Welcome to the September Issue of Keeping In Touch*

The holiday season for many is coming to an end. The schools are returning. The Courts which closed for August and September have been active this year as in other years. The full legal term will commence in October. For employment lawyers August has been a busy month.
There are a number of areas of law which we see developing over the next 12 months. These are:-

1. Claims of harassment and sexual harassment. To an extent the #Metoo has had a significant impact. Also the International Bar Association will now use the hashtag #Ustoo who recently produced a report indicating quite frightening levels of sexual harassment and bullying in the legal profession. In the area of sexual harassment worldwide 1 in 2 women and 1 in 14 men have been subjected to sexual harassment. This is a challenge for everybody in the legal profession. Similar percentages apply in other professions also. These cases are being taken. A significant number of them settle before they ever get to court. However it is a problem that needs to be addressed.

2. In the WRC we are seeing a considerable amount of people who think that they can bring their own claims to the WRC. Many can. However a majority are bringing claims under the wrong section or bringing claims that result in the claim being statute barred. There is a lack of information to enable people to bring their own claims. In saying this, the WRC seem intent on supporting the idea that individuals can bring claims without the benefit of representation. The WRC is an inquisitorial service. In reality they still, despite a decision of the Supreme Court seem to operate as an adversarial service.

3. In the WRC there are many cases where employers and employees are claiming that they were not notified of hearing dates. Previously before the LRC, the EAT and, the Equality Tribunal notifications of hearing were sent by registered post.

This no longer happens. They are not even sent with a certificate of posting. Despite this the WRC appears to work on the basis that because they have a copy letter on file that this means that the letter went out. This is an issue which at some stage is going to have to be addressed.

4. Claims before both the WRC and the Labour Court are now becoming extremely technical. This is placing increased cost on both employers and employees in bringing claims. This does raise the issue of the access to justice. At some stage some case is going to have to be taken in light of the Charter of Fundamental Rights of the European Union as to the right to legal aid.

5. In general litigation there is the ongoing saga in relation to personal injury awards.

6. There is an interaction between employment law and personal injury work. Stress and burnout cases are now becoming a lot more common. Excess of working hours. Constant availability. Lack of proper rest and break periods. Lack of uninterrupted holidays. These are all factors which are leading to stress and burnout. A significant number of claims are now arising because of the unrealistic expectations placed on employees by employers.

In this newsletter we try to highlight some of the more important changes and more important decisions which have arisen in employment law and in the area of personal injury law over the last month.

We hope those reading this newsletter find it useful.

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Out and About in August 2019

On 14 August Richard Grogan was quoted in an article in The Times Ireland Edition on the issue of Deliveroo riders and the submission by Deliveroo that they would be able to keep their riders as self-employed individuals.

On Thursday 16 August Richard Grogan was quoted in the Journal.ie on the issue of the government examining the right to disconnect from emails out of hours and whether this would work in Ireland. This issue arose out of the change of the law in France which outlaws employees accessing work emails or answering mobile phones out of working hours.

On Sunday 18th August Richard Grogan was interviewed on RTE on the This Week Show on the issue of working hours and the requirement for employees to access emails or answer mobile phones out of working hours. Subsequently on Monday 19 August Richard Grogan was interviewed on KFM Radio and on Highland Radio on the same issues.

On 21 August Richard was interviewed on the last word by Matt Cooper discussing the Ryanair injunction case.

Contracts for Senior Employees

When putting in place a contract for a senior employee the issue of that employee leaving or being required by the organisation to leave will not be at the top of the mind of the employer taking on the new employee. They will want to see it in a positive way. However there are realities of life that at certain stages an employer may want to dispense with the services of a particular employee.

For this reason it is important to have Garden Leave Clauses. Such a clause in a contact of employment will enable an employer to require an employee not to attend work and to only carry out very limited tasks during this period of Garden Leave. Employees continue to be paid during the Garden Leave and remain bound by his or her

contract of employment and the duty of trust in confidence during that period. A Garden Leave Clause enables protection to an employer where the employee may be leaving to set up their own business or to take up employment with a competitor. By placing an employee on Garden Leave the employer can effectively stop and reduce the risk of an employee using information, such as a new job or to set up on their own. The reason for this is that Garden Leave provisions will provide that the employee will not during the period of Garden Leave be involved in any other business.

It is possible to include a Garden Leave Clause in any contract of employment to cover a situation where an employee is going. It can be at the election of the employer. We would always advise to put in place or to activate a Garden Leave Clause the employer must furnish notice of termination of the employment. While the employee is on Garden Leave they continue as if they are at work but just not at work. By this we mean that periods of Garden Leave cannot be used towards holidays and while an employee is on Garden Leave they will continue to accrue holiday entitlements. Placing an employee on Garden Leave can be used as a period of notice for any requirement to pay notice either statutory or as per their contract.

Terms of Employment (Information) Act 1994-2014

An issue is arising in many cases where employers seek to state that various breaches of the Act are either technical or that the employee has suffered no detriment.

In addition, the issue of having to raise a grievance prior to issuing a complaint to the WRC is often raised.

In case TED-1943 being a case involving Beachfield Private Home Care Limited all these three defences were put forward. This occurred in the WRC and in the Labour Court. In the WRC, under ADJ18463, compensation of one week's wages was awarded. The employee appealed this to the Labour Court.

The Labour Court in this case as in case TE-1914 has confirmed that;

"It is not necessary for a complainant under the 1994 Act to demonstrate that he or she suffered a detriment".

The Court went on to state;

"Likewise the Court does not accept that a respondent's classification of its non – compliance with the requirements of the Act as merely a technical breach provides a legitimate defence to such non compliance".

The Labour Court then further went on to state;

"Furthermore, there is no provision in the 1994 Act that makes it a condition precedent of an employee's entitlement to refer a complaint under the Act …that he or she personally raises a grievance about their contract with their employer".

In this case the Court determined that the level of compensation should be at the highest level. It is interesting that the Court also states;

"The Court also notes the respondents continued characterisation of the breaches of the 1994 Act that occurred in this case as merely technical or semantic in nature".

While it is not set out in the particular decision of the Labour Court this is a case where before the WRC the AO had quoted the case of Irish Water and Hall. On appeal the employee in this case, again although it is not set out in this determination, quoted the case of Merchants Arch Restaurant Company Limited DWT188.

In these cases, before the WRC, there appears to be constantly issues arising in relation to the issue of matters being a technical breach or no detriment to an employee. In the last number of months the Labour Court has been very clear and concise that these are not relevant issues in making a determination.

It is going to be interesting to see if these defences continue to be raised in the WRC. If they are it is quite clear, from the decision of the Labour Court in this case, that where an employer argues that breaches are merely technical or semantic rather than addressing the

issue that this is an issue to be taken into account in setting compensation. In this case the maximum award was made.

Contracts of Employment – The Requirement to Furnish a Contract

In case TED1914 being a case of Maano Food (Dungarvan) Limited the employer in this case appealed the decision of an Adjudication Officer awarding four weeks wages. The Labour Court in this case awarded compensation of two weeks wages. The Court pointed out that the failure to provide the employee with a revised statement within one month of changes taking effect in this case was the less serious end of the scale.

