Welcome to the March Edition of our Newsletter Keeping In Touch.

There are changes in the areas of specialism, which we operate in, which are becoming more evident.

In the personal injury area work play accidents appear to be on the rise. In the area of workplace accidents there is often an interaction with employment law. There appears to be an increased level of work related stress especially for senior executives and managers. Very often this is arising as a combination of the stress of the job and excessive working hours.

Our Reputational Risk and Crisis Management Practice area is seeing a significant increase in this area of work.

Medical Negligence claims appear to be significantly rising. This may be due, at least in part, to the lack of doctors and support staff in the HSE resulting in those staff members both Doctors and Nurses being under significant pressure.

In the employment law area while issues such as Unfair Dismissal and Constructive Dismissal are always there, there are an increasing number of cases involving claims under the Organisation of Working Time Act. It might be considered that these would be cases which would be brought by those on lower wages. Our experience now is that a lot of these cases are beginning to be taken by individuals at higher grades. These include individuals at senior management level. The issue of 24/7/365 availability and the requirement to be so available seems to be a driving force in these cases being taken.

With the recent election all Employment Legislation which was going though the Oireachtas has now ceased and will have to be reintroduced. This will include such issues as the gender pay gap legislation, the issue of tips for waiting staff as just two examples.

Finally we would like to congratulate our colleague Natasha Hand who qualified in 2019 but who on Thursday 13th February received her Parchment in the Law Society.

We would like to congratulate Natasha in this regard. Natasha works in our employment practice and is already a regular presenting cases in the Workplace Relations Commission and has appeared in the Labour Court.

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Out and About in February

On 6 February we had an article in Irish Legal News on structuring settlement agreements for tax purposes.

On 12 February Richard Grogan was interviewed on the Hard Shoulder with Ivan Yates on the issue of breaks at work.

On 15 February Michelle Loughnane was for the second year a judge at the National Negotiation Competition which was held in the Law Society.

On 27 February Richard discussed how failing to follow Health and Safety rules can lead to dismissal in Irish Legal News.

On 25 February Richard Grogan was interviewed on the Sean O' Rourke Show on RTE about the coronavirus.

On 28 February Richard was quoted in the Journal.ir on "Confusion over pay entitlements amongst both employers and employees if staff present with COVID-19.

Both Richard Grogan and Michelle Loughnane have been active on social media giving practical tips to employers and employees on protecting their health because of the coronavirus.

Michelle Loughnane is recording in the Law Society her lectures to PPC2 students on Employment Law.

Specialist Senior Executive Services

In 2019 we formed a specialist section in our firm to respond directly to the growing demand from senior executives and senior managers for a commercially focused approach to advice on their employment and directorships in what is a fast changing business environment.

Our approach is a solution based approach. Our services are directed solely to senior executives and senior managers. We do not act for corporate clients in this particular area of work so as to avoid any perceived conflict of interest.
We have found that our clients have reputational risk and crisis management issues which require immediate proactive services to produce the results they require.

These issues cover such matters as being the subject of a "without fault dismissal", to contract negotiation, and, exit negotiations. We also deal with forced and voluntary situations where a senior executive or senior manager is exiting an organisation.

Our approach has been one of providing a highly confidential and professional service designed to minimise risk and reputational damage for our clients.

As a specialist boutique firm we have the ability to engage other specialists on effectively a no name basis, when required, to provide additional services from pension planning to tax planning. As a boutique firm we have the ability to match the other service providers best suited to the particular circumstances of our clients. Other firms may have their own in-house services. We however believe that the best

service to our client is to ensure that the best specialist in the field dealing with the particular issues relating to our client is the best service that we can provide.

Our approach is to provide a solution bases service. That means working with our clients to identify and put in place the result which best represents their best interest.

We recognise that these situations cause significant stress and therefore have to be dealt with both in a business like way but also taking due regard for the difficult situation our clients are in.

This service was formed in 2019 when we recognised the increasing demand for our services in this area of law. We are very pleased with the results which we received in 2019 for our clients and we look forward in 2020 to continuing and expanding this particular service to our clients.

WRC Postponement Process Guidelines

The WRC in February 2020 have issued new guidelines.

Applications should be made to postponements@workplacerelations.ie and relevant supporting documentation will be required.

In the event that the application is made within five working days of the date of the hearing letter the application will be granted automatically provided the written consent of the other party has been obtained and provided to PRU with the request.

Applications submitted on this basis will be limited to one application per party. Any subsequent application will have to be made through the normal process with relevant supporting documentation.

Applications outside the five working day period will be processed under the current process. On receipt of such an application PRU will advise the other party of the request generally be email setting out in general the request reason but will not provide the party with the supporting documentation. This is because of the fact that they may be subject to GDPR.

That party will be given two days to furnish comments on the application. Email will be sufficient. PRU will process the request on receipt of this information. In the event that no comment is made on the application the application will be decided on the basis of the material provided.

In the event that the application is approved both parties will be subsequently notified of the outcome in writing advising that the hearing is postponed. Equally if an application is refused the hearing arrangements will be affirmed.

The current test is exceptional circumstances and substantial reason. This test will be adjusted the closer the application is to the hearing. Requests within five working days of the hearing will be assessed against the test of exceptional and unforeseen circumstances and substantial reasons.
The initial decision will be subject to review. However on a pilot basis the review will be conducted by an Adjudication Officer at a postponement review hearing in Lansdowne House. Applicants will have to attend in person to advance the review application. Only cases that have been processed for review will be dealt with at the hearing. Parties cannot bring any request for reviews of other cases.

The WRC will advise the applicant in writing of the date and time and venue for the review hearing. The WRC will notify the other side of the review and they can either attend in person or submit written observations. Review hearings will take place on Tuesday mornings.

This issue will be kept under review and an evaluation will be conducted at the end of October 2020.

Tax Treatment of Legal Fees

The Revenue have issued a new update of part 07-01-28 on the tax treatment of legal fees. These were updated in January 2020.

The Revenue have confirmed that legal fees paid on behalf of an employee will not be subject to the provisions of Section 112 or Section 113 of the TCA 1997 where all of the following conditions are met, namely:-

(A) The fees must be what are termed "legal fees" these are fees due to a member of the legal profession arising from representing the employee or director.
(B) The payment on behalf of the employee or director must represent a full or partial discharge of legal fees incurred by the employee only in connection with:-

(i) An investigation/disciplinary procedure instigated by his or her employer or;
(ii) The termination of his or her office of employment for example to recover compensation for loss of office or employment or;
(iii) An action taken by an employee or director against the employer for breaches of employment law by the employer.

It is important to note that legal or other fees incurred on other matters do not qualify for this treatment.

The fees must be paid directly by the employer to the employees/directors legal representative and only having had sight of the invoice relating to such fees being an invoice issued to either the employees/director or the employer by the employer/directors legal representatives.

Where the payment of legal fees is made under either a Court Order or where a Court Order does not apply under the specific terms of a settlement agreement between the employer and the employee.

The tax treatment of other elements of the settlement for example chargeable under Sections 112 or Section 123 TCA, 1997 or whether they qualify for relief under Section 192 ATCA 1997 will depend on the specific facts. We would strongly advise anyone dealing with the tax treatment of legal fees to read the relevant Revenue ruling.

Tax Treatments of Settlements

This issue arose in the case of an Appellant and the Revenue Commissioners 13 TACD2020. The decision is dated 18th of December 2019.

The Settlement Agreement provided in part 1;

without admission of liability the employer agrees to pay to the employee a total of €340,000 gross subject to statutory deductions as are required in respect of the following;

1.1.1 damages for personal injury €45,000
1.1.2 1.1.2 special damages €95,000
1.1.3 1.1.3 ex gratia termination payment of €60,000.
1.1.4 Contribution to legal costs of €140,000 inclusive of VAT referred to as "legal costs".

The Tax Appeal Commissioner considered Section 192 Taxes Consolidation Act 1997. And also Section 123 Taxes Consolidation Act 1997.

The Appellant contended that the sum of €95,000 was a compensation payment and claimed within the provision of Section 192A (6). The Revenue contended that the special damages of €95,000 represented remuneration.

The issue was looked at in relation to the exemption which applies.

It was held that the purpose of an award of damages is to place the injured party in a position as close as practicable to that which the party would have enjoyed but for the injury caused by the other party. General damages are broadly viewed as being for pain and suffering (non-pecuniary loss) and special damages as pecuniary loss. It was held that the documentary evidence did not support the submission that the payment of €95,000 was a compensation payment. The agreement described the payment as special damages and the schedule of the special damages referred to loss of earnings for past and future losses. The schedule for special damages took a deduction for the income earned by the appellant for her part time employment in setting the loss of earnings. It was held that the schedule of special damages was a calculation to place the appellant as close as was practicable to that

which the appellant would have enjoyed had the appellant had the earing capacity of full time employment.

The Appeal Commissioner looked at the statutory language in Section 192A (5) (A) and said it had been broadly drawn as it uses the words "however described". The special damage for loss of earnings was calculated by reference to the income that the appellant would have earned in full time employment. It was held that if the appellant had been able to earn that income that income would have been taxable and it was held that €93,000 of the payment was remuneration and was subject to tax.

A further case of this arose under An Appellant and the Revenue Commissioners 132TACD2020 which issued on the 12th December.

This related to a payment of €65,000 to an employee inclusive of Statutory Redundancy Clause 5 of the relevant severance agreement provided that there was no admission of liability. There was a provision in respect of getting independent legal advice in the sum of €10,000 inclusive of VAT was to be contributed to the employees legal costs.

