

## GRIEVANCE & DISMISSAL

*Last Updated: July 2017*

### WHAT IS A GRIEVANCE:

A grievance may be defined as a complaint which an employee(s) has concerning his or her terms and conditions of employment, working environment or working relationships.

### EXAMPLES OF CAUSES OF GRIEVANCES:



### VICARIOUS LIABILITY:

Vicarious Liability provides that where an employee commits any wrongdoing in the course of their employment, not only may that employee themselves be directly liable for their action, but, their employer may also be held vicariously liable for that employee's wrongdoing. The employer can be held vicariously liable for the actions of their employee because the employer is in control of the actions that the employee carries out in the course of their employment.

Vicarious liability also applies in instances of harassment in the workplace or in the course of an employee's employment. An employer can be held vicariously liable for an employee's harassing behaviour whether or not this behaviour occurs with the employer's knowledge or approval.

Section 15 (2) of the Employment Equality Acts 1998-2011 states that

*"anything done for a person as an agent for another person, with the authority (whether express or implied and whether precedent or subsequent) of that other person shall, in any proceedings brought under this Act, be treated for the purpose of this Act as done also by that person".*

This, of course, can place a significant burden on employers regarding the behaviour of their employees.

In a judgement made in the case of **Sweeney v Board of Management Balinteer Community School ([2011] IECH 131)**, it was held that although the employer was not aware that the complainant was being bullied and harassed by an employee of the college, the college was still vicariously liable for the wrongful acts of that employee as those acts were committed within the scope of their employment. The court held that the employer was obliged to take reasonable care to prevent the complainant suffering as a result of being bullied or harassed.

It is notable that vicarious liability is not limited to actions carried out within the workplace. In the case of **A Limited Company V One Female Employee (EE10/1998)**, the Equality Officer concluded that "within the scope of employment" can include events outside of the workplace. In this particular case the claimant was allegedly harassed by her fellow employees during a residential company training

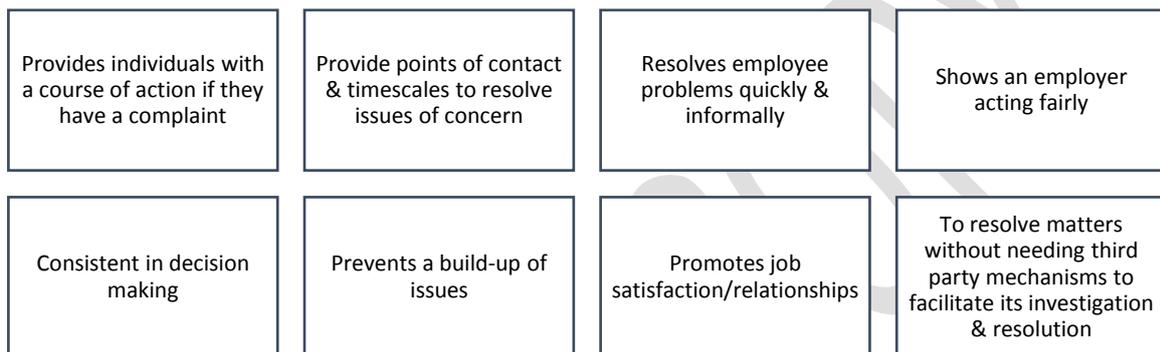
programme in a hotel. This case established that discrimination/harrassment may occur outside of the workplace.

A UK case **Majrowski -v- Guy's and St Thomas' NHS Trust [2006] U.K.H.L. 34, [2006] I.R.L.R. 695**, highlighted the potential for an employee to seek redress through the civil courts as opposed to going down the employment equality route. This can substantially increase the potential pay out in the case of a successful claim.

## WHY DO WE NEED A GRIEVANCE POLICY & PROCEDURE?

The aim of a grievance procedure is to encourage consistency, transparency and fairness in the handling of workplace problems or complaints.

It also achieves the following:



## REASONABLY PRACITCAL STEPS:

The good news for you, as a manager/employer is that you can avoid liability if you can demonstrate that you took steps to prevent an incident of harassment and if you can demonstrate that any complaints were dealt with after the incident.

Section 15 (3) of the Employment Equality Acts 1998 – 2011 requires employers to

*“take such steps that are reasonably practical to prevent an employee from doing that act or from doing in the course of their employment, acts of that description”.*

The only way for an employer to fully demonstrate that they took steps to prevent such acts is to ensure that they have clear written policies in relation to equality and bullying / harassment.

