treatment of any award subject of course to a right of appeal to the Revenue by the employer or the employee. Putting both employers and employees to the cost of getting tax advice and dealing with the Revenue we would contend an unnecessary expense.

As this was an Unfair Dismissal case the loss should have been the net loss.

## Redundancy Payment Acts

We have noted that we have been critical of some decisions in the past. We are now seeing more decisions coming from the WRC which set out the start date, finishing date and the weekly rate of pay and in appropriate cases any break in service which would be applicable. This is very helpful if a claim has to be made to the Department of Social Protection under the Social Insurance Fund.

## Redundancy

In ADJ 14931 the AO in this case looked at the issue of Redundancy. The approach by the AO makes a great sense in this case the AO stated;-

*"In circumstances where one employee has been selected for Redundancy from a workforce in excess of 60 staff there is an onus on the respondent to engage meaningfully with the staff member to apply a fair and transparent matrix for selection for Redundancy and to consider all alternatives to Redundancy"*

In this case the AO was not satisfied that the respondent presented compelling evidence to demonstrate meaningful engagement with the claimant, demonstrate that all viable alternatives to Redundancy were explored and it is not disputed that no transparent matrix was adopted for selection for Redundancy. The AO held that on the balance of probabilities the claimant was unfairly selected for Redundancy. This is a very useful decision, by the AO in setting out how employers should address matters.

## Constructive Dismissal

In case UDD 1910 being a case of Ryan, Cannon and Kirk Account Services Limited and Kneite the Labour Court again helpfully set out the law in relation to this issue.

The Labour Court set out that Section 1 of the Unfair Dismissal Legislation envisages two circumstances in which a resignation may be considered a Constructive Dismissal. The Court pointed out that if this arises where the employers conduct amounts to a repudiatory breach of the contract of the employment and in such circumstances the employee will be entitled to resign his or her position. The Court pointed out that this is often referred to as the contract test. The Court pointed out that this requires that the employer be guilty of conduct which is a significant breach going to the root of the Contract of Employment which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further

performance as held in Western Excavating (ECC) Limited –v- Sharp 1978 IRL 332. The Court pointed out that secondly there is an additional reasonableness test which may be relied upon either as an alternative to the contract test or in combination with that test. The test asks whether the employer's conduct in relation to his or her affairs in relation to the employee was so unreasonable that the employee cannot be fairly expected to put up with it any longer and if so he/she is justified in leaving.

The Court the set out that in normal circumstances an employee who seeks to evoke the reasonableness test in such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the Contract of Employment before taking the step to resign. The Court quoted the case of Conway -v- Ulster Bank Limited UDA 474/1981.

The Court did point out that there can be situations in which a failure to give prior formal notice of grievance would not be fatal and referred to the case of Liz Allen –v- Independent Newspapers 2002 13 ELR Moy Mogg Limited 2002 13 ELR 261 and others. The Court in this case pointed out that they were not satisfied that there were factors present which might excuse the complainant's failure to either avail of an appeal, to raise a grievance, to opt for mediation or to seek implementation of an investigators recommendations.

Our view in relation to this case is that the Court has very clearly and properly set out the law on this issue. Employees often resign without going through the grievance procedures. It is very clear from this and other decisions that the employee will normally be required to go through the internal procedures unless there are very strong grounds not to do so.

It would be our view that before any employee resigns appropriate advice from an Employment Law Solicitor should always be obtained. The reality of matters, as in this case is that the vast majority of these cases are lost by employees. The reason for same is more often than not failing to go through the internal procedures.

## Constructive Dismissal - A Claim Which Was Won

In this case the AO looked at the definition of a dismissal in Section 6 particular and in looked at sub section 1 which defines Dismissal of an employee where there is a Constructive Dismissal. The AO in this case had helpfully pointed out that the employee had provided documentary evidence of the breach of the Terms and Conditions of his Contract. The employer failed to discharge travel expenses and travel pay, and a failure to discharge wages, annual leave and public holidays. The employee had made repeated attempts to resolve the complaints with pay roll, HR and the operations manager without success over a period of 6 months prior to his resignation. The AO pointed out that the respondent failed to comply with the contractual terms and to act reasonably in addressing the issues in compliance with the Code of Practice SI146 2000 Industrial Relations Act 1990 ( Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order 2000 Section 42 of the Industrial Relations Act 1990. The AO held that the breach of the contract was one that was a significant breach going to the root of the Contract of Employment and relied on the case of Western Excavating (ECC) ltd -v- Sharp 1978 IRLR 27.