Again, Section 192A Taxes Consolidation Act 1997 was referred to. Equally Section 123TCA was referred to.

In the decision it was held that the severance agreement made no reference to the payment being made for breach of an employment right arising from a complaint of bullying. It was described as a termination payment. The provisions of Section 192A (3) provides that a payment may be exempt from tax if it is made in accordance with a settlement arrived under a mediation process provided for in a Relevant Act. It was pointed out that no evidence that a claim was made by the appellant to a relevant authority which in this particular case would have been the Labour Relations Commissioner but now would be the Workplace Relations Commission. It was pointed out that the mediation process between the appellant and the employer was not identified as a mediation process which had its origin in the Relevant Act. It was held that for the provisions of Section 192A (3) to apply the settlement should be arrived at under a mediation process provided for in a Relevant Act which is the WRC Mediation Service.

The Appeal Commissioner pointed out that Section 192(A) (4) provides;

"The a payment may be exempt from tax if it is made under an agreement between unconnected parties which is evidenced in writing and being in settlement of a claim which, had the claim been made to a Relevant Authority, would have been a bona fide claim under the provisions of a Relevant Act and, had the claim not been settled by the agreement, is likely to have been the subject of a recommendation, decision or determination by a Relevant Authority. The requirements of subsection (4) specifically refers to a statement of claim. The Revenue Commissioners submit that where a settlement to be considered an "out of Court" settlement it must be advanced to a point where there is a real prospect that the matter will be presented to a Court for decision. There is no reference in Section 192A (4) to quote "out of court" settlement. This wording appears in a leaflet published by the Revenue Commissioners and in the notes for guidance on the Taxes Consolidation Act 1997. While it may be wording which is a convenience of language, it is important that a consideration of whether Section 192A (4) applies is by reference to the wording of the Section. As regards the Appellant, no statement of claim had been produced. There is no evidence that a claim was made by the appellant to a Relevant Authority. As regards the requirement in section 192A (4) the respective position of the parties as at the date of the Severance Agreement is that the employer had a report of an external investigator which did not uphold the appellants complaint of bullying and the appellant had engaged legal representation to appeal the finding of the report of the external investigator.

In this case it was held that the payment was subject to tax. These two cases raised important issues for practitioners.

The first case is one where it is vitally important that where an agreement is being entered into that the appropriate wording is used. Solicitors and Barristers putting in place any settlement document have a duty to properly describe matters. If something is for loss of earnings then it is a loss of earnings and should not be described in any other way. If however it is compensation other than for loss of earnings then describing it as a loss of earnings is incorrect and can result in something that should not have been taxed being taxed. In relation to the first case it would appear that these were properly classified as loss of earning and therefore should have been subject to tax.

In respect of the second case it is extremely important for practitioners. It now appears that where a claim is to be brought and compensation is sought under a piece of employment legislation a complaint will need to be submitted to a Relevant Authority which could be either the Courts or the Workplace Relations Commission.

Under Section 192A TCA97 it is not possible to settle a matter without prejudice and claim the exemption from tax. Where the tax exemption is being claimed it requires the parties to set out that the compensation agreed is likely to have been the subject of a recommendation, decision or determination by a Relevant Authority. If either party is not prepared to do that and this is usually the employer then in those circumstances the payment will be subject to tax. This will apply even in a situation where a complaint had issued and where it was clear that for example the employee would win the case but where these words "without prejudice" are used or "without admission of liability" then in those circumstances the tax exemption will not apply.

The second decision refers to mediation. The only mediation is that in the WRC. In reality in many cases because of delays in getting on to mediation or in significant claims parties will want to use an outside mediator. The process in the WRC while called mediation is not really mediation in the true sense. If parties are going to go through mediation in those circumstances there is still a provision to enable matters to be settled and this is not a settlement under a Mediation Agreement. This is one where mediation outside of the WRC will be treated as a settlement so it cannot be without admission of liability.

Published in Irish Legal News 6 February 2020.

Contract for Service or Contract of Service – Self Employed or Employed

This issue arose in the case of Karshan (Midlands) Limited trading as Domino's Pizza –v- Revenue Commissions 2019 IEHC894 being a judgement of Mr. Justice O Connor delivered on 20 December 2019.

This case is interesting in that it dealt with, in some depth with the issue of mutuality of obligations. The principle case cited by the Revenue Commissioners was Weight Watchers (UK) Limited –v-

Revenue and Customs Commissioners 2011 UKUT433 (TCC) [2011] All ER(D) 229.

The case dealt with the issue of what could be called a hybrid contract and in the case referred to previously Briggs J at paragraph 30 stated;

"…the third, hybrid class consists of an over-arching contract in relation to certain matters, supplemented by discrete contracts for each period of work. In this hybrid class, it may be (and is, in the present case) sufficient if either the overarching contract or the discrete contracts are contracts of employment, provided that any contract or contracts of employment thus identified sufficiently resolve the question in dispute. Where, as here, the question is whether the PAYE regime and the applicable (National Insurance) regime apply to the work done by the leaders, it is clearly sufficient if there is identified either a single overarching contract of employment or a series of discrete contracts of employment which, together, cover all periods during which the leader's work is carried out".

The employer quoted the case of McKayed –v- Forbidden City Limited 2016 IEHC722. Both parties cited the judgement of Edwards J in Minister for Agriculture –v- Barry 2008 IEHC 216 in support of their propositions concerning the applicable law.

In that case at paragraph 43 Mr Justice Edwards stated;

"In each instance it is incumbent on the Tribunal to ask three questions. The first question was whether the relationship between each respondent and the Appellant was the subject to one contract, or more than one contract. The second question involves the scope of each contract. The third question involves the nature of each contract".

Under the heading Mutuality of Obligations it was pointed out that Edwards J at paragraph 47 stated;

"The requirement of mutuality of obligation is the requirement that there must be mutual obligations on the employer to provide work for the employee and on the employee to perform work for the employer. If such mutuality is not present, then whether there is no contract at all or whatever contract there is must be a contract for service or something else, but not a contract of service".

On the issue of integration the case of Stevenson Jordan and Harrison Limited –v- McDonalds and Evans 1952 1TLR102 at page 111 was quoted as follows;

"One feature which seems to run through the instances is that, under a contract of service a man is employed as part of the business and his work is done as an integral part of the business whereas under a contract for services his work although done for the business is not integrated into it but is only accessory to it".

In the conclusions in this case Mr. Justice O Connor importantly held,

"The Court is not persuaded that mutuality of obligation always requires an obligation to provide work and to complete work on an ongoing basis in the manner contended for by the appellant. Ongoing does not necessarily connote immediate continuation or a defined period of ongoing".

It was pointed out;

"The Commissioner in relying upon Weight Watchers did not go against Irish Law but rather recognised the necessity to adapt to modern means of engaging workers".

It went on to state;

"Revenue correctly submit that hybrid contracts of employment are relevant in tax or PRSI cases such as that now before the Court, undoubtedly umbrella and hybrid contracts require more ongoing commitments in….. labour rights cases due to the Statutory triggers based on defined periods of employment".

It was held that the Umbrella Contract required a driver to initiate an agreement with the appellant employer. The Commissioner had found that a driver who wanted to work had to put his name on the availability sheet and that once rostered there was a contract which retained mutual obligations. The right to cancel on short notice imposed obligations to engage a substitute to work out the remainder of the shift in the series.

The Court pointed out that this scenario is different from the engagement of a self employment tradesman or Solicitor. Drivers, unlike service providers work rosters and shifts. A self employed plumber may agree to service a boiler but the plumber has inherently tremendous latitude in that task unlike the driver who has ongoing obligations.

The Court pointed out that the Commissioner determines that the absence of an ability to genuinely subcontract is a factor which indicates that the drivers worked under contracts of service as opposed to contracts for services. The Court pointed out that the Commissioner did not err in applying the fact that drivers did not hire assistants. Rather one driver was replaced with another driver from the appellant's pool of drivers. The substitute was paid by the appellant employer. A substitute was not a sub contract of the driver. In relation to the issue of integration the Commissioner has cited Uber BV 0-v- Aslam UK EAT -0053/12/DA 2018 IRLR97. This case concerned a minimum wage claim for Uber drivers. This was upheld in the Court of Appeal under Uber BV –Aslam 2018 EWCA CIV2748. The Commissioner concluded that pizza delivery is fundamental to the business and is not merely accessory to it.

The Court pointed out that the Commissioner looked at many factors including the requirement for drivers to wear uniforms and place logos on their cars, reassure customers that they were dealing with personnel of the Appellant, maintain a coherent operation under the care of the appellant, and take telephone orders from the appellant and not the customers of the appellant.

The Court pointed out that looking at the terms of a contract that;

"...look at how the contract is worked out in practice and mere wording cannot determine its nature".

In this case the Court found in favour of the Revenue Commissioners.

One of the interesting aspects of this case is that the Court itself has recognised that there is potentially a form of hybrid employment status in Ireland. The approach by the Revenue as upheld by the Appeal Commissioner certainly indicates one where the issue of mutuality of

obligation appears to apply at times on an engagement by engagement issue but that the issue of integration is probably significantly important as to how individuals are identified.

This case is extremely important from a tax and Social Welfare perspective. It also however opens up an interesting discussion in relation to the issue as to how the reasoning in this case would be applied in employment cases.

We would expect to see a significant increase in claims under employment legislation into the future particularly as a significant number of individuals are now working in what could be called the Gig Economy.