## PROCEDURE:

A grievance policy and procedure will provide a mechanism to solve problems and no employee shall suffer any form of victimization as a result of raising a grievance under this procedure.

The Code of Practice on Grievance Procedure as provided for by S.I. number 146 of 2000 sets out the best practice guidelines for Grievance procedures.

The first step for anyone dealing with a grievance issue is to refer to the Company policy.

Although the Employment Equality Acts place a heavy burden on Employers to protect their employees from harassment, the Acts also provide an avenue of defence that can be easily met with the correct policies in place, and with increased awareness of the issue amongst the employees directly involved with managing people.

It was made clear in the case of **Piazza V Clarion Hotel (DEC-E2004-033)** that employers should have a dedicated policy in relation to equality, bullying and harassment and that they should not rely on a standard grievance policy and to tailor it to each organisation.

The procedure should be applied fairly and consistently to all staff.



### COMMUNICATION OF THE PROCEDURE:

These policies should be communicated to employees and signed by both parties to ensure that employees understand the content.

### TRAINING:

It is advised that as a Company you should provide appropriate training to any staff members who have staff management functions. This training should be kept under review in light of developments and best practice in this area and show management the basics in addressing grievances in the first instance.

### GENERAL PRINCIPLES:



### EARLY INTERVENTION:

Grievances are best dealt with at an early stage, informally, with the immediate Line Manager.

When an employee comes to you as a manager/employer with a grievance you should:

1. Provide the complainant with a copy of the grievance policy.
2. Talk through the company grievance procedure available to them i.e. informal, formal and mediation. Do not advise the employee to take any particular route. This is their choice and their grievance.
3. Ask the complainant to consider the options available to him/her regarding the choice to take the formal or informal route and to let you know his/her decision by a certain time limit. This will allow for you to act on the grievance [if the employee so wishes] or close the grievance off so that the Company are not in limbo.
4. Inform the complainant that if he/she decides to by-pass the informal procedure, that this will not reflect negatively on him/her in the formal procedure.

However, organisations should have formal procedures in place to handle cases left unresolved. Having formal grievance procedures in place allows employers to give reasonable consideration to any issues which can't be resolved informally and to deal with them fairly and consistently. Pursuing the formal route should be a last resort rather than the first option.

### **ACTING ON A GRIEVANCE:**

The grievance is the issue of the employee therefore the Company is not permitted to resolve it outside of the grievance procedure.

In many cases we receive calls in the office saying *"the employee said to me that she wanted to bring it to my attention that **XXXXXXXXXXXX** – she said that she doesn't want to do anything about it but wanted me to know"*.

In this case you or your managers should know and be advised that there is nothing we can do in this above instance. The employee owns this grievance and it is their side of the situation. A grievance allows for both sides to be stated therefore the company cannot show bias in addressing the issues without the employee deciding on a route of the grievance procedure.

In the above case it would be best for you or your managers to note *"OK, we appreciate you bringing this to my attention. However, please note the company cannot act on this issue for you outside of the procedures set down in our policies. The ownership of the issue belongs to you and if you wish to go down one of the routes of the procedures then this is your choice. I cannot address this issue with **XXXXX** unless you choose to do so using the procedure. I have gone through the routes available to you and I will send you a follow up letter after our chat."*

### **WORKING UNDER PROTEST:**

The company grievance procedure should contain a clause whereby employees are requested to work under protect during the completion of the greivance procedure.

Should a dispute arise in relation to the handling of a grievance, it is agreed that the employee's concerned will continue to work normally (under protest if necessary) pending resolution and exhaustion of the agreed grievance procedure.

### **INFORMAL PROCEDURE:**

Most routine complaints are capable of being resolved on an informal basis without recourse to the formal grievance procedure. The below is a best practise informal procedure.

- I. The complainant can approach the alleged perpetrator and inform him/her that he finds his/her behaviour to be unacceptable.
  - *This may resolve the issue and the grievance is finished at that point in time.*
  - *If the issues arise again with the employee then they are welcome to use this approach again or alternatively a different route to try to resolve the issues.*
  
- II. The complainant can approach the supervisor/manager and ask for their assistance with the matter.
  - This could involve the supervisor/manager approaching the alleged perpetrator on behalf of the complainant.
  - Normally, this would entail the supervisor/manager telling the alleged perpetrator that the complainant has raised an informal grievance and the nature
  - The supervisor/manager would faciliate a meeting between the 2 parties confidentially.

