Welcome to the October issue of Keeping In Touch

This issue is coming out at the time that the Courts are coming back. For those involved in employment law the Courts do not close. Brexit is on the horizon. This is a major challenge for our economy. It is a major challenge for employment lawyers. It is a major challenge for business and particularly SME's.

In the area of personal injury work this is an area which is constantly under attack. There are two conflicting legitimate interests. The first is to lower the cost of insurance. The second is to make sure that those who are injured receive adequate and proper compensation. We do have a problem in this Country in that the insurance industry is effectively not properly regulated. There is little transparency in relation to how a premium is set and why. The insurance industry claims that fraud is a major issue yet there appears to be little evidence that that is the position.

The appointment of a designated fraud unit in the Guards which will be looking at this issue is to be welcomed. Nobody can condone fraud but the message which is going from the Insurance Industry that fraud is rampant is extremely questionable. It makes great headlines for a newspaper when a case is thrown out as having been one where there has been fraud or exaggeration. In reality in most Courts on a daily basis a tiny percentage of cases involve fraud or exaggeration. However the other cases which are heard or resolved do not get the headlines.

In the employment law field the big challenge is in relation to the gig economy. It is creating mayhem in relation to individuals who are working in that manner and who are devoid of employment rights. The State is losing significant sums where individuals are classified as self employed when they are not self employed.

In the employment field it is interesting from the decisions of the WRC and the Labour Court that there now appears to be significant increases in the number of redundancy claims going to them. It would appear that one of the reasons for this is that previously employers could get a rebate if somebody was being made redundant. This rebate was paid and could be claimed immediately against tax and that was

any tax. That rebate has gone and now there is no encouragement for employers to discharge redundancy but rather to let the employees bring their claim to the WRC. This is delaying payments. It is tying up State resources in dealing with such claims and it is affective individuals who are made redundant having to wait a considerable length of time to actually get their redundancy payment.

Out and About in September 2019

On 8th September Richard Grogan was quoted in the Sunday Times on the need for e-scooters use to be regulated.

On 13 September Richard Grogan was quoted in the Journal.ie and in the Irish Daily Mail on the issue of Public Bodies using unpaid interns.

On 26 September Richard Grogan was on the Hard Shoulder with Ivan Yates discussing the proposal for a 4 day working week.

On 27 September Richard Grogan presented a paper to the Limerick Solicitors Bar Association entitled "Termination of Employment in Ireland".

Position of Fire-fighters

This issue has come into the fore and there have been two recent decisions. One of those is ADJ-00015512. The employee in this case contends that he was a retained fire-fighter and had to be able to respond to calls within 7 minutes of an alert and had to keep an alerter with him at all times. The employer in this case relied on SI 21/1998 and SI52/1998 being particular exemptions in respect of Sections 11, 12, 13, 15 and 16 of the Organisation of Working Time Act.

The employee relied on the Ville De Nivelle –v- Matzak being ECJ case C-518/15.

It was argued by the employer that that particular case did not apply on the basis that the Directive did not have direct effect. It should be

noted that this is a case which was received on the 26th June 2018 and the hearing took place on 22nd January 2019. The Arguement in relation to this case was that the case of Minister of Justice, Equality and Law Reform –v- The Equality Tribunal 2009 20ELR116 applied. This decision was issued on 7th August 2019 at which stage the Directive due to that particular case which had gone to the CJEU had determined that the Directive has direct effect. The employee also relied on the case C-151/02 known as Jaeger and the Simap case being C-303/98.

The AO in this case distinguished the MATZAK on the basis that in that case the employees were required to remain at a fixed place but that in this particular case the employees were not required to remain at a fixed place and could do as they wished.

There is a serious issue in relation to this. The employee had to be within 7 minutes of the fire station. The arguement that in those situations the employee was not involved in working time and was effectively in a position to utilise time as he so wished is one that is clearly going to have to be litigated at some stage the whole way through.

The AO in this case quoted in respect of the Matzak case at paragraph 57 which states;

"It is apparent from the case law of the Court that the determining factor for the classification of *"working time",* within the meaning of Directive 2003/88, is a requirement that the worker be physically present at the place determined by the employer and be available to the employer".

We may be entirely wrong in relation to this case and this is not a case which this office was involved in. But it is an issue which is going to have to be addressed. If it is that an employer can avoid the Directive by effectively providing that the employee does not have to be at a particular place but must be able to get to the employers premises within a set period of time then this creates significant issues which we believe ultimately is going to be a case that is going to have to go to the CJEU.