We would expect over the next couple of years to see a significant increase in case law in this area.

The issue is whether there will be legislation in this area also. In the UK they have three categories which is self employed, employees and then a special category of what are called “workers” who do not have all the benefits of being an employee but have certain protections. It will be interesting to see how the law in this area in Ireland develops going forward.

Using Apps For Business Purposes

There are challenges with the use of apps for business purposes. In some companies you will now have Whats App Groups. These apps work on the base of ephemeral messaging. These are a form of messaging which are normally only available on mobile devices. The difficulty is that they delete automatically after a short period of time.

There are advantages of these sort of messaging. The difficulty is however that if something important is sent or it is going to be needed at some stage in the future it may not be available.

If there are issues relating to the use of an app and litigation issues then there may well be an application to preserve all relevant documents once litigation issues or it is contemplated. This is itself a well-established rule under Irish law. The destruction or deletion of relevant material makes those a party to potential sanctions in court

cases but possibly in employment cases to not being able to defend a particular claim.

Take for example the position of a claim that is brought under equality legislation in the WRC on the basis that an employee in a Group App sends a joke which is racist. A manager sees it and immediately sends a note in the group stating that this is inappropriate and should be deleted and should not be looked at and that appropriate action is going to be taken. An employee arranges to retain same being the original message sent which can be printed off and goes and issues a set of proceedings. The case comes on a number of months later before the WRC and the company/employer contend that immediate action was taken. The counter argument is let us see what you did. If that particular message has not been retained then there is no evidence that that was actually done.

When it comes to these groups there are some issues which employers need to consider.

1. Is the use of ephemeral messaging actually appropriate in your business.
2. Do you have policies and procedures in place to address the use of ephemeral messaging?
3. Does senior management have full oversight of how this messaging is used on a day by day basis by your staff.
4. Are the staff aware of these policies and procedures?
5. Is it that they simply have received copies of these procedures?
6. Has appropriate training been given on the use of this form of messaging and do you have records of same
7. Will you have a system in place that is immediately able to put in place an appropriate retention of such messages on very short notice?
8. Do senior managers and managers within the organisation actually understand what ephemeral messaging is and how it operates?

Those in management of business understand the challenges of email. However, the use of Apps is an issue which some managers have a difficulty with. Email is seen as relatively informal. Emails within companies between staff members has often caused complaints from

bullying to harassment to sexual harassment by employees. Most employers have clear and defined policies in relation to the use of email. Most employers will have policies in place in relation to social media as to what can and cannot be posted on it and the use of it.

However when it comes to Apps there seems to be an even more relaxed atmosphere in some workplaces as to what this is. They are often seen as a form of "message board". The difficulty with these products and services is that because of their use outside the workplace with people being involved in various groups what may be acceptable within those groups can be imported into the workplace.
What is imported then into the workplace may be totally inappropriate for the workplace
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The joke which is put in a Whats App Group involving a number of girls or involving a number of women or another group involving a number of men may be classified as possibly acceptable but if that same joke was distributed within a workplace could be regarded as completely inappropriate and leave an employer open to a claim under the Employment Equality Legislation or a claim of bullying.

The use of this technology is becoming more common in the business environment. There is a significant potential resulting in accusations of inappropriate behaviour. It has huge potential for claims of harassment and sexual harassment and bullying against employers.

These claims are already arising. They are there. The difficulty is and the challenge is that most employers do not have the appropriate policies and procedures in place to deal with same.

The issue then is what should employers do.

Until you have determined that the use of this form of messaging is appropriate for your business then the use of these apps within the business should be notified as not appropriate and should not be allowed.

When you decide that they are appropriate for your business then it's important to make sure that there is full oversight, proper policies and procedures, proper training for staff and appropriate specific

disciplinary sanctions in place for breaches of these policies and procedures.

Technology is of great benefit to businesses. It increases productivity or is at least claimed to increase productivity. However the inappropriate use of messaging, which is becoming more common, raises the potential of significant claims against employers.

If you're going to be using apps in the business then you need appropriate procedures in place to be able to maintain that if it is subsequently going to be used. This may be simply to be able to defend yourself in a claim in the Workplace Relations Commission.
But equally that said an employee sends an inappropriate message he or she is brought to a disciplinary hearing and it is said that they sent an inappropriate message. Any good lawyer acting for them is going to ask for them to be shown the relevant message. If it has not been maintained and saved and has now been automatically deleted then the answer is you do not have it so if you do not have it it was never sent. The difficulty is that trying to dismiss the person in those circumstances or impose a disciplinary sanction may result in claims down to the Workplace Relations Commission where you as an employer will not be able to defend it. Saying that somebody sent an inappropriate message and not being able to produce that message is something that causes significant difficulties in proving that a dismissal would have been warranted.

Technology is useful. We are not saying do not use technology. What we are saying is make sure that you use technology properly and that you have the appropriate safeguards in place.

Excessive use of the internet

There is an interesting UK case of Hall –v- Weightmans LLP Reference ET/2405482/2019. In that case the Employment Tribunal in the UK found that an employee's dismissal for excessive internet use discovered during a disciplinary investigation was fair.

It is important that employers have an appropriate policy in place concerning internet use by employees. That policy should state that using business computers or laptops for searching the internet during

working hours can result in disciplinary action up to and including dismissal. The same will have to apply as regards tablets and mobile phones where there would be internet access.

The use of the internet by employees during working hours is an issue which is arising and we would anticipate that this issue is going to arise in cases in Ireland in the future.

Aggravated Damages

This issue arose in a case of Michael Doyle and Marie Donovan 2020 IEHC11. This is a case where no Order was given. However, it is interesting that the issue was raised and could have reference to employment cases. The relevant portion of the decision is at paragraph 41 where the Court dealt with it quoting the case of Swaine –v- Commissioners of Public Works 2003 IESC30 which in turn, had cited with approval a passage from the Judgement in Conway –v- Irish National Teachers Organisation 1991 2.I.R.305 at page 317 which describes the jurisdiction to award aggravated damages as follows;

"Aggravated Damages, being compensatory damages increase by reason of;

(a) The manner in which the wrong was committed, involving such elements of oppressive, arrogance or outrage, or;
(b) The conduct of the wrongdoer after the commission of the wrong, such as the refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or;
(c) Conduct of the wrongdoer and/or his representative in the defence of the claim of the wrong complained of, up to including the trial of the action. Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravated feature is the measurement of compensatory damages must, in many instances, be in part or recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrages conduct of the defendant".

In this case there had been an allegation that the Plaintiff had caused the accident. The Court pointed out that liability had been admitted prior to the hearing and that that defence, which had been delivered was not pursued at any stage.

One issue that regularly arises in employment law cases is that there will be what is now the very common add in, by some representatives, that the claim is frivolous and vexatious. There is an argument where that type of defence is put in which is subsequently shown to be completely without merit that there is an argument that that is one where a Court might properly consider awarding additional compensation and in employment cases possibly can do so both under the concept of aggravated damages and also on the Von Colson and Kamann principles on the basis that under the latter case that any award needs to be seen to be persuasive of an employer going forward and where an employer is prepared to put up a defence that a matter is frivolous and vexatious that this in itself is an issue which could be taken into account. This may well be an issue which will arise into the future.

Unfair Dismissal – Failure to Follow Health and Safety Rules

This arose in the case of Keeling's Logistic Solutions and Arlandas Kepenis UDD2006.

In this case the Labour Court referred to the case of Bunyan –v- United Dominions Trust 1982 ILRM404 where the EAT in Ireland adopted and applied the following principle enunciated by the UK EAT and NC Watling Co. Limited –v- Richardson 1978 IRLR225 as;

"The fairness or unfairness of the dismissal is to be judged by the objective standards of the way in which a reasonable employer in those circumstances in that line of business, would have behaved. The Tribunal therefore does not decide the question whether or not, on the evidence before it, the employee should be dismissed. The decision to dismiss has been taken, and our function is to test such decisions against what we consider a reasonable employer would have done and/or concluded".

In this case it was not disputed that the employee had received previous warnings for breach of health and safety. The employee was already on

a written warning. The Court pointed out that in circumstances where the respondent places priority on ensuring the health and safety of its workforce and where there were serious risks involves, it is understandable that the continuation of the employees employment relationship was in serious doubt, warranting dismissal.

The Court quoted the case of Besebvel –v- Rosderra Irish Meats Group Limited UD37/2014 where the Employment Appeals Tribunal stated;

"It is unacceptable in circumstances where a properly conducted risk assessment has led to the introduction of a safety measure that an employee should arbitrarily decide not to comply with the measure…"

The Court pointed out that the Tribunal had held against a claim of Unfair Dismissal in Andrew Byrne –v- Wicklow Co. Council UD656/2008 where it held that there could be no compromise in relation to the important matter of health and safety stating;

"…the claimants work record and the good service is acknowledged however, it is the considered conclusion of the Tribunal that the investigation process was reasonably satisfactory and that there can be no compromise in relation to the important matter of health, safety and welfare at work".

In this case the Court held that the dismissal was justified and fair.

What is interesting about this case is that the Court has reaffirmed the law relating to the issue of health and safety as being an issue in itself which can warrant dismissal as a breach of trust and confidence.

Published in Irish Legal News 27 February.

Notice of Dismissal – Resignation – Is it always binding?