- The supervisor/manager would ask the complainant to go first and explain the issues.
- The supervisor/manager would ask the subject of the complainant to respond.
- The meeting must be completed with dignity and respect.
- At the end of the meeting both should come to an agreement that this issues will be resolved and will not occur again.
- Both the complainant and the alleged perpetrator should be told that the option of mediation which should be considered as the next appropriate course of action.
- The supervisor/manager needs to ensure to ask the complainant at the end of the meeting if his/her grievance has been resolved via the meeting.
- The supervisor/manager needs to state in the meeting *“should you not feel happy that your grievance has been resolved or should issues arise again the grievance procedure is always available to you”*

If the matter has not been resolved satisfactorily through informal discussions, the employee may raise a formal complaint under the grievance procedure.

#### **ESCALATION:**

It may start and stop with the informal discussion but it may escalate to the formal procedure.

#### **MEDIATION:**

Workplace mediation is an alternative method of resolving complaints. This is a separate, alternative method of resolution where both parties agree to the process of mediation. Workplace mediation is an informal process, through which a Mediator helps the parties in a dispute to talk about the issues between them, and if they wish, to reach an agreement which is acceptable to both sides.

The process is voluntary and both parties must be willing to take part and agree to the appointment of a Mediator (internal or external).

If the parties agree to this approach, the Company must appoint a neutral and impartial Mediator, with the agreement of the parties, to facilitate the process.

#### **THE FORMAL PROCEDURE:**

The formal procedure for the settlement of grievances will not normally be invoked unless the matter has been first referred for settlement under the Informal Procedure or if the parties elect for the formal procedure.

Firstly the supervisor/manager should follow the early intervention steps outlined above.

Secondly the below are key for ensuring a fair process is achieved.

#### **REPRESENTATION:**

The employee should have the right to be accompanied by a work colleague or a chosen representative at any meeting under the procedure.

Under the Code of Practice, “employee representative” includes the below:

- a colleague of the employee's choice
- a registered trade union
- but not any other person or body unconnected with the enterprise

A witness may address the meeting but not speak on the employee behalf.

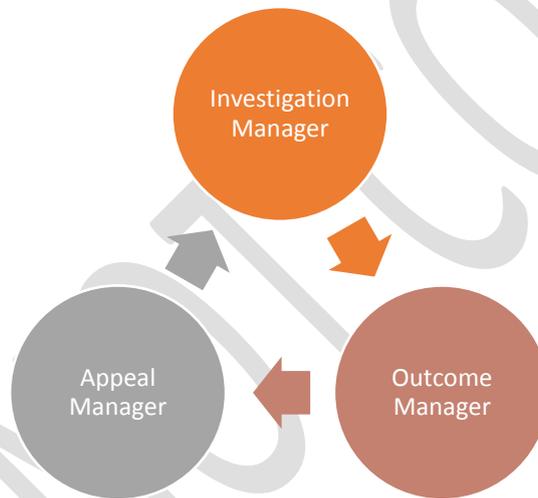
The right to representation should be stated in all correspondence & in minutes

**Justin Leigh v Speedking Couriers Limited t/a Fastway Couriers:** Mr Leigh was involved in a serious incident where a banger was exploded in the workplace causing injury to a number of employees. The EAT found that the investigative and disciplinary processes in the case “were fundamentally flawed to the extent that the tribunal considers and holds the claimant to have been unfairly dismissed”. Mr Leigh admitted responsibility from the outset but claimed that there had been nothing wilful in his actions. The Tribunal stated that that the exclusion of Mr Leigh’s union representative and the denial to him of his representative of choice during the process was unfair & a fundamental breach of his contractual entitlements. Awarded €1,500 for the unfair dismissal and €2,663 in lieu of four weeks minimum notice.