## Employment Equality Acts 1998 to 2015

In the case of Teresa Cross (Shannahan) Croc's Hair & Beauty and Helen Ahern EDA 195 the Labour Court has helpfully set out the law relating to the issue of the dismissal of a pregnant employee.
This case got a lot of publicity in the papers but we are limiting ourselves to the issue in relation to the protection of women during pregnancy.

The Labour Court pointed out that it had been made clear by the European Court of Justice that since pregnancy is a uniquely female condition less favourable treatment on grounds of pregnancy constitutes direct discrimination on the grounds of gender. The Labour Court referred to the case C-177-88 Dekker.

The Court pointed out that equality on the grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union.

The Labour Court has helpfully pointed out that the Charter is now incorporated in the treaty of the functioning of the European Union by virtue of the Lisbon Treaty and has the same legal standing as all treaties. The Court pointed out that it can be properly regarded as part of the primary legislation of the European Union.
The Court pointed out that discrimination on grounds of pregnancy constitutes direct discrimination on the grounds of sex in line with Directive 2006/56/EC and in particular referred to Article 2.2 (c) in stating that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 93/85/EEC constitutes unlawful discrimination.

The Court also referred to the case of C-406/06 Paquay that less favourable treatment on the grounds of pregnancy comes within the ambit of both the Equal Treatment Directive and the Pregnancy Directive.

The Court helpful pointed out paragraphs 45/47 of the Paquay decision.

In this case the Court found in favour of the employee and awarded a sum of €20,000.

## Claims under the Employment Equality Act, 1998

In case ADJ 12575 the AO in this case looked to see whether there was in fact a contract of employment as between the employer and the employee or was it a contract for services as between the self-employed contractor and a person to whom those services were provided.

The AO in this case looked at the issue of mutuality of obligation which was applied by the High Court in the case of Minister for Agriculture & Food – v – Barry & Ors 2008 IEHC 216 and the

enterprise test which was adopted by the Supreme Court in the case of Henry Denny & Sons – v –Minister of Social Welfare 1998 1 IR 34. With regard to the mutuality of obligation test the AO set out the decision of Mr. Edwards J who's stated:

*"There must be mutual obligations on the employer to provide work to the employee and the employee to perform work for the employer. If such a mutuality is not present, then either there is no contract at all or whatever contract there is must be a contract for services or something else, but not a contract of "services"."*

This case the AO held that the mutuality of obligation was not present.

We certainly do not criticise this case. It would appear that when you look at the Irish Legislation that certainly this decision is correct. The issue then however is when you now look at the Directive which is now would have to be effectively applicable directly even against private employers. It comes down to whether an individual in this situation would be classified as a *"worker"*. The definition of a worker is clearly more extensive than that of an employee. For example, in the case of a self-employed contractor who is a female who is dismissed because they become pregnant CJEU have held that the individual is entitled to the benefit of the Employment Equality Acts.

It is going to be interesting to see how this area of the law develops.

## Disability under Employment of Equality Legislation

In case ADJ 10769 the AO in this case quoted the ECJ Case in HK Denmark acting on behalf of Ring –v- Dansk Almenny TTigt Boligselskab case C-335/11 where the ECJ sought to differentiate disability from sickness.

*"Disability……must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or physiological impairments which interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and*

*the limitation is a long term one…… on the other hand, an illness not entailing such a limitation is not covered by the concept of discrimination."*

The respondent in this case argued that medical reports from relevant specialists/GPs, were necessary to satisfy the probative Burden of Proof outlined this Section 85A.

## Payment of Wages Act Claims

In case ADJ 10415 the AO in this case in the decision admitted that it was beyond the legal competence of the Adjudication Officer ("AO") in determining the amount to be awarded to the employee.