In case ADJ/00020747 this issue was addressed by the Adjudication Officer. The Adjudication Officer quoted the case of Martin –v- Yomen Aggregates Limited 1983 IRLR49 where the UK EAT held that;

"…it has obviously been contemplated in this Appeal Tribunal and has been contemplated for years that in the heat of the moment words which clear enough standing alone would indicate a dismissal can lose that effect if one looks at the surrounding circumstances. Of course, it must be a question of degree. Of course, you may get a situation in which the change of mind is so late that it is impossible to recover from the dismissory words expressed in the first place".

The Adjudication Officer pointed out in the UK Court of Appeal case of Willoughby –v- CF Plc 2011 IRLR985 at paragraph 27 that;

"The special circumstances exception to which I have referred is one that finds its expression in application in several reported authorities. They are cases in which either the employee has given an oral notice of resignation or (less commonly) in which the employer has given an oral notice of a dismissal. The words of the notice so given may, on the face of it, be clear and unambiguous and may take effect according to their apparent terms. Indeed, the general rule is that they will do so. The authorities recognise however, an exception to that general rule; namely, that the circumstances in which the notice is purportedly given are sufficiently special that it will or may not take such effect. For example, the words of notice may be the outcome of an acrimonious exchange between employer and employee and may be uttered in the heat of the moment such that there may be a real question as to whether they were really intended to mean what they appear to say. In such circumstances it will or may be appropriate for the recipient of such notice to take time before accepting it in order to ascertain whether the notice was in fact intended to terminate the employment".

It was held at paragraph 17 that;

"It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact intend what he had apparently said by it. In other words he must be satisfied that the giver really did intend to give a notice of resignation or dismissal as the case may be".

In this particular case the Adjudication Officer held that the employer did not make all reasonable attempts to satisfy the employee that the

employer wished to withdraw the words used and did not intend those words to result in a dismissal.

In this case the employee was a highly paid individual earning €53,000 per annum. The employee had obtained a new job earning €30,000 per annum. An award of €25,000 was made.

Unfair Dismissal – Setting out the claim against an employee

This issue arose in a case of RCI Call Centre (Ireland) Limited and Salah UDD202.

The Court in this case found that two additional disciplinary allegations were introduced mid process against the complainant. The Court pointed out that the question whether or not there was an impetus within the respondent employers to build a strong case against the employee. The Court quoted the Redmond on Dismissal Law 3rd Edition at paragraph 13.72 which states;

"Heavy emphasis has been laid in recent case law on the duty of an employer to set out clearly allegations made against the employee from the outset, with the employer not being permitted to augment the allegations at the investigation process. This is because an employee is entitled to be informed at the outset of the complaint being made against him or her in order to ensure he or she has a meaningful opportunity to prepare and present his/her defence".

The Court said it appeared to the Court that the employee was not informed at the outset of the investigation of all the allegations ultimately raised against him. The Court pointed out in this case that the disciplinary process lasted about 20 minutes and that the person hearing same was able to communicate the decision three hours later.

The Court also pointed out that there were concerns over the fact that the lead investigator and the manager who conducted the disciplinary hearing had previously been involved at different stages of other disciplinary proceedings against the complainant. In this case the Court allowed the Appeal by the employee to succeed an award of €20,000.

The case raises two important issues.

Firstly it is important to set out all matters against the employee that are to be investigated at the start.

Secondly, it is important that where matters are going to be investigated that the investigators and those holding the disciplinary hearing should not have previously been involved in disciplinary issues concerning the relevant employee. We would temper this view and admit it was not covered by the Court but that in larger organisations there will be greater potential for this to be able to be done. In smaller organisations it may not be practicable. Certainly in larger organisations there should be no difficulty in getting both an investigator and anybody hearing a disciplinary hearing to be individuals who would not previously have been involved. In smaller organisations this may be more difficult but this may mean for example that an investigation process needs to be outsourced and possibly even the disciplinary process itself. This will in smaller organisations depend on what previous disciplinary issues were investigated. If these were relatively minor issues then there may be a stronger argument that it is not necessary to outsource the process.

Thirdly, again this is not covered in the decision but it is important the procedures in an employer company allow for situations where disciplinary matters can be outsourced so as to ensure fair procedures if there could be any perceived bias.

Unfair Dismissal – Should an Employee Appeal

This issue arose in case ADJ-00023644 in that case the adjudication officer referred to a case of An Employee –v- An Employer ADJ00000381 where the Adjudication Officer commented as follows:-

"An appeal is not just an afterthought or a procedure that must be completed as a matter of course. It is a very important part of the disciplinary process and the greater the sanction that has been imposed the greater its importance. An appeal allows a dismissed employee the last chance to make their case highlighting any mitigating factors and seeking protection for faulty procedures or disproportionality of sanction".

The Adjudication Officer pointed out that the failure to appeal was a serious error of judgement.

This is a very useful restatement of the law.

Unfair Dismissal / Redundancy

This issue arose in case ADJ-0021532.

The issue was whether the process by which the redundancy was effected was so flawed as to render the dismissal to be unfair.

What is interesting about this case is that a considerable amount of case law was quoted.

The Adjudication Officer referred to the fact that the Adjudication Officer must consider the many authorities cited to the facts of the instant case. In Tolerance Technologies Limited –v- Joe Foran UDD 1638/2016 the Labour Court for multiple reasons decided that the conduct of the employer in relation to that dismissal could not be held to have been reasonable. The redundancy was executed on the same day as notified, he was denied representation and the employee asked and was refused the opportunity to argue for alternatives with his board. In Ian Steward –v- Post Publications Limited UD2006/2011 the complainants job had been pared away, there was no transparent criteria for his selection, an interview was held on 12 April for a job for which no job description was available until 2 days later and the Tribunal found that there was another job which the complainant could have undertaken. In a Hotel Manager –v- a Hotel and Spa Resort ADJ/00015257 the Adjudicator found that;

"After the complainant's redundancy, other employees have been recruited and the job role of the complainant has been filled by these personnel. There was little or no consultation with the complainant and the redundancy was clearly a strategy to conceal an unfair dismissal".

The Adjudication Officer pointed out that the complainant in this case was not arguing that the redundancy was a cloak to conceal a dismissal.

An Adjudication Officer pointed out in a case of A Production Manager –v- A Printing Company ADJ/00009028 the Adjudicator found;

"That the actual time frame within which the decision was taken to make the complainant redundant was only four working days…It is difficult to see how the respondent could contend that reasonable consideration, including the opportunity to discuss alternative options, was provided to the complainant. The Adjudicator found that the cost benefits of making the employee redundant demonstrated that the redundancy had more to do with the individual than the role".

In Employee –v- Employer UD1791/2010 the employer failed to consider the complainant for an identifiable alternate role.

The Adjudication Officer held in this case based on the evidence it would be hard not to conclude that the respondents preferred option was redundancy from the outset. The Adjudication Officer pointed out that there was defects. These shortcomings the Adjudication Officer pointed out and failures presented the majority concern non collective redundancies. Those complaints of unfair dismissal were upheld because those respondents failed to prove the genuine nature of the redundancy as in UD1791/2010 the employee was replaced.

The Adjudication Officer held that the EAT in the case of Nigrell –v- Graham UD690/2013 held that there was a genuine redundancy and that the absence of an appeal and the right of representation at the consultation stage did not render the dismissal to be unfair. The Adjudication Officer held this dismissal was not an unfair dismissal.

While the employer won in this case it is always better for an employer to go through a process that is clear and transparent. This avoids the employer having to end up fighting a case in the WRC and possibly on appeal to the Labour Court. Where there is a genuine redundancy process then employers should go through the appropriate consultations.

Disciplinary Processes

The issue of effectively being judge and jury and possibly also prosecutor arose in case ADJ-00017175. In this case the Adjudication

Officer quoted the case of Joseph Brennan Bakeries –v- Rogers UDD1821 where the Labour Court stated;

"The Court considers that the multiplicity of roles undertaken by TG(The General Manager) in the process calls into question the fairness of the procedure. TG was a person who initiated the investigatory procedure and he oversaw the procedure himself. That procedure resulted in a disciplinary procedure which TG also oversaw. The Court is satisfied that the enterprise is of a nature which afforded the respondent the opportunity to ensure a clear separation of investigation and disciplinary process by the selection of available management level personnel to carry out the different stages of the procedure".

The Adjudication Officer in this case held that the circumstances in this case were extremely similar.

In this case the Adjudication Officer held that the employee had contributed to the dismissal and took this into account in setting compensation.

The important aspect of this case in our view however is the reminder of the importance of where it is practicable not to have the same person involved in the investigation, disciplinary or appeal processes.

Constructive Dismissal

This arose in a case of Tesco Ireland Limited and Ann Maher UDD201.

This issue arose about the issue of an allegation that the employee was seen taking a bottle of water. The employee contended that she had in the past taken bottles of water and paid for them at the end of the shift. The employee confirmed that the she was aware of the policies in relation to staff purchases.

The employee submitted that she believed she was going to be dismissed and to avoid this handed in her resignation. This was a constructive dismissal case and the Court looked at the law on this issue. The Court pointed out that Section 1 of the Unfair Dismissals Act envisages two circumstances in which a resignation may be considered a constructive dismissal. Firstly, where the employers conduct amounts to a repudiatory breach of the contract of employment and in such

circumstances the employee would be entitled to regard himself or herself as having being dismissed. This the Court pointed out is often referred to as the Contract test. The Court pointed out in Western Excavating (ECC) Limited –v- Sharp 1978 IRL322 it was held to meet the Contract test an employer must be guilty of conduct which is a significant breach going to the root of the contract of employment or 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".