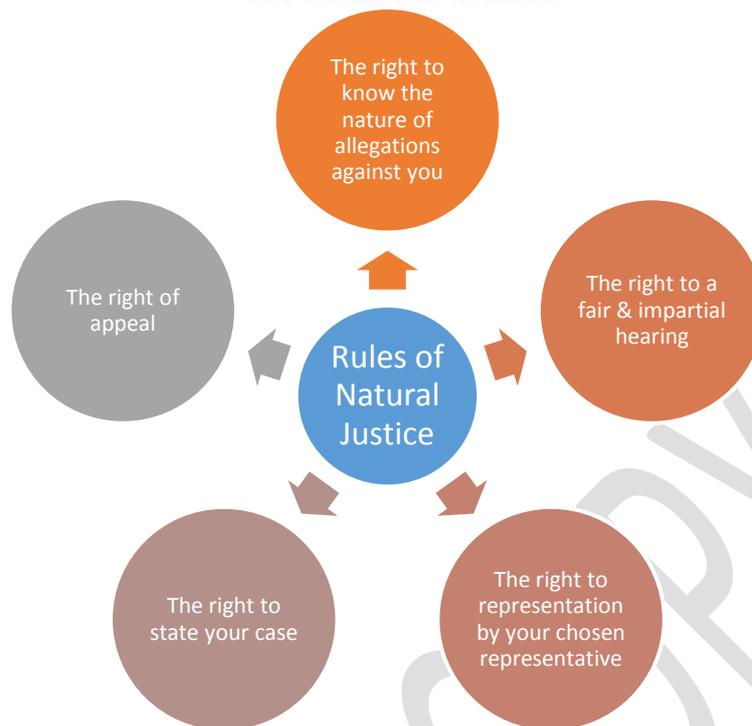
**TIME LIMITS:**

While every effort will be made to adhere to the prescribed time limits these may be extended at any stage in exceptional circumstances. Every effort should be made to address complaints quickly and fairly.

**SEPERATION OF PROCESS:**



**NATURAL JUSTICE:**



Both the complainant and the subject of the complaint are entitled to the below. Should either and/or both not receive the below the process is deemed as unfair.

- I. The right to know the allegations against you: We often get queries in the office regarding “*I am going to surprise them and then they will tell the truth*”. This is not permissible. The alleged perpetrator must get the allegation in full in advance of their meetings – this includes the written complaint, any witness statements and the minutes of the grievance investigation meeting with the complainant.
- II. The right to a fair and impartial hearing: this refers to the separation of process as confirmed above. An investigation manager and an outcome manager. A minute taker can be the same throughout the meeting. A common occurrence in the office is “can the investigation manager be my minute taker in my outcome meeting?”. No. The investigation manager cannot be involved in any stage passed the investigation.
- III. The right to representation: as confirmed above. It must be stated in all letters and in all meetings to be included in the minutes
- IV. The right to state your case: Both the complainant and the subject of the complaint are entitled to state their case and should be allowed full opportunity to do so.
- V. The right to appeal: should be stated throughout the process.

#### **PAPER TRAIL:**

The operation of a good grievance and disciplinary procedure requires the maintenance of adequate records. It is important to have a paper trail documenting each step of any investigation either grievance and/or follow up disciplinary.

**Remember:** if this particular grievance ends up in the WRC – their thinking is “*if it isn’t in writing it did not happen*”. If you cannot show you have given a fair procedure how can you expect the WRC to decide in your favour?

## **FORMAL PROCEDURE IN ACTION:**

### ***In advance:***

Terms of reference must be drafted.

### ***Grievance Investigation Meetings:***

When a complainant decides to go down the formal route the complaint must be in writing. The Company cannot proceed with this route if it is not in writing. The complaint will include precise details of the grievance such as dates, times, witness’s including the parties to the grievance.

The Investigation Manager needs to meet with the complainant, the subject of the complaint and any witnesses to establish the facts.

- ***The Complainant:***

Once the complainant has received an invite needs to be sent to the Complainant in writing inviting to an investigation meeting. The Grievance procedure and any relevant procedures need to be attached to the invite and the investigation terms of reference.

There is a set template for this letter which incorporates representation, evidence and the rules of natural justice therefore be sure to contact the office to get the template to ensure that you are in compliance with best practise.

Set guidelines need to be followed in this meeting. The HR Suite have drafted a guideline template. Be sure to contact the office to get the template as this is updated on an ongoing basis in line with case law.

The minutes then need to be typed to be used in the grievance investigation report and a copy given to the complainant as soon as possible.