It is going to be interesting to see how these cases develop and the area of retained fire-fighters is an issue which at some stage will end up in the CJEU. It possibly is advisable that the WRC to avoid costs to everybody would use their power to refer the case themselves to the CJEU and then there would be clarity on the law in this matter.

Contracts Where Employees Receive Some Monies Which Are Not Subject to Tax

An interesting issue arose in the case of Blackrock Leisure Limited trading as Blackrock Leisure and Nulty UDD1949, PWD1923 and DWT1920.

The issue in relation to this case involved an employee. The employee was employed as a cashier from 2 September 2015 until 3 February 2017 and was paid an hourly rate of €10.50 per hour which was reduced unilaterally to €9.50 per hour from 9 January 2017 and she claimed that she worked 42 hours a week. The employer contended that the employee only worked 10 hours per week.

The employee contended that after payslips were introduced she was given cheques for the amount shown on the payslip and the remainder was paid in cash.

The Labour Court in this case looking at the business in which they would have a particular expertise in respect of determined that effectively they accepted the evidence of the employee.

What is interesting in this case is the court then had to look at the issue relating to how matters would be approached. The court quoted a number of decisions but effectively found that a reasonable interpretation of the decision of Ms Justice Laffoy in Red Sale Frozen Foods –v- Companies Act 2007 ELR246 would be to say that she did not demur from the broad approach adopted in the case of Hall –v- Woolston Hall Leisure Limited 2000 EWCA CIV170 being that the test in such cases depends on evidence of active participation in any alleged illegality and that knowledge of itself is an insufficient basis to render contractual obligations to be unenforceable. The court held that while there was no doubt that the complainant had knowledge it

is up to the respondent to prove active participation and the facts as outlined to the court did not support such an assertion.

The Court in this case awarded compensation for failure to pay a Sunday premium, compensation for failure to meet the requirements set out in Section 21 of the Organisation of Working Time Act and compensation for breaches of Section 19 & 23 of that Act in the sum of €1,800 in respect of same for each breach. Compensation of €5,000 was awarded for an Unfair Dismissal claim. However when it came to a claim under the Payment of Wages Act the Labour Court awarded one weeks' notice based on our income declared for tax at the rate of €95 per week.

There certainly has to be some confusion in Ireland as regards how the treatment of compensation claims will arise where an employer has been involved in paying part of the wages by cash and not returning them to the Revenue. In this particular case the Labour Court directed that the file would be sent to the Revenue Commissioners.

In this case the Labour Court took a considerable amount of time setting out what the law on this issue is which has been derived from case law.

It would be important, in our view, that the state would set out what the rules are relating to an employee's right where an employer pays a portion of their salary in cash and does not return it to the Revenue.

The Payment of Wages Act specifically puts the obligation on the employer to pay the appropriate tax and social security and USC. The Payment of Wages Act also provided that an employer is entitled to pay wages in cash. We have very much moved on from a cash society to a non cash society. When the Payment of Wages Act was brought in it was quite usual for employees to be paid in cash as many employees might not actually have a bank account. The ability of employers to pay an employee in cash, and avoid paying appropriate tax, and putting an employee in the position where they may not be able to recover their actual wages and proper notice payment and are limited in a Payment of Wages case to what is on their payslip is an issue which may need to be addressed. Employees are always in a more vulnerable position. Unless an employee can be shown to be in active

participation which is the test that the Labour Court has applied then in those circumstances it would be our view that the employee is entitled to recover all sums which were paid by way of notice or for breach of any entitlements for example a holiday pay or in calculating their salary for the purposes of redundancy or the Unfair Dismissal legislation.
This is an area of law which we see developing and it is an area of law which at some stage may well need to go to the High Court for determination as to how matters are to be dealt with going forward. There does need to be very clear and definitive law on this and how then the rights of employees, in such circumstances will actually apply in practice. The law on it is reasonable clear. The issue of how the law is then applied in practice would in our view be one that is open to argument at the present time.

Self Employed Contractors

This issue is beginning to become an issue and certainly appeared in a case of ADJ0018087. This involved a band rodie and a band. While the employee lost the case it is interesting in that the AO in this case took the time to quote the relevant law and in particular the issue of mutuality of obligation as set out in Minister for Agriculture –v- Barry 20019 1 IR215, the enterprise test set out in the English decision of Market Investigations –v- Minister for Social Security 1969 2Q.B.173, the integration test, the control test and the intention of the parties which was set out in the EAT case of McCotter –v- Quinn Insurance Limited UD242/2011.