This case is interesting in that the award under the Payment of Wages Act for a six month period of time amounted to €39,000. The AO correctly held, in our view that the legislation provides that the AO awards the sum net of tax. The AO has stated that it is beyond the legal competence of the AO to make that determination and therefore awarded the gross sum less any lawful deductions.

We must commend the AO on their honesty in relation to this matter. However does raise a significant legal issue. The obligation is to award the net sum not a gross sum subject to lawful deductions.
There is an anomaly between the Payment of Wages Act and the Taxes Acts. Under the Payment of Wages Act there is requirement to make any award net. Under the Taxes Acts this sum is treated as a gross sum and is then taxed further. This may appear unfair but that is the way the legislation works.

It would be our view, and it is only our view that the net sum would be equivalent to the net sum which the employee would normally take home as take home pay. By this we mean if the rate of pay for the employee was say €4,000 per month gross and their normal net pay per month was €3,000 then that is their net pay and that is the amount which must be awarded not the €4,000 in a case where the claim related to one month's pay.

In cases of this kind there does need to be appropriate back up services for the AO's, within the WRC for this calculation to be done

on their behalf. If a case like this was in front of the Courts then any Judge in any of the Courts can require a solicitor, regardless as to whether it impacts on their client or not to advise the Court as to what the law on a particular issue is and by implication what the calculation of the net wages would be.

While we commend the AO for their honesty in relation to this issue the law on the issue is clear. The issue of gross and net loss of earnings is one which causes difficulties in the WRC and some legislation is gross and some is net. Appropriate resources need to be provided in the WRC to assist AO's in dealing with such cases.

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## Payment of Wages Act 1991

In ADJ 19283 while the amount involved is reasonably small the principle is possibly far more important.

The provisions of Section 6 (1) (a) provide for a payment of the net amount of wages. When this decision is reviewed it is clear that the AO has awarded the gross wages.

Where a case is brought under the Wages Act the law on it is very clear and it has to be the net wages.

This issue was also seen in case ADJ 15950 where holiday pay was awarded gross. The claim was taken under the Payment of Wages Act. Under the Payment of Wages Act the award should have been made net. If the claim for non-payment of Holiday pay had been brought under the Organisation of Working Time Act then the AO would have been allowed, under that Act to award the loss as a gross payment, not as a net payment and in addition the AO would have been entitled to award compensation. The compensation would have been exempt from tax. In the alternative the AO could have simply awarded compensation for breach of the Act, being the Organisation of Working Time Act.

The above cases have to be compared with ADJ 12978 in setting out the wages of the employee being the net wages and setting that out as the basis from making the award.

## Deduction of Wages

In ADJ 1701 the AO in this case held by the action of the employee in the mind of the AO had accepted the deduction.

What is interesting in this case is that there was no written record of a deduction.
Our understanding of the law, we may be wrong, is that for it to be a deduction the employer must notify the employee in advance and there must be a notification in writing. The employer claims that they mislaid the said document.

In cases involving a deduction from the salary of an employee the Burden of Proof is on the employer. Where the documentation is not available then in our view the employer will not be able to justify the deduction.

It will be interesting to see does this case go on appeal. The Labour Court has been very specific recently in setting out the law relating to deductions from wages.

## Annual Leave Entitlements

In case ADJ 9003 the AO in this case has given a very interesting decision which we would have some concerns with
.
In this case it was common case that the employee had been and continued to be on sick leave since the 30th August 2016. On the 11th June 2017 the employee issued a claim which was heard at the end of May 2018 and where a decision issued in February 2019.

At the date of the hearing the employee continued to be on sick leave.

The representative of the employer in this case argued that the entitlement to claim holiday pay on the return to work or when the employment terminated.

The AO in this case disagreed effectively in directing that the employee was entitled to 13 days annual leave for the leave year 1 April 2016 to 31 March 2017. The AO held that as the claim was brought within the relevant fifteen months period of time that the employee had this entitlement.

We would have a difficulty with this. Take a position of an employee who is out ill for the leave years ending 31 March 2018, 31 March 2019 and 31 March 2020. Let us assume for argument purposes that the employee issues a claim on the 2 April in each of those years. If the employee was then to return to work on say the 2 April 2020 the employee would be able to claim effectively 60 days holidays.