The Labour Court importantly however has confirmed that

"It is well established in the determinations of this Court that it is not necessary for a complainant under the Act to demonstrate that he or she suffered a detriment arising from the employer's non-compliance with the Act in order to secure compensation"

This is an extremely important statement by the Court.

In various cases before the WRC the argument is regularly made by employers that the employee has not suffered a detriment. It is helpful that the Labour Court has again restated that such an issue is not relevant and that an employee, bringing a claim does not need to demonstrate that they suffered a detriment.

It is to be hoped that this most recent decision of the Labour Court is one which will be taken on board to avoid unnecessary arguments being made in the WRC that detriment is an element to be taken into account.

Whistle-Blowing Policy

A new European Union Directive on the protection of persons reporting on breaches of Union Law will result in a change in the law here in Ireland. The Irish legislation is one of the strongest in Europe

as it is. The Protected Disclosures Act provided that a workers motivation for making any protected Disclosure is irrelevant. An amendment to the Act in 2018, being the EU (Protection of Trade Secrets) Regulations 2018 provides that where a whistle – blower wants to reveal a trade secret as defined by that Act they have a duty to demonstrate that they are doing so in the public interest.

In relation to the Directive, most of the Directive will not need to be implemented here in Ireland as it is already applicable.

There are some changes proposed however;

1. The Directive will expand the definition of relevant wrong doings to include breaches of EU Law, Money Laundering, Corporate Tax Laws, Food product and Transport safety along with Environmental protection, public procurement, Data Protection, Consumer Protection, nuclear safety and public health.

The definition of whistle-blower will now encompass what is termed legal persons as well as natural persons or individuals. The following workers will be included to include self-employed, company shareholders, non-executive directors, volunteers and unpaid trainees and interns.

The legislation in Ireland requires public sector employers to have a whistleblowing policy. This does not apply to the private sector. The Directive will extend the requirement for having a policy to all entities operating a financial services or vulnerable to money laundering, private entities with more than 50 employees and private entities with an annual turnover or balance sheet of €10 million or more.

They will also be required to have reporting channels to ensure the confidentiality of the whistle-blowers identity and ensure that reports are followed up within three months.

The issue of whistleblowing is an important issue in many organisations and it is important to have proper policies in place where there are no proper policies in place, employers have a difficulty in restricting disclosures within the organisation. By having a policy in place it means that disclosures can firstly be dealt with in organisations.

Protected Disclosures Act 2014

Claims under this Act do not regularly arise. This is one where it did arise and helpfully the AO in this case has set out the law in some detail.

The AO in this case set out the legislation in Section 3 which sets out what penalisation is and that Section 5 (8) of the Act provides that in proceedings as to whether a disclosure is a protected disclosure it is presumed until the contrary is proved that it is.

The AO pointed out that a worker must reasonably believe that the information disclosed by him tends to show one or more relevant wrongdoing. The worker is permitted to be wrong as outlined in a policy however the UK EAT case of Darnton –v- University of Surrey 2003 ICR615 set out that a reasonable belief must be based on facts as understood by the worker not as actually found to be the case. The AO pointed out that Section 5 (7) of the Act provides that motivation is irrelevant in making a protected disclosure. The AO pointed out that the seminal case on penalisation in this country to date is found in the case of Aidan and Henrietta McGrath Partnership –v- Anna Monaghan PDD2/2006 where the test was identified as

1. To establish that a protected disclosure is in existence
2. An examination of the facts to establish whether penalisation has occurred.

The AO pointed out that the detriment giving rise to the complaints must have been incurred because of or in retaliation for the complainant having made a protected act. The commission of a protected act must be the operative cause in the sense that "but for" the employee having committed the protected act he would not have suffered the detriment.

It is helpful, that the AO, in this case has set out the law in such depth.
This is a case which the employee won and was awarded €10,000.

Protected Disclosure Dismissals

It is worth remembering the case of Dougan and Clarke –v- Lifeline Ambulance Limited unreported Circuit Court being a decision of Comerford J where Judge Comerford considered what circumstances would amount to a substantial ground for a Court to conclude that a dismissal had resulted wholly or mainly from making a protected disclosure.

"The Court concluded that such factors would necessarily include the temporal proximity between the making of the protected disclosure and the dismissal, whether any animosity arose between the parties as a result of the protected disclosure prior to dismissal, whether fair procedures of natural justice were afforded to the complainant in the dismissal procedures adopted by the respondent, whether any such apparent fair procedures of natural justice were real or merely window dressing and whether the complainant was treated in a less favourable manner to comparative employees who had not made protected disclosures".

There is a belief by some employees that simply making a protected disclosure therefore means that they are immune from any action by an employer. This is incorrect. We are simply pointing this out at this stage for the purposes of clarification as some employees take these cases up entirely incorrectly as to what the Protected Disclosure Act is there to do.

Unfair Dismissals and Fair Procedures

This is an issue which is constantly arising and arose in case ADJ18048.

In this case the employee had been found in possession in the employers premises with an illegal substance contrary to the employer's staff handbook.

The employee was given a right to be represented by a fellow employee but refused this. The employee never requested to be represented by a lawyer. The employee appealed. The company policy does not specify that an oral hearing is required at an appeal stage but it is good practice. In this case there was no oral hearing of an appeal.

The AO in this case quoted the case of Looney –v- Looney UD83/1984 where the EAT referred to the role of an adjudicator was

"To consider against the facts, what a reasonable employer would have done"

The case of Bunyan –v- United Dominis Trust 1982 ILRM 404 which states

"The fairness or unfairness of a dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business, would have behaved"

In reference to the issue of considering whether the decision to dismiss is proportionate to the gravity of the complaint the case of Frizelle –v- New Ross Credit Union 1997 IHC 137 in that case it was quoted

"The decision must also be proportionate to the gravity and effect of dismissal on the employee"

In Pacelli –v- Irish Distillers Limited 2004 ELR25 the EAT stated that any investigation should have regard to all the facts, issues and circumstances.

The case of Geron –v- Dunnes Stores Limited was one where the complainant in that case had an entitlement to have her submissions listened to and evaluated.

The AO in dealing with the issue of procedural as against substantive justice quoted the case of Redmond's Dismissal Law where it was noted
"Procedural defects will not make a dismissal automatically unfair… an employer may be able to justify a procedural admission if it meets the

onus proving that, despite the omission, it acted reasonably in the circumstances in deciding who dismissed the employee".

The AO in this case pointed out that the issue in relation to being allowed cross examine witnesses was not relevant where the offence was omitted. In addition no evidence offered was one where the complainant sought or was denied the opportunity to cross examine witnesses. In this case the AO held that the dismissal was fair.

The facts that all procedures are not followed will not automatically mean that a dismissal will be deemed to be unfair. However where procedures are not followed it may result in a finding of unfair dismissal. It is therefore better practice for all employers to follow dismissal procedures fairly.