The Court pointed out that secondly there is an additional reasonableness test which may be relied upon as either an alternative to the Contract test or in combination to that test. That test is whether the employer conducts his or her affairs in relation to the employee so unreasonably that the employee cannot be expected to put up with it any longer and if so he /she is justified in leaving.

The Court pointed out that there was no suggestion that there was any significant breach going to the root of the contract. The Court pointed out in Constructive Dismissal cases the Court must examine the conduct of both parties. The Court pointed out in normal circumstances an employee who seeks to invoke the reasonableness test must act reasonably by providing the employer with an opportunity to address whatever grievance they may have. The Court pointed out they must normally demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before resigning and the Court quoted the case of Conway –v- Ulster Bank Limited UD474/1981 and Beatty –v- Bay Side Supermarkets UD142/187.

The Court pointed out that there are cases such as Allen –v- Independent Newspapers (Ireland) Limited 2002 ELR84 where the Employment Appeals Tribunal had held that it was reasonable on the facts of that particular case for the employee not to have faith in the employer's ability to properly or effectively address the grievance.

In this case the Court was not satisfied that there was factors present which might have lead the employee to believe she would not have been afforded fair procedures. The Court dismissed the appeal of the employee.

The Court in this case interestingly pointed out that if the employee had gone through the process she may well have been able to bring an Unfair Dismissal case at the end.

Constructive Dismissal Cases in our view are extremely difficult to win. Where an employee resigns they have the burden of proof put on them to prove their case. In an Unfair Dismissal case where a person is dismissed the burden of proof to show that the dismissal was not unfair falls onto the employer and if the employer fails to prove same the employer loses.

There is an issue now arising of employees resigning and seeking to bring constructive dismissal cases. The percentage of these cases which are won are extremely low. A lot of employees do not understand the law on constructive dismissal. The fact that a person does not understand the law on constructive dismissal is not a defence to a claim.

Terms of Employment (Information) Act 1994 – Time Limits

An issue arises often as to the time limit for bringing a claim under this Act. This issue was addressed in case ADJ00020358 where the Adjudication Officer held that the time limit within which the employer must provide a statement which complies with Section 3, but rather that there can be a continuing breach where a document is not furnished which fully complies with Section 3 and in those circumstances it is a continuing breach. It is useful that the Adjudication Officer has set this matter out in such depth in this particular case. This is an issue which regularly arises. It should not and it is useful that the Adjudication Officer has restated the law on this matter.

Section 5 Terms of Employment (Information) Act 1994 – 2014

In case TED201 Medical Ambulance Limited and Aidan Ryan.

In this case it was a common case that the employer reorganised the method by which it calculated pay in early 2019 and from that time

onwards pay was calculated in accordance with actual time worked. A change was introduced in order to align its payroll function with changes to the PAYE system brought in one 1 January 2019. Up until December 2018 the employee received a regular payment to include basic pay and overtime. From January 2019 the payments varied to reflect the different stages in his shifts cycle. The employee claimed that this was a breach of Section 5 as he was not notified within one month. The evidence was that there was a chain of emails. The Court considered the emails and held that they were less than clear notification of the nature and date of the change in question. The Court pointed out that there had been an attempt at communication and though there was a breach of Section 5 the report regarded the breach as being at the less serious end of the spectrum and awarded a sum of €580 being equal to one weeks gross pay.

Where there is to be a change in an employee's terms and conditions of employment it is important for employers to consider properly notifying the employee to avoid these types of claims.

Transfer of Undertaking Regulations – European Communities (Protection of Employees on Transfer of Undertaking) Regulations 2003 SI 131/2003.

The relevant Statutory Instrument in Ireland is commonly referred to as TUPE. In this case a cleaner brought a claim against a cleaning company to include claims under the above Act and under the Payment of Wages Act. The employee had been transferred under TUPE. However, when working in one company she had been paid at the ERO rate but when transferred this was not paid. The Adjudication Officer in this case upheld that complaint. The complaint had been issued on 4th May 2018 and the Adjudication Officer had held that this was a rolling breach and therefore following the decision in Health service Executive and McDermott 2014 IEHC313 the claim was within time. The fact that the first deduction would have been outside of time did not stop this claim proceeding. The Adjudication Officer held that the relevant period was from 5th November 2015 to the date the claim was lodged which was 4th May 2015 and awarded compensation for the financial loss as to the increased rates which were between 25 and 30 cent per hour.

What is interesting in this case is that the Adjudication Officer also held that there had been a breach of the TUPE Regulations and awarded a sum of €6,500. The Adjudication Officer pointed out that the Adjudication Officer could award up to two years remuneration which would amount to €47,750 but reduced this to €6,500. This was equivalent to a little over three month's wages but importantly was exempt from tax.

It is important for employers to understand that breach of the TUPE Regulations can result in substantial compensation being awarded.

Transfer of Undertaking Regulations Claims – Time Limits

The relevant regulations in Ireland are in SI131/2003. In the Case ADJ-00014799 the Adjudication Officer had to deal with a situation where a transfer had occurred a number of years previously, the case was referred in 2018. The employer argued that the claim was outside the 6 month period. The Adjudication Officer referred to the case of *Health Service Executive -v- McDermott* 2014 IEHC 331 and held that the breach being complained of, being the failure to pay increased payments under the Transfer of Undertaking Regulations was effectively a rolling breach and therefore the Adjudication Officer had jurisdiction to hear the case. The Adjudication Officer held that the Adjudication Officer can award up to 2 years' wages, which in this case will be €49,836, but in all the circumstances, awarded a sum of €6,500.

The concept of a rolling breach is one which employers need to be aware of.

Transfer of Undertaking Regulations – Redundancy Claims

This issue arose in case ADJ0020597 when a cleaner claimed redundancy against a facilities company. The respondent claimed that there had been a transfer under the Transfer of Undertaking Regulations. They claimed that they were the transferor and that the obligation therefore passed to the transferee and not to them.
The Adjudication Officer in this case looked at a number of relevant cases. The first was the Spijkers case where seven criteria were set down namely:-

1. Was the undertaking a stable undertaking with an ongoing life of its own.
2. Has the entity retained its identity.
3. Has some or all of the staff been taken over by the new employer.
4. Has the customer base transferred.
5. Are the activities post transfer similar to those carried on before transfer.
6. Has there been an interruption of the activity.
7. Has there been a transfer of assets.

The Adjudication Officer held that it is necessary to look at all relevant factors. The Adjudication Officer held that the cleaning services of the health centre was ongoing. That the entity had retained its identity and the activities been carried on post transfer were identical to those carried out under the previous contractor and that there was no break or interruption of activity.

The Adjudication Officer pointed out that the Adjudication Officer also had to look at what is known as the Suzen case where the CJEU held

"The Directive is to be interpreted as meaning that the Directive does not apply to a situation in which a person who had entrusted the cleaning of his premises to a first undertaking terminates his contract with the latter and, for the performance of similar work, enters into a new contract with a second undertaking, if there is not concomitant transfer from one undertaking to the other of significant tangible or intangible assets or taking over by the new employer of a major part of the work force, in terms of their numbers and skills, assigned by his predecessor to the performance of the contact".

The Adjudication Officer pointed out that the impact of that decision is that a contract for a service provided by a previous contractor being transferred to a new contractor does not necessarily mean that an economic entity has been transferred.

The Adjudication Officer referred to the case of Cannon –v- Noonan Cleaning Company Limited and CPS Cleaning Services Limited 1998 9ELR153 where the EAT found;

"The tribunal must consider all the factors characterising the undertaking in question. The nature of this undertaking is that of cleaning. The

equipment used by Noonan's was not transferred to the new contractor. The same premises had to be cleaned by both contractors and each were under the control of the Department of Justice. The staff do not transfer when the contract is withdrawn and given to the new contractor. There was no good will as such to be transferred. The undertaking could be said to have retained its identity. While there was no apparent transfer of tangible assets however it could be said that there was a transfer of intangible assets i.e. the likely profit to be made from the contract. This must have existed, otherwise why was there competition for the contract… Also the possible transfer of intangible profit margins is not of significance in itself to be a major factor in the transfer. It follows that this transfer is not caught by the directive as it does not constitute the transfer of undertakings".

It was pointed out that similar outcomes could be found in the case of Shields & Others –v- Noonan & ISS Contract Cleaners and Dignan Sheehan Security Corporation 2005 16ELR22.

The Adjudication Officer held that there had been no transfer and therefore a redundancy situation arose.

These cases can be extremely complex.

It is important in these cases to look to see carefully whether or not a transfer has occurred.

Discrimination Claims – the Burden of Proof

This arose in case ADJ-000000026. The facts of the case themselves are interesting but what is more interesting is the setting out of the law by the Adjudication Officer as regards the Burden of Proof. The Adjudication Officer set out the Labour Court case of Cork Co Council –v- <McCarthy EDA0821 which held;

"At this initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary for her to establish that the conclusion of discrimination is the only, or indeed, the most likely explanation which can be drawn from the proved facts. It is sufficient

that the presumption is within the range of inferences which can be reasonably be drawn from those facts".

In EDA0826 DYFLIM Publications Limited –v- Spasic the Labour Court stated;

"What the passage quoted indicates is that the Court should consider the primary facts which are relied upon by the complainant in their proper context. It also indicates that in considering if the burden of proof shifts the Court should consider any evidence adduced by the respondent to show that, when viewed in their proper context the facts relied upon do not support the inference contended for by the complainant".