It is helpful that the AO in this case has taken the time to set out the law in such depth. For those interested in this area of law this is a case well worth reading.

Pregnancy Related Dismissal

An issue which often arises is the issue relating to pregnancy related dismissal. Very few of these cases ever actually get to hearing. One of those which did is a case of a Director of Marketing and a telecom and electronic communication infrastructure sport company. The reference is ADJ-00019756. This is a case where the employee and

the employer were represented by very well recognised employment Counsel and Solicitors. This is a case where an award of €50,000 was made in relation to the issue of the breach of the statutory right not to be dismissed under the pregnancy related legalisation and €5000 for the breach of the rights under Statutory Maternity Leave.

The case is important in that particular reference was made to the Pregnant Workers Directive 92/85/EEC and to relevant case law.

The AO in this case held that the relevant law and burden of proof related to discriminatory pregnancy dismissal.

The AO raised the issue as to whether at first instance a prima facie case of discrimination occurred. In the circumstances of a pregnancy related dismissal the AO pointed out that the Labour Court in Southern Health Board –v- Mitchell remains the leading decision and that for a case to be made out;

"The first requirement is 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 on seeking to raise a presumption of a lawful discrimination. It is only if these primary facts are established to the satisfaction to the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment".

The AO in this case referred to Bolger Bruton and Kimber in Employment Equality Law –Roundhall Press 2002, Section 2 – 222 quoting;

"The case law and burden of proof in cases of alleged pregnancy dismissal have developed in a singular manner due to the particular provisions of the Equal Treatment and Pregnancy Directive. It is now well established that the existence of the Pregnancy itself is sufficient to shift the Burden of Proof to the employer to prove that a dismissal of a pregnant employee was not on grounds of the pregnancy (Ref to the Trailer Care Holding case EDA128) in other words the riles of burden of proof have been moulded in a manner to take specific account of the jurisprudence on pregnancy".

The AO pointed out that in plain English the burden of proof shifts to the employer to prove that the alleged dismissal was not related in any way to the pregnancy and this would also apply to a redundancy.

The AO in this case went through the issue of the law on this and quoted Section 10 of the Directive being the Pregnancy Directive 92/85, which requires an employer to set out;

"Duly substantiated grounds in writing" where a pregnant worker is dismissed.

The AO then at some length set out the decision of the Labour Court in EDA195 Teresa Cross (Shanahan) Croc's Hair and Beauty and Helen Ahern setting out the relevant Legislation and the relevant case law.

There is a quite substantial part of the decision which has set this out in some detail and for those interested in this area of law this is a decision which is well worth reading.

In this case the employer argued that the exception in Article 10 of the Directive should apply being an exceptional case not connected with her condition on the basis that this was a redundancy. The AO set out Article 10 in full.

The AO in this case held that a letter which was sent was the very bare and absolute rock bottom minimum required to "sight grounds in writing" and therefore the case came back to the evidence given.

The AO in this case fairly stated that the AO came to the view that the employer had not sufficiently established there was no link to the employee's pregnancy in her inclusion on the 18 staff exit list.

The AO held that it is accepted that the Burden of Proof or Rebuttal is very high in these types of cases. The AO fairly stated that the CEO was quite clearly under considerable pressure to keep the company afloat but that is not an acceptable excuse in a pregnancy discrimination case.

In setting out this commentary we are really looking at the law rather than the facts of this particular case and therefore this is why this is a case worth reading particularly in account of the level of compensation awarded. In relation to the issue of the award, the AO pointed out that Section 79 of the Employment Equality Acts 1998-2015 requires that a decision is made in relation to a complaint in accordance with the redress provisions set out under Section 82 of the Act. In relation to this the AO pointed out that a breach of the principle of Equal Treatment and especially where a pregnancy issue is involved has to be;

"Effective, dissuasive and proportionate". The Labour Court set out that the case of Lee trading as peeking House –v- Fox EED036 that guidance was given where the Court said;

"Effects which flowed from the discrimination which occurred. This includes not only the financial loss suffered by the complainant arising from the discrimination but also the stress and indignity which she suffered in consequence thereof".

The AO in this case pointed out that the employee was a high profile Director on a substantial annual salary but this salary was not set out and that the sector is not large and her redundancy would have quickly become common knowledge. The AO said that "however in a high tech industry there can be considerable staff changes and redundancies flowing from rapid changes in technology and market fluctuation globally and any award cannot be totally divorced from this reality.