Unfair Dismissal and Redundancy

It will often arise that an employee will claim that the employee was unfairly dismissed and the employer will contend that it was a redundancy. This issue arose in case ADJ17951. In this case there was extensive case law quoted.

The union in this case quoted the cases of Sheehan and O'Brien –v- Vintners Federation of Ireland 2009 ELR155 where the claimants had been employed as regional representatives for about 12 years before being made redundant. They contended that there had been no discussion about how their jobs could be saved or the possibility of alternative positions within the organisation. That is a case where the employees were successful and were awarded €43,000 each. The case of Crosby –v- Fuss Door Systems Limited 2009 ELR38 where dismissals were found to be unfair because the company did not consult the trade union sufficiently. In Callaghan –v- Olok Limited where the EAT said that best practice was to carry out a genuine consultation process prior to reaching a decision as to redundancy. The case of Mulligan –v- J2 Global (Ireland) Limited UD1369/2008 is one where the EAT found that the complainant was not properly consulted. Also the case of JBC Europe Limited –v- Ponisi 2012 ELR 70 where it was highlighted that it might be "prudent and a mark of genuine redundancy that alternatives to letting an employee go should be examined"

And went on to state

"A fair selection process may indicate an honest approach to redundancy by the employer"

The union quoted the case of Mulcahy –v- Kelly 1993 ELR35 where it was noted that

"It is well established that there is an obligation on an employer to look for an alternative to redundancy".

The union also quoted that where redundancy is unavoidable the employer is required to establish reasonable and objective criteria for selection and must apply those fairly. The case of Boucher –v- Irish Productivity Centre UD882/1992 is one where the EAT in holding a dismissal unfair stated

"It is not for the tribunal to consider whether input would have made a difference but its denial is a denial of the right of the natural and constitutional right to defend oneself which is not at the gift of the employer or of this tribunal but is vested in every citizen no less in any enquiry affecting their employment, that when the enquiry might affect their liberty"

The union submitted that the components of a reasonable redundancy process would include

(A) Warning that redundancies are being considered
(B) Attempts to avoid redundancy
(C) Objective criteria for the redundancy selection
(D) Time for an employee to suggest other alternatives to the redundancy

The Adjudication Officer in this case pointed out that it was clear that the Complainant had been called to a meeting to discuss the finances of the club in this case but refused to attend when the Complainant learned the purpose of the meeting and no further meeting was arranged.

The Adjudication Officer in this case quoted the case of Nigrell –v- Sandra Graham UD690/2013 where the EAT considered the consequences of a failure to consult and stated

"Such may be good and prudent practice and is probably found in larger enterprises. However, the Tribunal is not persuaded that such prudent practices are mandatory but automatic consequences for employers who do not follow them. Such practices may be negotiated or contractually provided for but in the instant case they are not legally required to be recognised such that a failure to do so recognise would result in a genuine redundancy being considered to be an unfair dismissal"

This case is a useful statement of the law. While the complainant lost in this case there are some important matters which can be taken from the case.

1. It is important for employers to consult with employees if redundancy is a possibility
2. It is important that employers show that they have sought to avoid redundancy
3. It is important that employers prepare objective criteria for redundancy selection
4. It is always important to give employees the opportunity to suggest alternatives to the redundancy

The fact that these may not happen will not automatically make a dismissal unfair.

In saying this however, if an individual is made redundant and other individuals in the same employment with the same employer who do the same job are not dismissed then as the Adjudication Officer in this case pointed out the provisions of Section 6 (3) of the Unfair Dismissal Act 1977 which specifically covers this issue would deem the dismissal unfair. This issue was confirmed in the case of An Employee –v- An Employer UD1451/2010 which is a case which was in the EAT. This case was a comprehensive overview of the law by the Adjudication Officer.

Unfair Dismissal Act and Fixed Term Contracts

The case of the Board of Management of Malahide Community School and Dawn Conaty 2019 IEHC 486 being a decision of the High Court delivered on the 5th July 2019 has brought great clarity to the issue of use of fixed term contracts entered into where an employee had an existing permanent contract.

The first issue that was looked at really relates to Section 13 of the Unfair Dismissal Acts which provides that a provision in an agreement whether a contract of employment or not and whether made before or after the commencement of the Act shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provision of this Act.

It was his Honour pointed out that on a literal interpretation of Section 13 of the Act it would appear to include the possibility of an employee ever waiving their rights under the legislation. He pointed out that such an inflexible rule could prevent difficulties in practice. This would be especially so in the context of settlements of claim for alleged unfair dismissal. His Honour pointed out that the Courts have taken a pragmatic approach to the interpretation of Section 13. The case of Hurley –v- Royal Yacht Club 1997 ELR 225 was one which was quoted where his Honour held

"The Circuit Court accepted that, notwithstanding the literal meaning of Section 13, it cannot have been the intention of the legislature to prevent employers and employees from compromising claims under the Unfair Dismissals Act".

His Honour went on to state

"The judgement goes on to suggest that in order for an agreement to be valid

(i) The agreement must identify the employment protection legislation which is being waived

(ii) The employee should have been advised in writing that he should take appropriate advice as to his rights"

His Honour pointed out that the principle set out in that case had been endorsed in the High Court case of Sunday Newspaper Limited – v- Kinsella 2019 ELR53 and also quoted the case of Ryan, Redmond on Dismissal Law (Bloomsbury Third Addition 2018 in paragraph 25.54)
His Honour pointed out at paragraph 57 of the decision that the principle underlying the case law namely that a person cannot be taken to have waived the statutory right unless they make an informed decision to do so, would appear to apply equally to the advance waiver of rights under Section 2 (2) (b). This is the provision of the Unfair Dismissal Act 1977.

At paragraph 61 it is pointed out

"Section 2 (2) (b) allows for the possibility on an employee, at the commencement of their employment, making an informed decision to waive their statutory rights. This waiver must be confirmed by the employee signing a written contract which states that the Unfair Dismissal Act shall not apply to a dismissal consisting only of the expiry of the fixed term. The provisions of Subsection 2 (2) (b) carves out an exception to the general rule in the Unfair Dismissal Act. As such, same falls to be interpreted strictly"

His Honour pointed out that this is not an exclusion from the Act but rather a "waiver".

In this case his Honour pointed out that there had been a history of employment and stated that the exemption under Section 2 (2) (b) is only available in the case of a first time employment, or, perhaps, employment pursuant to a series of fixed term contracts.

This statement of the law by the High Court is of significant importance in situations where an employee has a permanent contract and is then subsequently moved onto a fixed term contract. That now appears from this judgement not to be an option for employers. The High Court was very clear on it that allowing an employee to be moved from a permanent contract to a fixed term contract that such an interpretation would be open to potential abuse.

The Court then dealt with the issue of informed consent. In relation to the exemption under Section 2 (2) (b) the Court held that it is nevertheless necessary that the waiver is given on the basis of informed consent and that there is an implicit obligation on the employer to put an employee on notice that the entry into a particular contract will entail the loss of statutory rights previously acquired by the employee. The Court pointed out that a false statement to the effect that the Unfair Dismissal Act does not apply to the dismissal consisting only of the expiry of a fixed term would not be sufficient rather the contract would have to include an express acknowledgement to the effect that the employee was relinquishing their acquired rights to the protection of the Act.