Our reading of the legislation, and we may well be incorrect, is that an employee who is on sick leave cannot claim holidays or pay until they return to work or the employment is terminated and the claim is then limited to fifteen months prior to that return to work or termination. The counter argument is under Section 20 (1) (C) of the Organisation of Working Time Act 1997 as amended by the Workplace Relations Act 2015 that because of the use of the words;-

*"within a period of fifteen months after the end of that leave year"*
That in those circumstances an employee is effectively able to claim for every year that the employee is out absent particularly if the employee has worked for any time during the relevant leave year.

This is an interesting decision by the AO. It is an issue which does throw up an interesting point. Hopefully this is an issue which will be ruled upon by the Labour Court. The reason for saying this is that it has generally been accepted that the entitlement is limited to fifteen months holiday pay being equivalent to five weeks pay regardless as to the length of time that the employee is out ill.

## Annual Leave – Compensation in the WRC

In case ADJ 10391 the AO in this case decided not to award compensation to an employee in relation to a claim for annual leave and public holidays.

The claim was taken under the Organisation of Working Time Act. The facts are relevant. The employee finished work on the 22nd March. A claim was lodged in August and a hearing took place in October 2018. Just before the hearing the employee was paid her outstanding annual leave and public holidays.

The AO in this case held that the claim was dismissed on the basis that the employer had paid the annual leave and public holidays prior to the date of the hearing.

We would not necessarily agree with this approach. The Organisation of Working Time Act provides for the said payment as and when they become due. Where an employee has had to issue proceedings to get the payment and the payment is paid just before the date of the hearing then it is difficult to see how the principles of in *Von Colson and Kamann* would not be issues which would need to be addressed. Of course if the claim was under the Payment of Wages Act then paying just before a hearing is sufficient as the Payment of Wages Act only relates to actual loss and there is no compensation element except in very limited circumstances. However there is an issue with employees having to bring claims to the WRC to be paid their annual leave. This is European legislation. There is a requirement to be persuasive of an employer going forward and it is difficult to see how this decision complies with that obligation.

## Rest Intervals at Work

For those interested in the law on this issue it is useful to look at a recent decision of an AO in case ADJ 16951.

The AO in this case has taken some time to deal with the legal arguments and the law on this issue which has been dealt with in some detail.

What is also very interesting about this case is that the AO in this case has relied upon the fact that the employer failed to maintain records of rest breaks at work in finding in the favour of the employee. It would be our view following the case C-684/16 that the law on this issue has moved on since this case was heard and that now the test is that not only that the employer maintains the said records but that the employer used due diligence to make sure the employees received their rest breaks at work.

This area of law is developing and it would be interesting to see how it does develop. Issues relating to case 684/16 are currently going to the Labour Court. Their rulings on this issue will be of a significant importance for AO's going forward.

## Protection of Employees (Part-Time Work) Act 2001

In the case of the National Concert Hall and John O'Reilly PTD 191 the issue of difference in treatment was dealt with before the Labour Court.

The relevant legislation is set out in Section 9 which provides the general right of part-time employees to equal treatment with comparable full-time employees in respect to conditions of employment. The Court pointed out in order to make out a claim under the Act an employee must first identify comparable full-time employee against whom the employee can show there is a difference in treatment.

The employee must also comply with the provisions of Section 7 subsection 3.

The Court pointed out that the combined effect of these provisions is that a comparable full-time employee for the purposes of the Act is a full-time employee employed by the same employer as the complainant. The Court pointed out that in the absence of a comparable employee employed by the same employer a person who comes in the terms of Paragraphs (b) or (c) of Section 7 (2) who is engaged in like work. The Court pointed out that while the term *"like work"* which is used in Employment Equality Legislation is not used

in the Act the Court pointed out that the conditions set out at Section 7 (2) and 7 (3) amount to the same thing.

The employer in this case relied on case on Wippell –v- Peek Cloppenburg 2005 ILR 2001.

In this case the Labour Court referred to the case of Dundalk Town Counsal and David Teather PTD 113 which dealt with the relevant of the Wippell in terms of determining a comparator.