The Adjudication Officer also quoted the case of Gardiner –v- Mercer Human Resource Consulting DEC-E-2006-007 where it was stated;

"The court "must always be alert to the possibility of unconscious or inadvertent discrimination. Mere denials of a discriminatory motive, in the absence of independent corroboration, must be approached with caution".

In many cases those acting for employers seem to work on the assumption that the employee must prove their case. That is not the position. All the employee at the start need do is show facts from which an inference of discrimination could be inferred. The fact that other inferences could equally be inferred does not mean that the employee has not passed the initial hurdle that is effectively shifting the burden of proof then back to the employee to counter that.

If an employee shows facts from which discrimination could reasonably be inferred and the employer is not able to rebut same then the employee need go no further and that employee has won their case.

For some reason there still seems to be a significant misunderstanding on what the law on this area is.

Bringing An Employment Equality Act 1998 Claim For An Officer Of The Defence Forces – An Anomaly

This issue arose in the case of Diana Byrne and Minister for Defence, Ireland and the Attorney General in case 2019 IECA338 being a decision of Ms Justice Donnelly delivered on the 20th December 2019.

The facts of the case are effectively that when the officer was still on maternity leave four other male captains who were direct entry officers in the same class as Ms Byrne were promoted to the rank of commandant. Ms Byrne was not aware of the promotions at the time. She was not told of the convening of the interview board. The other officers were only told of the process after they had been selected for interview. Ms Byrne returned from maternity leave on the 15th September 2013. She resigned her commission. She claimed that this was because of the negative and unprofessional way she was treated. Claims were brought and subsequently an award of damages were made in her case entitled Byrne –v- Minister for Defence and Others 2016 IEHC464. The State appealed the decision.

This case turned on the interplay between Section 114 of the Defence Force Act 1954, Section 77 of the Employment Equality Act 1988 and Section 104 of the 1998 Act also.

In the judgement it was pointed out that the Equal Treatment Directive being Directive 76-2007-EEC applies to the armed forces as a result of the case of Kreil –v- Germany case C-285/98.
In paragraph 55 of the judgement it is stated;

"In my view, the plain intention of the Oireachtas in enacting the 1998 Act as amended by the 2005 Act, was that a member of PDF, who had a complaint covered by the scope of the 1998 Act and who wished to claim redress under the act, was obliged to make a claim under Section 114 of the 1954 Act. If the authorised officer did not make the referral under the 1998 Act or the referral was not complete, the member of the PDF had a right to make her own complaint after a period of 12 months elapsed from the date she made her Section 114 complaint or, if she is not satisfied with the recommendation, she can make a complaint with 28 days of that recommendation."

In paragraph 54 it was stated;

"For the reason set out above, I am satisfied that a construction of the Act which is inconformity with the objectives of the equal treatment and

equality Directives, namely the provision of redress for those persons including members of the armed forces, was right under the said Directive or violated, means that a complainant member of the PDF, who has made a complaint under Section 114, is entitled to claim redress under the Act in her own right provided certain procedural rights are met."

In paragraph 60 it is stated;

"In my view, the respondent was a member of the PDF was provided with a mechanism to claim redress under the 1998 Act. The only difference between an ordinary employee and a member of the PDF in claiming redress, was that in order to make a claim for redress a member of PDF has to engage in the Section 114 complaint procedure under the 1951 Act. Member of the PDF potentially will be time-delayed in making a complaint under the 1998 Act, if the authorised officer did not refer her case to the Director General of the WRC or there was a delay in adjudication of her complaint."

This is an important decision. It is one which has clearly clarified the law relating to the issue as regards Commissioned Officers in the defence forces bringing an equality claim.

The effect of this decision is that the claim must firstly go under Section 114 of the 1954 Act and then if that does not rectify matters then Section 104 of the 1998 Act applies for the purposes of determining whether a claim is then brought under Section 77.

For those who at some stage may be dealing with a Commissioned Officer it is therefore important to consider the Employment Equality Act in total and also the Defence Act 1954.

It is interesting however that the Court in paragraph 39 stated;

"Having considered the relevant Sections of the 1998 Act together with Section 114 of the 1954 Act, I considered that they do not represent the finest example of parliamentary drafting. The interpretation requires moving between one Act to another Act, from one Section to another Section and from one Subsection to another Subsection. These preliminary remarks do not imply that the interpretation of the legislative provisions is therefore other than clear; rather the point is made that the

particular drafting style requires those seeking to understand the legislation to make a determined and sustained effort to ensure that they remain on the right path within the legislative labyrinth. It is not too much to ask that acts of the Oireachtas be readily accessible to all without the need for multiple cross referencing."

This is a very valid and important commentary by the Court. Employment legislation is complex enough as it is. It is in our opinion unsatisfactory that the manner in which the legislation is put in place in employment law in particular equality legislation is such that there is no codified legislation. What is a complex enough issue is made even more complex by the lack of appropriate drafting. The appeal by the State was successful so the effect is that the Commissioned Officer will not receive the compensation which was previously awarded.

Sexual Harassment Claims

This arose in case ADJ00016274. While this has been reported in the papers an interesting aspect of this case is whether the claim actually issued within the relevant six month period of the last incident.

The employer contended that the last incident would have been on the 7th February 2018 and held that the claim was brought on 9th August 2018. The relevant period was from 10th February to 9th August 2018. They quoted the case of McDonald Restaurants of Ireland –v- Comerford DWT1628 and Irish Rail - Lynch UDD822 in relation to the issue of not extending timer.

The Adjudication Officer in this case went through matters in great detail and found that in the opinion of the Adjudication Officer the last incident occurred on 14th February and therefore was in time.

An issue in relation to this arose about the fact that matters were subject to an investigation.

While this case was won and an award of €25,000 was awarded the Adjudication Officer pointed out that a higher award would have been awarded had it not been for the steps taken by the respondent via the investigation and the appeal teams. Because the last incident would have occurred on 14th February then all similar incidents back can be taken into account which the Adjudication Officer did.

This case is one where it highlights the issue of bringing claims early. If there is a complaint of sexual harassment and even if it is being investigated by the employer unless the employer has indicated that the employer will not seek to apply the time limit and requests the employee not to issue proceedings pending investigation taking place then in those circumstances the employee should ensure that claims are issued as soon as possible to stop the time running. In this case if the employee has waited another 5 days the claim would have been out of time. Of course it is understandable that an employee of good standing will give the employer time to undertake an investigation however that can run against the employee if it subsequently is found against them that they can end up being out of time. That is an issue which regularly arises in cases which are seen by Solicitors that the claim are just out of time. An argument that the employee was going through the employer's grievance procedure will not extend time and the Labour Court have ruled on this on a number of occasions.

Pregnancy Related Dismissal – Do Not Bring an Unfair Dismissal Claim

We have mentioned this on a number of occasions previously. An example of this is case ADJ-00020604 where an employee brought a claim on the basis that she had been dismissed while pregnant. The Adjudication Officer in this case determined that it was appropriate that the employee be awarded three months financial loss together with one weeks' notice which amounted to a total sum of €700. In an Unfair Dismissal case the Adjudication Officer is limited to setting out financial loss. They can do no more than that. If this case had been taken under the Equality Legislation then in those circumstances the employee could have claimed up to two years' salary without having to show any economic loss. In addition, under Section 82 (4) where there is a dismissal the Adjudication Officer in the alternative can award €40,000. Normally this applies where a claim is brought where the complainant was in receipt of remuneration at the date of the reference of the case but that date moves back if there was a date of dismissal as there would have been in this case.

For some reason people continue to believe that it is better to bring an Unfair Dismissal case but this is not a view that we would agree with.

Entitlement to Public Holiday Pay while out Sick

This issue arose in case ADJ00023551. The employee was out sick and brought a claim in relation to the issue of being paid public holidays during certified sick leave. The Adjudication Officer held that the employee was entitled to be paid for any Public Holidays falling within the first 26 weeks of his absence. The Adjudication Officer pointed out in the case the employee received his full pay for the first six months of his absence and that there was no payment due in relation to Public Holidays. We would have to disagree with the Adjudication Officer on this point. This issue arose some time ago in a case of Thermos King where the Labour Court ruled on the particular wording of the Act that even in those circumstances an employee was entitled to be paid Public Holidays which would in effect be an additional days pay where they are paid under a sick pay scheme.

Ryanair DAC and Peter Bellew 2019 IEHC907 – Restrictive Covenants

This is a case which received a lot of headlines. However for lawyers probably the most interesting aspect of this case is the issue of how far a restrictive covenant can apply.

In this case, Mr Justice Allen quoted the case of Macken –v- O'Reilly 1979 ILRM79 here O'Higgins CJ said at page 90

"All interference with the individual's freedom of action in trading is per se contrary to public policy and, therefore void. The general prohibition is subject to the exception that certain restraints may be justified. Restraints restrictions or interference are permitted if they are, in the circumstances obtaining fair and reasonable. Whether what is complained of can be justified on the basis involves a careful examination of all the circumstances – the need for restraint, the object sought to be obtained, the interests sought to be protected and the general interest of the public. What is done or sought to be done must be established as being reasonable and necessary and on balance to serve the public interest".