The Court went on importantly to state at paragraph 76

"Alternatively, lest I am incorrect at my interpretation of Section 2 (2) (b), I am satisfied that, as a matter of contract law, an employer who requests an employee to agree to inferior terms and conditions, which involve the loss of statutory rights, is required to explain the precise legal effect of those changes to the employee. This implied term is part of the implied obligations of mutual trust and confidence between an employer and an employee. It is also necessary to reflect the unequal bargaining power between an employer and an employee."

There has been a system creeping into Irish Employment Law particularly in relation to individuals getting to retirement age or close to it where they are approached and advised that they can move on to a fixed term contract. At the end of the fixed term contract their employment is then terminated. This decision of the High Court appears clearly to outlaw such actions except where the employer clearly advises the employee that they are giving away important statutory rights and protections which they have. Effectively it moves the contracts into a situation where they become void unless the required consent has been obtained and importantly the effect of that consent has been advised to the employee in advance.

Constructive Dismissal

In a number of our newsletters we have addressed the issue of constructive dismissal. We are again doing so. The reason for doing so

is that there appears to be a considerable amount of misunderstanding as to what is needed to bring a successful constructive dismissal claim. For those who are interested in this area of law case ADJ15711 is a very useful summary of issues.

In this case the employee argued that there were two tests in relation to constructive dismissal being the contract test where there are fundamental breaches to the contract by the employer and the reasonableness test where the conduct of the employer was such that it was reasonable for the employee to resign. The employee in this case as part of their claim cited applicable case law in relation to the maintenance of mutual trust and confidence including O'Kane –v- Dunnes Stores Limited UD1547/2003, the provisions of a safe place of work Maddy –v- Duffner Brothers Limited UD803/86 and the right to be treated with respect Corcoran –v- Central Remedial Clinic UD7/1978.

In relation to the relevant tests the employer cited the leading case law with regard to the need to carry out an objective assessment of the reasonableness of the employer's behaviour being Berber –v- Dunnes Stores 2009 and the reasonableness test Western Excavating ECC Limited –v- Sharp 1978. The employer contended that the onus of proof rests on the employee and is a stringent one. The employer also contended that it was incumbent on an employee to use the internal grievance procedure and quoted the case of Conway –v- Ulster Bank UD1981.

The AO in this case set out that the appropriate test in respect of constructive dismissal is set out in the Western Excavating (ECC) Ltd –v- Sharp 1978 1 ALLER713 in that it comprises two tests being the contract test and the reasonableness test.

It summarised the contract test as follows

"If the employer is 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 other performance"

The reasonableness test assess the conduct of the employer and whether it is one where the employer

"Conducts himself or his affairs so unreasonably that the employee cannot be expected to put up with it any longer, if so the employee is justified in leaving"

The AO pointed out that the Supreme Court in Berber –v- Dunnes Stores 2009 ELR61 said that

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it"

The AO in this case also helpfully pointed out that the Labour Court held in the case of Ranchin –v- Allianz World Wide Care S.A. UDD1636 that

"In constructive dismissal cases, the court must examine the conduct of both parties. In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the steps to resign"

Conway –v- Ulster Bank Limited UDA474/1981.

The AO in this case dealt with the issue where an employee had not used the internal grievance procedure and referred to the employment appeals case of Travers –v- MBNA Ireland Limited UD720/2006 where the EAT held paragraph

"We find that the claimant did not exhaust the grievance procedure made available to him by the respondent and this proves fatal to the claimant's case… In constructive dismissal cases it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair"
In constructive dismissal cases effectively the employee must show either

1. That the employer has broken a fundamental term of the contract of employment; or
2. That the conduct of the employer was so unreasonable that the employee had no alternative to resign.

The burden of proof is on the employee in a constructive dismissal case.
It is not the opinion of the employee which counts. The issue as to whether the employer acted unreasonably is to be judged objectively, reasonably and sensibly by a tribunal in either the WRC or the Labour Court.

An employee who believes that there has been a breach of their contract or that the employer has acted unreasonably must in the majority of cases go through the internal grievance procedure laid down in their contract of employment. The fact that the employee may believe that that process may not result in any change is not the relevant question to be looked at. It is whether or not the process is fair or unfair.

There are limited and by this we mean very limited circumstances where an employee would be entitled to resign without going through the internal grievance procedure. The case of Allen and Independent Newspapers would be an example of this. However, it must be stressed that failure to use the internal grievance procedure will only apply in a tiny minority of cases.

As Solicitors we are regularly seeing clients who have resigned before getting legal advice. Very often they have not gone through the internal grievance procedure. The reality of matters is that in a number of these cases we will see claims which we believe would have been good cases except for the fact that the employee has not raised an internal grievance and given the employer an opportunity to respond.

We can only advise that any employee considering bringing a constructive dismissal case where they feel that they have to resign that they never resign without getting legal advice in advance.

Constructive Dismissal – Change of Location

In the case of Joe Lawlor Limited and Guerin the Labour Court in this case dealt with an appeal relating to an employee who had worked in one location and was being required to move to another location.

There was no employment contract in this case. The employee contended that there was a verbal agreement that he would not be required to work outside Limerick or the surrounding area and an issue arose about him being required to work in Dublin. The employer strongly denied that there was any agreement that the employee would be limited to working in Limerick.

In this case the Court pointed out that if there was a clear commitment given to the employee prior to his acceptance of the job then this forms a part of the employment contract. The Court pointed out that it is often argued that minor breaches of contract do not constitute a basis to ground a claim for constructive dismissal. The Court however stated that if the Court accepts an employee's version and their understanding of the contractual terms the Court then has a reason to examine if the breach goes to the root of the contract so that the employer's action can be said to have sundered the contract and have caused the constructive dismissal of the employee. The Court pointed out in this case there was a clear conflict of evidence the court quoted the decision of Lord Denning and Western Excavating (ECC) Limited –v- Sharp 1978 ICR221 which set out clearly that

"If an employer is 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."

In this case the Court upheld the view that the employee had been subject to constructive dismissal. The Court however pointed out that they found it difficult to understand how the employee who had many

construction skills struggled for so long to find employment and this was taken into account in the compensation which was awarded.

The reality of matters is, in our view, as expressed by the Court on many occasions that an employee has an obligation to minimise their loss. With the current economic environment, it is hard to understand, in many cases how employees will find it difficult to obtain new employment.

Protection of Employees (Fixed-Term Work) Act, 2003 – Limited Use of Successive Fixed Term Contracts

The issue of a number of successive fixed-term contracts can arise where the employer contends that there is an economic reason for continuing same and that therefore the right to a contract of indefinite duration does not arise. In the case of McNamara –v- Teagasc FTD138 is a case where the Labour Court said

"If it were to be held that the use of successive fixed-term contracts could be used indefinitely in such employment so as to protect the employer against the possibility of an insufficient supply of work at some point in the future, the effectiveness of the directive…would be seriously subverted. If, due to economic circumstances or fall of demand, there is no longer a sufficient working order to maintain a worker in employment, the employers remedy lies in making surplus staff redundant. It follows that while the requirement to balance staff levels with available funding is a legitimate objective that continuing use of fixed-term contracts is not always a proportionate and necessary means of achieving that objective".