- ***The Subject of the Complaint***

Once the complainant has been met it is now necessary to inform the subject of the complaint. The subject of the complaint needs to receive an invite detailing the allegations including a copy of the written complaint and the minutes of the investigation meeting with the subject of the complaint. The Grievance procedure and any relevant procedures need to be attached to the invite.

There is a set template for this letter which incorporates representation, evidence and the rules of natural justice and the investigation terms of reference therefore be sure to contact the office to get the template to ensure that you are in compliance with best practise.

Set guidelines need to be followed in this meeting. The HR Suite have drafted a guideline template. Be sure to contact the office to get the template as this is updated on an ongoing basis in line with case law.

The minutes then need to be typed to be used in the grievance investigation report and a copy given to the subject of the complaint as soon as possible.

- ***Witnesses:***

Witnesses need to be met if mentioned in the formal complaint or within investigation meetings.

A witness may not wish to be involved in the procedure and unfortunately this may be the case in some grievances. If a witness refuses to partake they cannot be forced to do so. However it should be noted in the grievance investigation report.

There is a set template for this letter which incorporates representation, the fact that the name was given whilst investigating this complaint and that there is no implication on the witness. Be sure to contact the office to get the template to ensure that you are in compliance with best practise.

Set guidelines need to be followed in this meeting. The HR Suite have drafted a guideline template. Be sure to contact the office to get the template as this is updated on an ongoing basis in line with case law.

The minutes then need to be typed to be used in the grievance investigation report and a copy given to the witness for their own records as soon as possible.

#### ***Preliminary Grievance Investigation Report:***

Once the facts have been established the Investigation Manager needs to draft a preliminary investigation report.

There is a set template for this report and corresponding appendices therefore be sure to contact the office to get the template to ensure that you are in compliance with best practise.

Both the complainant and the subject of the complaint will receive a copy of this Preliminary Grievance Investigation Report with a letter stating that they are being given a final opportunity to review and make additional comments on the preliminary findings as they deem fit. Once the Investigation Manager has received feedback from both parties the Investigator will finalise the Grievance Investigation Report and it will be issued to both parties and the Company [if separate to the Investigation Manager]. Any feedback must have a deadline date so as to keep the process going and to ensure the process is completed in a timely efficient manner.

#### ***Finalised Grievance Investigation Report:***

Once feedback has been received the Investigator will then finalise the report.

This finalised report will be sent from the Grievance Outcome Manager with an invite to the outcome meeting for both the complainant and the subject of complaint. There is a set template for these letters which incorporates representation and the rules of natural justice therefore be sure to contact the office to get the template to ensure that you are in compliance with best practise.

#### ***Grievance Outcome Meeting:***

There are set guidelines need to be followed in this meeting. The HR Suite have drafted a guideline template. Be sure to contact the office to get the template as this is updated on an ongoing basis in line with case law.

The minutes then need to be typed. The Outcome Manager then finalises their decision and issues to the complainant and the subject of the complaint. The minutes of the subject of the complaint and complainant outcome meetings need to be attached to the back of the decision letter.

The Outcome Manager then finalises their decision and issues to the complainant and the subject of the complaint. The outcome could be one of the following:

- I. The grievance is not upheld.
- II. There is no sufficient evidence to confirm or deny the allegations.
- III. The grievance is founded and disciplinary is warranted.
- IV. The grievance is vexatious.

### **Appeal:**

All parties have the right to appeal and this should be set out within the following:

- The grievance procedure
- The outcome meeting
- The decision letter

If an appeal is taken please contact the office as there is a set process to be followed for the invite letter which incorporates representation etc. Be sure to contact the office to get the template to ensure that you are in compliance with best practise.

The appeal manager needs to be a separate individual and not have been involved in the process to date.

### **VICTIMISATION:**

An employee should not be penalised in any way for making a complaint in good faith regardless of whether or not the complaint is upheld.

### **DISCIPLINARY AFTER A FOUNDED GRIEVANCE:**

If the outcome manager upholds the grievance investigation report and confirms that a disciplinary sanction is required then the normal disciplinary process must then be completed.

This refers to a:

- Disciplinary investigation meeting with the subject of the complaint
- Disciplinary outcome meeting
- Sanction issued
- Appeal [if invoked]

The team that carry out the disciplinary process must be completely and independent of the grievance team.