The case of Murgitroy & Company Limited –v- Purdy 2005 IEHC159 was quoted where Mr Justice Clarke as he was then who stated;

"A restraint on a person's working or being engaged in one or more lines of business is by definition of restraint of trade. It is well settled that such a term will not be enforced by the courts unless it meets a twofold test –

A) It is reasonable as between the parties;
B) It is consistent with the interests of the public"

The judgement dealt with the case law on this in great depth. Paragraph 154 and 155 are important in that the court held

"In the written submissions filed on behalf of the plaintiff it was suggested that, in general post termination restraints are valid if the terms thereof are fair and reasonable in the circumstances. In argument, Mr Hayden agreed that the law is more nuanced. The presumption is that post termination restraints are void and unenforceable but they may in certain circumstances be justified if the purpose of the restrain is legitimate and the restraint goes no further than is necessary to protect a legitimate interest and is, in all the circumstances, fair and reasonable. It was accepted that the onus is on the plaintiff to establish to a legitimate purpose and to show that the restraint goes no further than is necessary"

The Court pointed out and this is important that if an employer with a nationwide chain of supermarkets might seek to enforce against a senior executive a covenant not to work in the supermarket business in Ireland within say 12 months of the cessation of the employment. The Court said if the executive had been employed at such time when the chain was established, the restraint might be justified. But if the executive had been employed say as a trainee manager at the time when the employer had a single shop it would not. In the example it could not at the time of the contract have been anticipated that the employee in the course of his employment would come to be in possession of sensitive commercial information so as to engage the clause. Similarly, the confidential information in relation to a chain of supermarkets would be of a different character to that of a single shop. The Court went on to say that it is important to set out that enforceability of the restraint is to be judged by reference to what the employee agreed not to do rather than what he or she proposes to do after the cessation.

The Court went on to point out that sensitive and valuable commercial information cannot be adequately protected by a confidentiality clause. The court pointed out that the Court was satisfied that the nature and

extent of the confidential information that would inevitably come to the knowledge of Mr Bellew in the course of his employment was such as to justify a post termination restraint.

The Court pointed out at paragraph 173 that what effects the Court most was whether the restraint went further than was necessary than the legitimate protection of the business.

The Court in this case held that the restraint was too wide and therefore was not capable of being enforced.

Time Limit for Issuing Claims – Issuing Claims Too Early

This issue arose and was commented on in case ADJ00018457. In that case the Adjudication Officer referred to the case of Brady –v- Employment Appeals Tribunal 2015 ELR. That case involved Bohemian Football Club. In that case Mr Justice Barrett pointed out that a number of issues had to be considered namely that the prescribed time periods are typically intended to thwart the tardy not punish the prompt. He did however also say

"Of course there will be some boundary in time and some circumstances in which an ostensibly premature notice will be found in fact to have being premature and thus not duly lodged within the appropriate time period for the purposes of Section A (2) (Unfair Dismissal Acts)."

It is helpful that this case is again being raised and quoted by an adjudication officer.

It is our view that if there is an issue as to what the correct termination date is, for example where employee is terminated on say 1 March but there is a six months' notice period does the employee issue the claim some date after 1 March or does the employee have to wait until a date after 1 September. In those circumstances it is our view that it is probably wise to issue the proceedings immediately and then to issue a further set of proceedings once the six month period has elapsed in those circumstances at least one of the claims will be in time.

Submitting Claims Within Time

This issue arose under the Payment of Wages Act in the Case ADJ-00014779.

The Adjudication Officer was met with a claim which went back a number of years. The Adjudication Officer held that the claim must cover a 6 month period prior to the date of lodging the claim. There is provision to extend matters back for a further 6 months in exceptional circumstances.

In this case the Adjudication Officer declined the jurisdiction.

There is a simple way of dealing with matters.

The first is that to put in a claim limiting the period to 6 months prior to the date of lodging the complaint. A second claim can then be lodged looking for a further 6 months back and setting out that there are exceptional circumstances. If that argument is upheld then the employee can effectively go back 12 months. If the argument is not upheld, the employee is still entitled to run their claim for the 6 month period of time.

The alternative, where there are significant sums of money is to limit the claim to 6 months and then to issue separately in the courts, going back for a 6 year period excluding the 6 months that was dealt with by the WRC.

It might be argued that cases should be dealt with in one location at one time. As the WRC has limited jurisdiction, that argument cannot subsequently stand up in our view.

Issuing Claims Under The Wrong Statutory Instrument

This is a problem that arises with the WRC claim form. This issue arose in ADJ00020505. The employee issued the claim under Section 6 of the Payment of Wages Act 1991. The employee was contending that the Sectoral Employment Order (Construction Sector) 2017 SI455 2017 applied to him. The Adjudication Officer pointed out that while the Adjudication Officer has jurisdiction to hear the complaint under the order the claims are brought under the Workplace Relations Act 2015 and not dealt with under the Payment of Wages Act 1991. The

Adjudication Officer held that they did not have jurisdiction to hear the case.

A claim under the Sectoral Employment Order must be issued under Section 41 of the Workplace Relations Act 2015.

This is a difficulty with the complaint form and the legislation as previously such claims would have been under the Payment of Wages Act on the base of payments properly due. We do consider such a claim could be validly raised.

Penalisation in Employment Matters

The issue of penalisation of an employee for bringing a claim is one which does arise on a regular basis. The issue arose in case ADJ00018981. The first issue was the issue of the burden of proof. This was addressed in the case of Toni & Guy Blackrock Limited –v- Paul O Neill HSD095 where in respect of the burden of proof the Labour Court stated;

"It seems to the Court that a form of shifting burden of proof, similar to that in Employment Equality law should be applied in the instant case. Thus, the claimant must establish on the balance of probabilities, that he made complaints concerning Health & Safety. It is then necessary for him to show that, having regard to the circumstances of the case; it is apt to infer from subsequent events that the complaints were an operative consideration leading to his dismissal. If those two limbs of the test were satisfied it is for the respondent to satisfy the Court, on credible evidence and to the normal civil standards, that the complaints relied upon did not influence the claimants dismissal".

The Court went on then to consider what amounts to penalisation stating;

"It is clear from the language of this section that in order to make out a complaint of penalisation it is necessary for a claimant to establish that the detriment to which he or she complained was imposed "for" having committed one of the acts protected by subsection 3. Thus, the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the claimant having committed a protected act. This suggests that where there is more than one causal factor in the

chain of events leading to the detriment complained 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 or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned determent".

This test which applied to the Safety Health and Welfare at Work Act is also now being applied to cases under the Organisation of Working Time Act and the Protected Disclosures Act.

Returning to work after an accident – Can an employee seek "lighter duties"

An Employee suffers an accident. The employee is certified fit to return to work but on lighter duties. What are the rights and obligations of the employer and the employee?

It may often happen that an employee will be involved in an accident. It may be an accident in the workplace or it may be an accident outside of the workplace. The employee then comes to the employer with a certificate, from their GP stating that they are fit to return to work but only to undertake lighter duties.

The employer in these situations can be met with a number of situations that they need to consider.

1. Should they be asking the employee to continue to put in sick certificates until they are in a position to return to their normal duties;
2. The employer is unable to provide lighter duties; or
3. The employer is reluctant to have the employee come back on lighter duties.

This raises a number of questions and the first one is

1. Is an employer obliged to provide an employee with lighter duties

The issue as to whether the employee is suffering from a disability under the Employment Equality Acts is often overlooked by employers.

In Leydon –v- Customer Perceptions Limited DEE17/2003 the employee had suffered an injury in a road traffic accident.

The Labour Court in that case held that the employee was not suffering merely from a temporary minor condition. The Labour Court looked at the issue of the ordinary and natural meaning of the word "malfunction" used under the Act and held that the employee came within the scope of the protection of the Act.

So what does this mean in practice?

In reality it means that the legislation requires an employer to make appropriate enquiries as to the extent of the employee's injuries. The employer must consider any special measures which could be put in place to reasonably accommodate the employee. Where the employee is not fully capable of doing the job they were employed to do even with reasonable accomodation the employer is not obliged to retain that employee. Now it is quite clear in those circumstances the employer does not have to provide lighter duties and can require the employee to continue sending in certificates until they are fit to return to their normal duties.

The problem arises however where the employer considers dismissing the employee. If the employer does not carry out the proper enquiries then the employer runs the risk that the employee may well win a discrimination case on the disability grounds.

Section 16 (3) of the Employment Equality Act sets out the requirements for an employer to provide reasonable accomodation.

This issue arose recently in the case of Nano Nagle –v- Daly 2019 IESC63 which approved the test which an employer should use in accessing reasonable accomodation. That is the test that was set out in Humphreys –v- Westwood Fitness Club 2004 ELR296. There are three conditions namely;

1. The employer must examine the factual position and seek clear medical guidance regarding the employee's capability. This includes the degree of impairment arising from the disability and its likely duration;

2. The employer must consider what reasonable accomodation or appropriate measures can be made available by which the employee may become fully competent to perform his or her role; and
3. Consult with the employee along the way to ensure that the employee has a say in any decision which could impact in a negative way on their terms and conditions of employment or which could lead to the termination of the employment.

It is advisable that the employee is encouraged to participate in the process from the outset. The Supreme Court in the Nano Nagle case found that while consultation is not mandatory and does not itself constitute discrimination that a prudent employer will provide "meaningful participation", in effect to show vindication of the employers duty under the Act.

Must the employer provide an entirely different job. The decision in the Nano Nagle case is that it is quite clear there is no obligation on an employer to provide a completely different job. Therefore if you had an employee who was working as a general operative on the factory floor there is no requirement to give the employee a job of an administrative nature.

Where an employer cannot reasonable accommodate an employee returning then the employer can insist on sick certificates to cover absences until they are fit to return to their normal duty.

It is best practice to have the employee reviewed by an occupational health advisor. This is particularly so if any issue of dismissal may subsequently arise.