In the case of Edener and Others –v- Ellinlkos Organismos Galalktos C-212/04 is a case where the CJEU held that

"The concept of objective reams within the meaning of Clause 5 (1) (a) of the framework agreement must be understood as referring to precise and concrete circumstances characterising a given activity, which is therefore capable in that particular context of justice and to find the use of successive fixed-term employment contracts"

This approach was taken by the Labour Court in the case of Irish Museum of Modern Art and Stanley FTD146 where the court stated

"The defining characteristics of fixed-term contracts or fixed-term employment is that it is determined by an objective condition which is identifiable without reference to the views of perceptions or intervention of either party to the contract"

This view was also taken by the CJEU in Del De Cerro Alonso –v- Osakidetza Serbibicio Vasco De Salud C-307/05 where it was stated *"The justification relied on must be based on objective transparent criteria which in fact responds to a genuine need, our appropriate for achieving the objective pursued and are necessary for that purpose"* There is a view that it is possible to have effectively indefinite fixed-term contracts. This is not a view that this office agrees with. There are limited circumstances where this may arise but they will be in the minority of cases.

Protection of Employees (Fixed-Term Work) Act 2003

One of the great strengths of the Act is that it enables an employee who is a fixed-term worker to claim equal rates of pay with permanent employees.

However the Act cannot be used outside the realm of fixed-term workers claiming equality with permanent employees to address other pay issues.

In Railway Procurement Agency and Bell FTD097 is a case where the Labour Court held that the Act protects fixed-term workers and the claimants must be covered by that title or in effect that job position.

In Dublin Port –v- McGrath the Labour Court held that the Act cannot be called upon to correct anomalies and pay outside a fixed term standing. The legislation in Ireland protects fixed-term workers and ensures that they are not discriminated against as regards receiving a lower rate of pay than a permanent full time employee however the Act cannot be used to advance claims relating to difference in pay in respect of different employees.

Burden of Proof and Time Limits in Employment Equality Claims

The issue of the Burden of proof is one which employees, bringing claims under the Employment Equality Acts often fail to take account of.

In a case of Valerie Smollen and Irish Prison Service being a case ADJ7285, the issue as to what the burden of proof is was set out in some detail.

The AO in this case set out that Section 85A of the Employment Equality Acts 1998-2011 set out the burden of proof as being;

"Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove the contrary".

The evidential burden was established by the Labour Court in the case of the Southern Health Board –v- Mitchell DEE011 where the Court found that the claimant must;

"Establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities the primary facts on which they rely in seeking to raise a presumption of unlawful discrimination".

The AO also quoted the case of the Cork County Council –v- McCarthy EDA0821 where the Labour Court found;

"The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicates that where the primary facts alleged are proved it remains for the Court to decide if the inference or presumption contended for can properly be drawn from those facts.

This entails a range of conclusions which may appropriately be drawn to explain a particular set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed the most likely explanation which can be drawn from the proven facts. It is sufficient that the presumption is within the range of inferences which can be drawn from those facts".

The AO in this case also quoted the UK case of Igen –v- Wong 2005 IRLR 258 as to the extent to the evidential burden where it was held;

"Where the claimant has proved facts from which conclusions can be drawn that the respondent has treated the claimant less favourably on the grounds of sex, then the burden of proof moves to the respondent. It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed that act. To discharge that burden it is necessary for the respondent to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex since

"No discrimination whatsoever" is compatible with the Burden of Proof Directive.

This was a very useful restatement of the law. The AO in this case also dealt with the issue of time limits. This is covered in Section 77 (5) of the Act which effectively is a six month period of time which can be increased to twelve months. The AO pointed out that the effect of the provisions is that the complainant can only seek redress in respect of occurrences within the six months prior to the date on which the complaint was received unless the Acts relied on constitute ongoing discriminatory treatment. This was dealt with in the case of Cork VEC-v- Hurley EDA24/2011 where the Labour Court ruled that;

"Occurrences outside the time limit could only be considered if the last act relied upon was in the time limit and the other acts complained of were sufficiently connected to the final act so as to make them all part of a continuum".

The case of Co. Lough –v- Johnson EDA0712 was also referred to. Effectively the effect of these decisions is for example if an employee

was subject to an act of sexual harassment 15 months ago, and again 9 months ago and again 3 months ago then in those circumstances all 3 incidences could be taken into account. If however the employee on the first occasion was subject to sexual harassment, on the second occasion to racial harassment and on the third occasion then sexual harassment then in those circumstances the employee would be limited to one complaint namely the last issue as the other matters would have been outside the time limit.

The issue in relation to time limits is such that if an employee believes they have a claim it is important that they obtain advice from a Solicitor as soon as practicable.

This is a case where the employee was awarded €20,000. We have limited our review of the case simply to the legal principles which arise as this case is important for setting out the issues relating to the burden of proof and the time limits for bringing claims.

Harassment in the Workplace

In Case ADJ15003 the AO in this case dealt with two significant issues.

Firstly what is harassment; and
Secondly the issue of investigations of complaints

What is Harassment?

The AO in this case quoted the case of Nail Zone Limited and A Worker EDA1023 which defined harassment as;

"The essential characteristics of harassment within the statutory meaning is that the conduct is;

(a) Unwanted
(b) That it has either the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.

This suggests a subjective test and if the impugned conduct had the effect referred to at (b) of the subsection whether or not that effect was intended or whether or not the conduct would have produced the same result if a person of greater fortitude than the complainant, it constitutes harassment for the purposes of the Acts".

The relevant section is Section 14A.

There is a defence where an employer shows that they have taken action to investigate and deal with the complaint immediately.

This was covered by the Labour Court in a case of Limerick Co. Council –v- Mannering EDA1210 which revolved around the issue as to whether or not there was an appropriate policy in place. In that case, as quoted by the Labour Court in this case, is one where the Court stated;

"The adequacy or otherwise of the investigation undertaken after the occurrence of the event complained of is irrelevant to the question of whether or not the respondent had taken steps which could have prevented that event from occurring. Rather, in cases such as this, this focus should be on whether or not the respondent had in place adequate policies and procedures intended to make all employees aware that harassment on any of the discriminatory grounds is unacceptable and will not be tolerated by the respondent".

In case ADJ15003 the employee had an annual salary of €16,000. The legislation specifically provides in Section 82 for various levels of compensation up to two years wages or €40,000. In this case the AO awarded €40,000.

This case like the previous case from the Labour Court is important in reminding employers of the importance of having proper policies and procedures in place. Where an employer does not have the proper policies in place then in those circumstances claims against the employer will invariably be successful.