Should you require any information on the disciplinary procedure please ask for a copy of our factsheet and disciplinary and dismissal.

All dismissals must be conducted in line with best practise and must adhere fully to the rules of natural justice.

### **SUSPENSION OF THE PROCESS:**

What happens if the complainant and/or the subject of the complaint starts sick leave during the grievance and/or follow on disciplinary proceedings?

- I. If this happens it would be imperative for the company to ensure the sick leave procedure is being strictly adhered to.
- II. It is advised that a pause is placed on any internal procedures.

- III. A letter stating the same should be issued to all parties i.e. the complainant and the subject of the complaint. Please contact the office to ensure your letter is drafted in line with best practice.
- IV. If it becomes apparent that the employee intends to use sick leave as a means to avoid participating in the process the Company needs to ensure that absence procedures are invoked at an early stage i.e. sending to the Company Doctor etc. so that actions towards the termination of the employees employment based on long term absence. This statement is generic and any consideration towards the termination of the employees employment in each and every case should be reviewed by The HR Suite.

### **PARELLEL PROCEEDINGS:**

How should you handle matters when an employee raises a counter grievance or allegations of bullying during the grievance and/or follow on disciplinary process into their conduct?

- If a fresh grievance is raised that is unrelated to the process – it is important that a fresh investigation is done typically whilst continuing the parallel proceedings already in place.

As each scenario is different if you are unsure then it is advisable to contact our office to discuss so that you can step back and take stock of the situation.

### **GRIEVANCE V PROTECTED DISCLOSURE:**

The Code of Practice on Protected Disclosures Act 2014 came into effect on the 15 July 2014 and was heralded as providing world class whistleblowing protection for all sectors of employment.

The Code stresses the importance of including a section in every whistleblowing policy which distinguishes between a grievance and a protected disclosure. The former being defined as a “matter specific to the worker” i.e. something in relation to the workers terms and conditions of employment. This type of issue should be dealt with by the organisations grievance procedure and significant care is needed in distinguishing both apart.

The maximum compensation payable under the unfair dismissals acts is five years remuneration with no service requirement needed to take the case for a dismissal relating to a protected disclosure. This clearly demonstrates the strong protections in place for employees who have made a protected disclosure.

### **WHAT IF I AM UNSURE WHEN AN EMPLOYEE RAISES AN ISSUE?**

- Take the details of the concern / complaint.
- Engage with The HR Suite to discuss.
- Take time to consider in line with the definition of a grievance and whistleblowing and other procedures before advising on an appropriate process.

Ensure you have a paper trail.

### **WHAT HAPPENS IF MY COMPANY DOESN'T FOLLOW PROCEDURE:**

If the Company does not follow correct procedure in the grievance procedure the employee who complained can take a case under the Section 20(1) of the Industrial Relations Act, 1969 [as amended]

- **20.—(1) Where the workers concerned in a trade dispute or their trade union or trade unions request or requests the Court to investigate the dispute and undertake or undertakes before the investigation to accept the recommendation of the Court under section 68 of the Principal Act in relation thereto then, notwithstanding anything**

*contained in the Principal Act or in this Act, the Court shall investigate the dispute and shall make a recommendation under the said section 68 in relation thereto.*

This can be taken with specific reference to the provisions of S.I. No. 17/2002, Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in The Workplace) (Declaration) Order 2002 where best practise grievance guidelines are given [and outlined above in the factsheet].

If an employee has exhausted all the options available to him/her and the company refuses to invoke the grievance procedure or conduct it properly then the employee resign from their place of work and take a case of constructive dismissal under the Unfair Dismissals Acts 1977-2001. This means:

- I exhausted all the internal options available to me.
- I was left with no other choice but to resign due to the conduct of my employer.
- It was reasonable for me to resign due to the conduct [or lack of] by my employer.

If an employee is dismissed as a result of a grievance being upheld they can take a claim under the Unfair Dismissals Acts 1977-2001. This legislation is intended to provide employees with legal protection from being unfairly dismissed from their jobs, to lay down criteria by which dismissals are to be judged unfair, and to establish an adjudication system to provide redress for any employee who is found to be unfairly dismissed with up to two year salary compensation.

#### TOP TIPS:



#### CONTACT THE HR SUITE:

If you have any queries please do not hesitate to contact our office on 066-7102887 and we would be happy to deal with your query.