An employer who has an employee who is not fit to do the work they were engaged to do may ultimately dismiss the employee. However, it is important that employers are extremely careful before going down that route as until they can show that they dealt with the issue of looking at reasonable accomodation the employer can find themselves of the wrong side of an equality claim.

Appeal of Compliance Notice

This issue arose in the case of Boots Retail (Ireland) Limited and the Workplace Relations Commission CNN194.

The appeal was brought on behalf of Boots Retail (Ireland) Limited. The appeal was made under Section 28 (7) of the Workplace Relations Act 2015 against a compliance notice.

Section 28 of the Act is relevant. It determines that where an inspector is satisfied that an employer has, in relation to any of his or her employees, contravened a provision to which the section applies, the inspector may serve a notice (in this section referred to as a "compliance notice") on the employer.

Section 28 (17) states that Section 28 applies to those provisions specified in Column 3 of Schedule 4 of the 2015 Act. The provisions in question include under the Working Time Act Section 6(2), 11, 12, 13, 14 (1), 15 (1), 16(2), 17, 18, 19 (1), 19(1a), 21, 22 and 23 (1) & (2).
The compliance notice also alleged that the issue which in this case related to breaches of Section 12 of the 1997 Act being rest breaks added in the words

"Contrary to the provisions of the Organisation of Working Time (Breaks at Work for Shop Employees) Regulations 1998 SI 57/1998…"

The inspector formed the opinion that there was breaches of the 1997 Act and SI57/1998.
The Court pointed out that Section 28 (10) of the 2015 Act provides that the Labour Court on appeal can do one of the following:

(A) Affirm the compliance notice;
(B) Withdraw the compliance notice concerned;
(C) Withdraw the compliance notice and require the employer to whom the notice applies to comply with such directions as may be given by the Labour Court.

The Court noted that concerns related to the inclusion of alleged breaches of SI57/1998. That statutory instrument is not an enactment specified in Column 3 of Schedule 4 of the 2015 Act.
The Court pointed out that it was not open to the Court to infer or imply inclusion of a Statutory Instrument into the Schedule simply on

grounds of the legislative basis for that statutory instrument having issued.

The Court pointed out in no uncertain terms that it does not have the power to "blue pencil" a compliance notice and that it did not have the power to amend or otherwise rewrite any compliance notice.

The Court held that the relevant compliance notice was defective and directed that it be withdrawn.
The decision of the Labour Court makes perfect sense. The Labour Court has its jurisdiction from what is set out in the 2015 Act.

The issue in relation to the 2015 Act is that this Act is consistently being commented upon, though not by the Labour Court in this case, as effectively being defective. There has been extremely poor drafting of this piece of legislation. This is another prime example of defective drafting. It would have been a very simple matter to include the relevant Statutory Instrument. The Statutory Instrument relates to shop workers. Therefore as the law currently stands an inspector of the WRC, cannot issue a compliance notice for breach of the break periods relating to shop workers where there are more beneficial provisions than those set out in the Organisation of Working Time Act. This is and we use the word on purpose a further example of quite appalling negligence in the drafting of legislation. We have the appalling situation of poorly drafted legislation where the government of the day was not prepared to invest in putting in place codified legislation. The Workplace Relations Act, 2015 is a mismatch of bits of legislation dragged together in a substandard fashion. The effect of the legislation is that the WRC inspectors have no power in relation to the relevant Statutory Instrument. They can do nothing about it. They cannot issue a compliance notice.

The sad reality is that there is no agenda there by either the Department of Employment Affairs and Social Security or the Department of Business Enterprise and Innovation to put the funds in place to put in place proper codification and modernisation of our employment legislation. It will be interesting to see if this blatant defect in the legislation will be dealt with by way of any form of amending legislation. Taking the way both of these Departments work it's probable that this will not be regarded as anything urgent. Knowing the two Departments it is unlikely that they will even comprehend the effect of what this

decision of the Labour Court is which has significant implications for enforcement of the legislation in respect of shop workers and their break entitlements.

Getting Employment Cases Resolved

In cases before the Employment Tribunal in Northern Ireland parties now have to consider the option of early conciliation before formally lodging a claim. From the 28th January those wishing to lodge a claim with the Industrial Tribunal or Fair Employment Tribunal have first to contact the Labour Relations Agency to discuss the option of early conciliation.

Nobody has to take part in early conciliation but they will be required to hear an explanation of the system. They must then consider using it to find a legally binding settlement. There are a number of exceptions but normally they will have to go through this process.

The time limit on bringing a claim in Northern Ireland will be paused for one month when an early conciliation notification is made. A conciliation officer can pause the time limit for a further 14 days if the conciliation officer believes there is a reasonable prospect of an agreement that both parties agree to.

Here in the Workplace Relations Commission the legislation specifically provides that parties must opt out of mediation. However, the way in which the WRC operates is that the parties must actually opt in which means that the claim form is actually wrong.
The WRC do not have sufficient resources for conciliation of employment rights cases and certainly do not have enough mediation officers.

The idea that the WRC could be as proactive in providing a system whereby parties would be required to consider mediation before lodging a claim is one which has absolutely no chance of ever getting onto the statute book here in Ireland in the foreseeable future. It is highly unlikely that the WRC will actually issue a claim form that complies with the legislation to require individuals to opt out of mediation and if they do not that they are presumed to have opted in. There is absolutely no chance at all of legislation providing for a holding period while people consider this as an option.

The reality of matters is that the WRC should be adopting a similar system. Mediation rather than litigation is what should be encouraged. Mediation is most definitely cheaper for both employers and employees. It enables matters to be settled in a confidential and non-confrontational way. It allows a mediation officer to help the parties reach an agreement subject to complying with the normal mediation rules. The reality on it is that the WRC is so underfunded that there is absolutely no way that they would have those resources made available to them.

When the Act of 2015 being the Workplace Relations Act was introduced we were told we were going to get a world class service. That quite frankly at this stage can be said to be an untruthful statement. In the five years since the Act came into force we have gone nowhere near that.

The WRC's own publications are considerably misleading. We were told that we were going to get hearings within twelve weeks of a claim being lodged and a decision within 8 weeks. In our experience that has never happened. At times we have got an early hearing. At other times we've got a very quick decision. However, the current position is that you are likely to be waiting at least eight months to get a decision. By that we mean a hearing date and then a decision. In reality the time limit now for cases before the WRC between the date that a matter is lodged and the date that the decision is received is likely to be in excess of twelve months. Mediation being formal mediation rather than this phone call mediation which is no more mediation than the man on the moon is rarely offered except with the case of equality cases. Even though this office would regularly and by regularly we mean in 99% of cases indicate that we are happy to go to mediation we have yet to be called for a mediation in relation to an Unfair Dismissal case or a claim under the Organisation of Working Time Act. The only cases which seem to be allocated for mediation are those under the Employment Equality Act.

The new system being introduced in Northern Ireland is proactive. It is forward thinking. It is a system which saves costs to employers and employees. It is resolution based rather than confrontational based which is the position in the WRC.

This is not a criticism of the WRC. This is a criticism of the manner in which the WRC is funded. It is totally underfunded.

There is an issue as to where challenges are going to start issuing.

The European Court of Justice a number of years back held in relation to competition cases that a three year period between a case being referred to the CJEU and the CJEU giving a decision was an excessive period of time and gave compensation to the parties on the basis that they had an entitlement to have matters dealt with quickly.

The CJEU held that competition cases are the most complex cases which the CJEU has to deal with. We must then start looking at the issue of claims under legislation such as the Employment Equality Act or under the Organisation of Working Time Act of the other piece of legislation which derived from EU directives. It would appear to us that it is now open for parties to consider issuing proceedings against the WRC for failure to comply with those rules of dealing with matters in a speedy fashion. The first of these cases is going to set out the time limit for a hearing and for a decision to issue. With the current delays in having matters dealt with in the WRC it is likely that these cases are going to start issuing.

Faulty Spinal Support Rods

On 13th February 2020, NuVasive Inc, an American medical device company, issued an urgent field safety notice to healthcare providers using MAGEC System Model X rods in patients. This notice issued a recall of the MAGEC System Model X rods having discovered that some patients had experienced the separation of an end cap component in the rod after surgery. NuVasive Inc indicated that the cause of this issue is still under investigation.

The number of patients affected is not yet known. However, the MAGEC System Model X rods, which were manufactured in 2017, have been used in children to treat scoliosis. Scoliosis is a sideways curvature of the spine. The spinal rods are surgically implanted to support spinal growth and protect lung development. The spinal rods have been implanted in children as young as two years.

An audit is now underway in Ireland to identify the children who have had the MAGEC System Model X rods implanted to treat scoliosis.

Whether or not these children will have to undergo further surgery to have these faulty rods removed will be a decision for their treating doctors.

Once concerned parents have had an opportunity to consider their options, this issue may result in a number of personal injury* compensation claims being brought against NuVasive Inc for damage and loss caused by their defective products and/or against the treating hospitals for medical negligence, if the surgical treatment fell below the standard of care. This is a very serious issue.

If you are the parent of a child who has had spinal rods implanted and you are concerned that these rods may be the MAGEC System Model X rods, then you should contact your GP and book an appointment to meet him / her. They may be in a position to put your concerns at ease immediately. Alternatively, they can arrange to make a referral to the surgical team that treated your child for assessment and investigation.

If you would like to speak with us in relation to your legal options, contact us today. While we are based in Dublin, we do offer a nationwide service and do our best to ensure that as much work as possible is carried out by telephone, email and post.

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