This may sound hard. It is, in our opinion, to highlight the importance of employers having procedures in place. Where there are procedures in place it minimises the potential for harassment.

Employment Equality Act 1998 – 2011

The recent Supreme Court decision in the case of Nano Nagle School and Marie Daly which was delivered on the 31st July 2019 is to say the least complex decision.

We will be reviewing it in greater detail in the October issue of our newsletter.

There is one issue which comes out in relation to the whole issue of the Act is the manner in which it is effectively drafted. In this case there have already been five hearings and there will be a further hearing in the Labour Court in due course. This matter was before the Equality Tribunal, on appeal to the Labour Court, the High Court, the Court of Appeal and the Supreme Court. What is clear from the decisions of the Courts is that the legislation itself is less than precise. The Supreme Court was critical of the Labour Court in the manner of which their decision was set out. There are some practical issues in relation to the Labour Court. There is no recording system in the Labour Court. The hearing rooms are set out on the basis that there would be recording equipment there, as there would be in the Courts, but they have never been provided. It would appear, and we do not have access to the funding for the Labour Court, that there appears to be a lack of resources made available to the Labour Court to have a recording system similar to that which would apply in the courts which would enable a division of the Labour Court to have full access to the notes of any hearing. Effectively members of the Court have the notes of the Registrar and their own notes along with the submission documentation. It may well be that a number of the criticisms leveled against the Labour Court could easily be rectified if sufficient funding was provided to the Labour Court to have a recording system so that a transcript of evidence could be obtained. This would be there for the Court and the parties should an issue subsequently arise. The Supreme Court set out that the Labour Court had failed in its statutory duty and, while this is probably an issue for discussion in due course, the whole issue of the proper funding of the Labour Court is an issue which goes to the root of the question as to the issue of the Labour Court properly performing its duties. A lack of resources can impact upon the ability of any tribunal to comply with its statutory duties.

While this case dealt with the Labour Court the reality of matters is that this issue as regards how determinations are set out and why will also apply to the WRC. In relation to the WRC the issue of interfering with the decision of the WRC would equally apply where there would be a determination which is ultra vires where there has been a failure of a statutory duty.

The decision in this case has huge importance in relation to the interpretation of the Employment Equality Act. A secondary issue in relation to matters is the drafting of legislation in this country which very often, in our view, is questionable. The third issue then is proper funding of both the WRC and the Labour Court so that the potential for a decision issuing which is ultra vires and is therefore subject to being overturned by the courts is reduced. A recording system for evidence given in the Labour Court would probably mitigate against issues arising that it could be argued that evidence was not set out fully in any determination would become an issue which would be highly unlikely to arise if there was such a recording system. That however requires resources and possibly a discussion which is going to have to take place at some stage is that the Labour Court is properly resourced.

Bringing A Claim For Equal Pension Entitlements

Case ADJ12722 is an example of where a case involving discrimination in relation to pension entitlements was brought under the wrong Act. The employee in this case brought the claim under the Employment Equality Acts. The Employment Equality Acts 1998-2015 do not provide protection for discrimination in respect of pension rights and membership of an occupational pension scheme. The relevant legislation is Section 69 of the Pensions Act 1990. In addition Section 72 (2) of the Pension Act 1980 prohibits an occupational pension scheme from disregarding any service during maternity leave for pension purposes.

The AO pointed out that in Co. Louth VEC- v- Equality Tribunal and Brannigan 2019 IEHC307 McGovern J had held that the form EE1 is a non statutory form and was only intended to set out the broad outline of the nature of the complaint and that it was permissible to

amend a claim set out therein "so long as the general nature of the complaint remains the same".

In this particular case the actual submission of the employee had included reference to the Pension Act 1990, the Recast Directive and the Maternity Protection Acts but not the Employment Equality Acts.

In this case the AO held that they had an entitlement to hear the case. The respondent in this case, had in our view correctly quoted the case of A Bar Worker –v- A Licensed premises ADJ3795 where the AO in the case stated

"For reasons that will be obvious, an Adjudicator can only decide a matter on the basis of the legislation under which the complaint is referred, and the complainants will be well advised to ensure that they have selected the legislation most appropriate to their complaint at the time of submitting it".

In our view the view of the AO in quoting the case of Clare Co. Council –v- Director of Equality Tribunal 2011 IHC303 being a judgement of Mr. Justice Hedigan applying the same rationale as in the case of Co,. Louth VEC, are not cases which allow for a claim form to be amended where the incorrect legislation is quoted. There is no difficulty, in our view, expanding on a claim form in respect of a matter where a claim has been brought under a particular piece of legislation. However, if the complaint is brought under an entirely incorrect piece of legislation then it is not open to an AO in our opinion to amend the proceedings unless it is one where the complaint related to an issue which has occurred within 6 months of the date of the claim coming on for hearing in the WRC.

Transfer of Undertaking Regulation

In case ADJ14591 the issue arose as to the liability in relation to claims. The AO referred to the case of Celtic Limited –v- Astley and Others C-478/03 where the European Court of Justice held that *"Article 3 of Directive 77/187 must be interpreted as meaning that the date of a transfer within the meaning of that provision is the date on which responsibility as employer for carrying on the business of the unit transferred moves from the transferor to the transferee"*

This decision of the AO also points out that if parties as held in that case cannot agree to a different date applies.

Labour Court Appeals – Exceptional Circumstances

This issue arose in a case of Glenella Foods Limited trading as Eurospar and Simon King.

An issue arose as to whether an Appeal had been made. The Labour Court pointed out that the Appeal would need to have been received on 1 January 2009 but was not received until 2nd January.

An appeal was submitted on 42nd day which was 1 January. Despite attempts during that day and into the evening they were unable to open and/or download the form and they tried to open and access the form the system crashed and a warning came up that the form was 60 days out of date. It was contended that the crashing of the Labour Court electronic submission system was an exceptional circumstance.

The Labour Court reviewed the law on this and asked whether a system malfunction constituted an exceptional circumstance. The Court held that a system malfunction is something that is regularly encountered and cannot be considered to be an exceptional circumstance. The Court pointed out that even if the Court accepted that the malfunction was an exceptional circumstance there were other options available which could have facilitated an appeal being submitted within the time allowed under the Act.

The Court refused the application.

The reality of matters is that systems do crash.

Of course an appeal could have been submitted by hand delivery to the premises. If this was not possible it could have been sent by fax or alternatively an appeal could have been scanned and sent by email to the Labour Courts general website.

The Labour Court appeal form is not a statutory form. However, it is advisable always to have a hard copy, if we can call it that, of the appeal form and that if an issue arises that it is possible to use the

hard copy form, scan it along with the decision being appealed and sent to the general email address.

Claims Against Embassies

This issue is covered in case EDA1925 by the Labour Court. It is a comprehensive decision in relation to matters. A considerable amount of case law and decisions have been quoted. However the relevant issues for practitioners in considering cases can best be covered by the manner in which the Court summarised matters.

1. There was no evidence before the Court that the employee's employment touched upon the business of the sovereign government as at all times the employee was merely performing routine administrative functions that could not be said to have impacted in any meaningful way or at all on either the formation or implementation of sovereign policy.