The Court quoted from the decision at length but relevant extracts would be;-

*"The claimant in this case cannot decide for himself whether to work or not, also he is employed on the same contractual basis as the comparators except that he is engaged part-time and the comparators are engaged full-time. For these reasons alone, this case can be distinguished from Whippell."*

Furthermore, the reference in the Directive to the "*same type of Contract of Employment relationship"* cannot be in interpreted as meaning that a Contract of Employment for part-time work is of a different type to a similar contract for full-time work if the Framework Agreement were to be so construed it would defeat the very purpose of the legislation which is to allow for a comparison between those on full-time contracts and those on part-time contracts nor can it be interpreted as meaning that full-time and part-time workers that are engaged in a different type of employment relationship because the employer chooses to treat them differently. Rather, the reference in the Frame Work Agreement must relate to the difference between, for example, Contract of Service and a Contract for Services, or a Contract for Apprenticeship.

The Court also quoted a case Mc Ardle and the State Laboratory FTD 063 where the Labour Court considered arguments on the nominated comparator and held in that case;-

*"It is for the claimant to choose his or her comparator provided they meet the statutory criteria. The only test is whether the claimant and the comparator are engaged in like work"*

That case was appealed on a point of law and Laffoy J in that case in the High Court reported 18 ELR 165 upheld the fillings of the Labour

Court except for one point which was not relevant. In that case it was stated;-

*"I can see no error of law in the conclusion of the Labour Court that an established Civil Servant in the State Laboratory, who is engaged in like work with the defendant was "comparable permanent employee" for the purpose of Sections 6 because, on the basis of unchallenged findings of fact made by the Labour Court, such person fulfilled the criteria set out in Section 5 where a comparable permanent employee vis/a/vie the defendant as a fixed term employee. The Act expressly provides that the term "employee" include an established Civil Servant"*

This case is helpful in resetting out the law by the Labour Court.

## Protection of Employees (Fixed-Term Work) Act

In a case of Cork County Council and Sheehan FTD 193 a very usual issue arose. This is case which the employee lost.

In this case the employee was a permanent employee of the County Council. On a temporary basis the employee acted in an acting up position. The employee acted in the acting up position for a period which would, if they had not been a full-time employee of Cork County Council having entitled them to a contract of indefinite duration at that contract level.

The Court pointed out that the purposes of the Act is to offer certain protections to fixed-term workers who are by their status, possibly to be treated less favourably than permanent employees. The Court pointed out that is not a purpose of the Act to offer additional protection to permanent employees in respect of temporary arrangements within their contracts of employment.

The Court pointed out that the Court in Louth County Council and Paul Kelly FTD 1320 observed that a complainant who reverts to their substantive grade and who's employment continues at the end of the Fixed-Term assignment does not enjoy the protection of the Act.
A number of cases were quoted in this regard.

The effect of the legislation is respect of protecting Fixed-Term workers is quite limited when the cases, referred to in this decision are looked at.

Take a position of a person who joins a company straight out of university at an entry grade. They become a permanent employee with the full protection of the Unfair Dismissal Legislation one year later. After two years they are promoted on a Fixed-Term Contract to a higher grade. Let us assume that their entry salary is €25,000 and at the time they get promoted that salary has risen to €27,000. The Fixed-Term Contract they receive is at a much higher grade and they are paid €35,000 per annum while acting up. Let us assume that thereafter every single year the employee is given a new Fixed-Term Contract and it is properly renewed annually for a further period of twelve months. Over a period of fifteen years the person may well rise to a post that is a very senior position in the organisation. If the employer then decides to cease the Fixed-Term Contract even though the person maybe working for ten years in a senior role they can revert them back down effectively to the level they were at as two year entry level employee with a substantial reduction in salary with the employee having no protection whatsoever.

The law on this issue is very clear and the Fixed-Term Legislation is certainly open to be abused by any employer who wishes to do so by putting in place the proper scheme to effectively means that all promotions are on the basis of acting up under Fixed-Term Contracts. This may not be possible in every employment but certainly there would be employments where this would be possible.

## National Minimum Wage Act Claim

In ADJ 14676 the employee in this case issued a claim in respect of a period of 10 April 2017 to a date in July 2017 on the 14 May 2018. The AO in this case held that the complaint was out of time.
What is not set out in this decision is when the request under Section 23 was made.