2. The nature of the work performed by the employee could not be said to have been involving her in the public business organisation and interests of the embassy.

3. The employment was not of such a nature that it gave rise to a degree of trust and confidentiality over and above the ordinary level of trust and confidentiality which would apply in any employment situation.

4. Article 11 point 2 (a) of the United Nations Convention on Jurisdictional Immunities and of their Property 2004 is not engaged of the facts of the appeal as there was no evidence before the Court to support the submission that the employee was recruited to perform particular functions in the exercise of governmental authority.

5. The Court accepted that the fixed term contract contains a clause purporting to invest the Courts of Riyadh with exclusive jurisdiction in relation to any disputes. The Court pointed out however that on the credible evidence she was merely presented

with her contract of employment in Arabic for the purposes only of signing it and was never afforded an opportunity to read it in detail or to take advice on it before signing it and it follows therefore that she cannot be said to have given any meaningful consent to the exclusive jurisdiction clause.

6. The Court found that the employment did not involve her in performing functions in the exercise of government to authority. This is one where the adjudication officer had found against the respondent on the matter but did not deal with the substantive claim. The case was remitted to the WRC for adjudication.

In addition to the importance of this decision the comment by the Labour Court in relation to the fact that the employee was not given a reasonable opportunity to read and get advice on a contract may have greater implications in cases going forward. It is always best practice to make sure that contracts of employment are given to employees, that they are given an opportunity to read them and take advice if necessary.

WRC Decisions and the Statutory Period for Claims

In case ADJ17390 involved a complaint that an employee had not received their public holidays. The complaint was received on the 9th October 2018. It was accepted that any breach had been rectified and that there had been no breaches in 2018. The employee had brought claims relating to the years 2016 and 2017. These were clearly outside the six month period and could only have been brought on the basis that there was a reasonable ground to extend time. In this case the AO accepted that matters went beyond the six months period of the complaint but was of the view that the complainant should receive some compensation for not receiving public entitlements for the 2 years in question.

We fully appreciate that there will be times when an AO will have a lot of sympathy for a particular employee. However an AO is obliged to apply the law as it stands. As the law currently stands in this area there is no entitlement for an extension of time in relation to public holidays outside the statutory period and in certain limited circumstances for a period of 12 months. Despite whatever sympathy

an AO may have for a complainant or an employer if there is no valid claim then the AO is precluded from issuing such a decision. If an employer has no valid defence the fact that there may be sympathy for the employer does not mean that there should be any reduction in compensation. Therefore equally if an employee has no valid claim an employer should not have to be in a position of having an award against them. An AO is appointed by statute to apply the law and it is not possible, in our view, for an AO to go beyond the statutory requirements no matter how much sympathy they would have for a party.

Time Limit for Bringing Claims to the WRC

An interesting case arose in the matter of ADJ17865. The employee in this case ceased employment in December 2017. The claims were brought in October 2018.

The claim under minimum notice and the claim under the Organisation of Working Time Act were held by the AO to be well outside the time limit. There was a claim also under the Redundancy Payment Acts and redundancy was awarded.

The time limit to bring a claim under most acts is six months. In relation to a redundancy payment claim the employee has a period of twelve months to bring a claim.

It is important for employers and employees to understand that the time limits which generally are six months in certain cases such as those under the Redundancy Payment Acts are actually twelve months.

Time Limits for a Payment of Wages Claim

This issue arose in the case of Elsatrans Limited and Joseph Murray PWD1917.

The Labour Court held that the relevant six month limitation period in the Act for the complaint issued was the period 27 November 2015 –

26 May 2016. The complaint purported to refer to the period 10 November 2015 – 30 March 2016.

It was argued that following the case of HSE –v- McDermott 2014 IEHC331 that this renders the entire complaint statute barred. The Counsel in the case referred to the following passage of Mr Justice Hogan

"For the purposes of this limitation period, everything turns, accordingly, on the manner in which the complaint is framed by the employee."
If, for example, the employee has been unlawfully making deductions for a three year period, then provided that the complaint which has been presented relates to a period of six months beginning

"on the date of the contravention to which the complaint relates, the complaint will nonetheless be in time, it follows, therefore, that if an employer has been making deductions x from the monthly salary of the employee since January 2010, a complaint which relates to deductions made from January 2014 onwards and which is presented to their rights commissioner in June 2014 will still be in time for the purposes of Section 6(4). If on the other hand the complaint had been framed in a different manner, such that it related to the period from January 2010 onwards, it would have been out of time".

The Labour Court followed this rational and further pointed out that the Court had no jurisdiction to permit a complainant to amend at the Appeal stage his or her original complaint referred at first instance to the WRC.

This is a helpful decision of the Labour Court restating the law.

Bonus Payments

The issue of bonus payments arose in ADJ19978.

The facts of the case are interesting. In this case the contract provided that;

"You will be eligible to receive an annual bonus of up to 10% of salary. This bonus will be performance related and therefore not guaranteed. Performance will be evaluated on both personal and financial performance".

The AO in this case quoted the case of Board Gais Energy Limited and Niall Thomas PWD1729 where the Labour Court stated;

"The Court placed considerable weight on the fact that the complainant's contract set out the eligibility requirements for the payment of the performance related allowance and that the complainant confirmed in evidence that he was aware that one of the criteria of the scheme required that he be in employment at the date of the payment".

In this particular case the AO held that the employee retained her entitlement to a bonus. This is despite the fact that the employee left during the financial year. We have some comments to make in respect of this case. The first is that the best practice for an employer is to clearly specify, if there is a requirement that you be in employment at the date of the payment of the bonus, that the contract specifically provides for this. Relying on custom and practice is not the best practice.

The second issue in relation to this case is that the AO held that the employee was entitled to be considered for a bonus for the 2018/2019 financial year. We have some concerns about the elements of how the decision was arrived at.

Because claims must be made within 6 months of a right arising, it would be our view that the AO in this case must decide what payment should be made rather than simply providing that the employee is entitled to be considered to be included in the scheme. This is a claim made under Section 6 of the Payment of Wages Act and therefore the issue is making a determination which can be enforced.

The third issue is enforcement. The only enforcement is that the individual is considered, rather than a requirement for the employer to pay a certain amount to the employee.

Rights to a Bonus

The issue as to the right of an employee to a bonus is now a regular issue which arises in cases.

There is also always the question as to whether an employer can revoke any bonus scheme. The majority of contracts will have a provision where a bonus is going to be paid or might be paid that it is discretionary and that it can be withdrawn. However, the Courts, and in particular the High Court decision in Cleary and Others –v- B&Q Ireland Limited 2016 IEHC119, identified an employer's obligation to exercise discretion reasonably.

In that case Mr. Justice McDermott stated;

"The discretion to withdraw the bonus scheme at any time, in my view, was always intended to apply in futuro and attached to the conferring of bonuses, as yet un-accrued, under the terms of the Scheme. The payment of the bonus crystallised as a contractual obligation once it was earned in accordance with the terms of the Scheme as operated".

Effectively the decision has held that once a bonus has been earned it cannot be revoked. However, provided a contract is properly drafted an employer, in the future, can suspend or withdraw completely any bonus scheme that has been put in place.

Litigation Privilege

An interesting case in relation to this issue arose in the case of Christopher Lehane an official assignee as plaintiff, Yesreb Holdings Limited defendant, and Celtic Trustees Limited notice party being a decision of Mr Justice Haughton delivered on the 15th January 2019. In that case the court held that

"Privilege, whether litigation privilege or legal advice privilege, is an exception to the normal rule under which relevant documents must be discovered as McDonald J emphasises in Artisan Glass, there is an onus of proof on the party asserting privilege to satisfy the court of the entitlement to privilege. That applies equally to the official assignee,

notwithstanding the statutory basis for his office, functions and powers."

The Court pointed out that despite what a party may state as being the dominated purpose in each incident it is for a Court to determine on an objective basis whether a document is privileged. What is clear is for documents to obtain privilege they must have been in contemplation of litigation. The Court pointed out that it may readily be accepted that the proceedings were in the course of preparation over a number of months prior to the actual issue of a plenary summons and it would not take much to persuade a Court that correspondence relating to the collection of relevant documents/documentary evidence and the raising of queries in relation to same arising in the 3-6 month period prior to the institution of these proceedings should in all the circumstances be covered by litigation privilege.

This case is under 2019 IEHC4.

The issue of litigation privilege is an issue which is likely to arise more often in cases before the WRC and the Labour Court and it is going to be interesting in relation to these issues how this area of the law develops into the future.

Requirement to Set Out the Address of Solicitors or Employees in Affidavits before the High Court

In case 2019 IEHC480 this issue was addressed by Mr Justice Hunt.

In the decision at Paragraph 43 it stated that in the course of the hearing the plaintiff made the point that various affidavits delivered on behalf of the defendants should be struck out because they set out the business address of the deponent and not their "true abode" as required by the relevant rules of the Court. His Honour set out that the deponents in questions for their affidavits for the purposes of their employer or the legal firm representing that employer. He stated that he was satisfied that their business address is their true abode in those circumstances which has nothing whatever do to with their private capacity or residence. He pointed out that he was bound by and fully agreed with the approach of the Court of Appeal in this point

in Karney –v- Bank of Scotland PLC and Other 23 February 2015 and Allied Irish Banks and Others –v- Gibney 9 November 2018. He pointed out

"There is no possible or interest or benefit to the plaintiff in knowing the private residence of bank employees or solicitors in a case such as this"

It is helpful that this issue has again been clarified by the High Court.

Workplace Stress and Burnout

Many employees said goodbye to a defined working day with advancements and developments in technology. Smart phones, email and social media have made it impossible for workers to unplug and bring their working day to an end. The culture of organisations in how they provide a 24/7 service to their clients / customers also makes it difficult to bring an "end" to the working day. How many of you have told your partner, husband, wife, family or friends, "I'll be leaving work early today!" and what you actually mean by "early" is "on time"?

Long hours, client/customer demands, social media, unrealistic targets/deadlines and the culture of certain workplaces does lead to stress and burnout. However, it is important to note the difference between what is known as occupational stress and workplace stress. Occupational stress is not an actionable wrong. It is stress associated with the job that we all experience at some stage of our working lives. You cannot bring a personal injury* case for occupational stress. Workplace stress, however, is different. The Health and Safety Authority has defined workplace stress as stress caused or made worse by work. It is an imbalance between the demands of the job and the working environment and a person's capacity to meet those demands.

Workplace stress can have a negative impact on an employee's health and lead to serious illness. A recent survey revealed that mental health issues are now the most common workplace illness with two out of five workers suffering from stress and anxiety. Workplace stress can manifest itself in psychological symptoms such as anxiousness, nervousness, fear, racing thoughts, upset, feeling

low. However, it can also manifest itself in physical symptoms such as heart palpitations, raised blood pressure, poor sleep pattern, and stomach issues. These are just some examples. Ignoring these symptoms of workplace stress can lead to serious and permanent injury*.

The Safety, Health and Welfare at Work Act 2005 places a duty on employers to ensure the safety, health and welfare of its employees so far as is reasonably practicable. Stress is a hazard which can lead to injury*/illness. However, a case arising out of workplace stress is not straight forward. The following criteria must be satisfied: –

1. There must be an injury* to health. If this is not a physical injury*, it needs to be a recognisable psychiatric injury*. Only a specialist medical practitioner such as a psychiatrist can make this prognosis.

2. The injury* must be attributable to the workplace stress, e.g. excessive demands made of the employee such as excessive working hours or unrealistic targets and deadlines. Again, only a specialist medical practitioner such as a psychiatrist can determine the causation of the injury*.

3. The workplace stress must be wrongful and actionable in law, e.g. there must be some form of negligence or breach of duty. When determining if the behaviour towards the employee was wrong and actionable in law, the court will adopt an objective test, i.e. would any reasonable person deem this behaviour as wrong and actionable in law? In the case of *Berber –v- Dunnes Stores [2009] 20 ELR 61*, the Supreme Court set out the following test: –

" 1) The test is objective;
2) The test requires that the conduct of both employer and employee be considered;
3) The conduct of the parties as a whole and the cumulative effect must be looked at;
4) The conduct of the employer complained of must be reasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it."

4. It must have been likely that in all of the circumstances, the employer should have foreseen that the employee would be harmed. An employer is entitled to assume that an employee can cope with the pressures of the job unless they are aware of some vulnerability, e.g. previous complaints about deadlines, excessive working hours, and unusual lengthy absences from the workplace.

5. The employee must be within the 2 year statute of limitation period within which to bring the case.

6. Each of the above elements must be met before embarking on a case for workplace stress or burnout. An employee suffering with injuries* as a result of workplace stress should give great consideration to the advice of both their legal advisors and medical advisors before initiating such a claim. They are difficult cases to win with no guarantee of success. They are also costly cases. In addition, a medical team might find that litigation will do more damage than good to the employee's health.

The solution to the problem may not be entirely a legal solution. However, good employment law practice in organisations can help to keep workplace stress at a minimum. Ensuring that all employees, regardless of seniority or level of responsibility within an organisation, receive their daily rest periods between finishing and starting work, rest and break periods while at work and weekly rest periods in accordance with the Organisation of Working Time Act is an important and simple health and safety measure that should be enforced by organisations. In addition, it is important for employees to take their full annual leave entitlements. A risk assessment will also help to identify any stressors in the workplace and measures can be put in place to tackle same. Unfortunately, not all employers are good employers. In those circumstances, it is extremely important that employees prioritise their mental health at work. If you are suffering with stress, it is important to report it to your employer and talk to your GP before it becomes more serious. Sometimes, employees may just need a break from work and a problem shared is a problem halved. However, if the workplace stress is manifesting itself in serious symptoms with extensive certified sick leave from work, then you should speak with a solicitor specialising in work related personal injuries*, as soon as possible.

***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.**