We are assuming, in this commentary, that such a request was made. Under Section 23 a complaint can be made requesting a statement falling within the 12 month period immediately preceding the request.

The employee then has a further six months in which to issue a claim. On that basis if the claim issued within six months of the request under Section 23 been furnished then the employee would have been within time. In addition, the right to claim National Minimum Wage goes back for a period of six years.

Whereas the decision is not clear as to when the Section 23 request was made but clearly the six month issue is one which is regularly coming up in cases before the WRC which would not be in line with previous decisions of the Labour Court.

The issue of time limits under the National Minimum Wage Act is currently before the High Court awaiting a ruling and there are ongoing cases coming to the Labour Court shortly on this issue also.

## Penalisation under Safety Health and Welfare at Work

In case ADJ 13495 the case of Kelly T/A as Western Insulation and Algridas HSD 081 was quoted where the complainant was compelled to establish not only that he/she suffered a detriment of the type in subsection (1) but that detriment was imposed because of or in retaliation for the employee having acted in a manner referred to in subsection (2).

The case of Toni and Guy Blackrock Limited -v- O' Neill HSD 095 was also reported which is known as the "but for" test. This suggest that where there is more than one causal factor in the chain of events leading to a detriment complaint of the commission of a protected act must be an operative cause in the sense that "but for" the claimant having committed the protected act he would not have suffered the detriment. This involves a consideration of the motives or reasons which influence the decision maker in imposing the impugned detriment.

## Setting out a Decision which is very clear from a Tax point of view

In case ADJ 15324 we see a case where the Tax classification of a claim under the Organisation of Working Time Act has been set out with absolute clarity.

In this case the AO in respect to two claims awarded sums for the economic loss the AO separately set out a figure as compensation for the breech of the relevant sections.

Where this is done the economic element is simply subject to tax in the normal way. The compensation element as it relates to Legislation where there is an exception from tax where compensation for the breach of a right is set out applies here.

It is fantastic to see decisions set out in this way as it means if there is any issue for an employer or an employee in the future as regards to the tax treatment of the decision it will be absolutely clear to any tax practitioner what the tax treatment would be.

## Setting the Value of Claims

One issue which the WRC must be congratulated on is that the majority of AO's do seek to set out normally how a compensation figure is calculated.

ADJ 104481 is a very good example. In this case €20,000 was awarded. The AO in this case set out that the employee in the period to the hearing of the case had earned €6,000 and that the award would have been €26,000 being one year's wages less than what was earned making a total of €20,000.

It is very helpful that the AO's do this.

## Delay in Submitting a Claim

Case ADJ 15628 is another example of cases where employees are issuing claims out of time.

The normal Statutory time limit for issuing a claim other than under the National Minimum Wage Act, is six months which can be extended to twelve months.

As the AO in this case pointed out the Labour Court case in DWT 1244 confirms that ignorance of the law and ones rights is not a ground for seeking an extension and also quoted the case on Minister for Finance –v- CPSU and others 18 ELR 36 where Laffoy J stated that ignorance of the law can never be a reasonable ground for seeking an extension.

Unfortunately the Employment Law in Ireland is complex. There are strict time limits and this case again indicates the importance of employees getting appropriate advice.

## Amending Decisions

In ADJ 16770 the AO in this case referred to Section 39 (4) of the Organisation of Working Time Act 1997 in relation to the issue of an incorrect employer being named.

The AO set the legislation out at some length. The AO held that as the wrong employer had been identified that in those circumstances the AO had no alternative but to dismiss the claim rather than amend the proceedings.

The AO in this case has, it appears, taken the view that the relevant application has to go to the relevant authority which would be, in such cases the WRC and not to an adjudication officer.
In practice, in many cases, in the WRC technical amendments are made to claim forms by AO's.

On the basis of this ruling by the AO it would appear in future that such cases effectively have to go back to the WRC, to be amended and then reserved.

As there is a lack of continuity in the WRC on this issue it would again be useful if there was a clear and precise statement of practice by the WRC on this point.

***Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.***
****In contentious cases, a solicitor may not charge fees as a proportion or percentage of any award or settlement.***