This was an issue which the AO fond was an issue that had to be taken into account in setting compensation. This is not a view that we would necessarily agree with. The EU Directive on the award being "effective" is one that flows from a case on Von Colson Kamann and the issue of the particular industry, in our view, would not be a relevant factor in setting compensation. However, the AO as is the right of the AO, found that this was a factor. The AO held that the side effect of losing her entitlement to statutory Maternity leave by reason of the date of the redundancy was clearly distressing in a well advanced pregnancy situation and that this is a matter which could easily have been addressed by the employer in consultation with the employee regarding the date of the actual ending of the service. What

is interesting is that in this regard €5000 was awarded and this was on the basis of the difficulty the employee experienced in qualifying for statutory maternity leave as a result of the discriminatory redundancy.

The issue in relation to this is that we do not know what salary the employee was on. Therefore it is difficult to determine what the level of compensation was.

In relation to the determination, it is interesting that it is set out as compensation for breach of a statutory right as regards the €50,000 and as regards the €5000 as compensation for distress. These would of course be exempt from tax yet the decision states that the taxation is a matter to be considered in conjunction with advice from the Irish Revenue Commissioners.

In relation to claims under the Equality Legislation which are purely for compensation and do not relate to a loss of monetary amounts as is compensation for being dismissed under this legislation (unlike unfair dismissal) is quite clearly one that would be exempt from tax.

It will be interesting to see is this case appealed.

It certainly is clear that the AO has set out the law in significant detail and must be commended in respect of same. However, as set out previously the issue of taking into account how a particular industry operates would in our opinion be an arguable issue as to whether this is a criteria to be taken into account. It may well be that if this case goes on appeal to the Labour Court additional clarity will be provided. Certainly it is very clear that at some stage this issue as to issues relating to a particular industry and how it operates will be addressed by the CJEU.

Where there are many claims for pregnancy related dismissal or pregnancy related redundancy which goes to the WRC. The reality is that very few of these cases ever get on for hearing. Therefore there is to a certain extent a novelty factor in respect of same. The law in relation to this has become fairly clear that effectively the burden of proof by an employee is proven once they show that they were pregnant and were dismissed. The real issue now where there is confusion is the criteria to be applied in setting the compensation and

this may be the next area where the law in this will develop. We are certainly not saying that the AO is wrong. We are equally not saying the AO is correct. What we are saying is the whole idea of valuing these cases is something which is going to have to be addressed for the purposes of having certainty for both employees and employers and those representing employees and employers. Where there is certainty there is a greater chance that cases resolve earlier through mediation or get resolved before mediation. Equally where there is certainty it means that employers are to be aware of what the effect will be of not complying with this area of law.

Mandatory Retirement Ages

This issue arose in a case UDD1950 being a case of Longford Co. Council and Michael Neilon. In this case the Labour Court determined that the employee was unfairly dismissed and that he would be reinstated until he reaches the age of 70. The decision of the AO was overturned.

The Labour Court in this case quoted Section 2 (1) (b) of the Act which provides that the Act does not apply in relation to persons

(b) *"an employee who is dismissed and who, on or before the date of his dismissal, has reached the normal retiring age for employees of the same employer in similar employment …".*

The Court also quoted Section 7 of the Act which sets out the reliefs which the Court can provide.

The Co. Council was relying effectively on the fact that a retirement policy had been introduced and circulated to Employee Representative Bodies in 2006. It was accepted that a number of people before 2006 were entitled to remain on after 66 years of age.

The employee contended that he had never been furnished with a contract of employment, despite even a data access request and the case of McCarthy –v- HSE 2010 IEHC75 was quoted that in order for a term regarding retirement to be implied into a contract by custom and practice it must be;

"So notorious, well known and acquiesced in that the absence of agreement in writing is to be taken as one of terms of the contract between the parties... it is necessary in order to establish a custom of the kind claimed shown that it was so generally known that anyone concerned should have known of it or easily become aware of it".

The Court held that it was significant that the employee had not been furnished with a contract of employment which set out clearly a mandatory retirement age nor had the Court been supplied with a collective agreement or a copy of a pension scheme to support the contention that 66 was the normal retirement age for staff in the category of the employee in this case.

This case does highlight the importance, in unfair dismissal cases, of an employer having a contract in place which clearly sets out a retirement age or documentation that has been shown to employees and furnished to them which could clearly show what the mandatory retirement age is.

Employment Equality Act – Discrimination

This case is interesting but effectively it fell on the basis that the employer had not put in place evidence to demonstrate that the requirement for the complainant to do the job on a full time basis was a legitimate aim and that the means to achieve the objectives were appropriate and necessary. The employee had been a part time worker and the AO found that the dismissal of the complainant was prima facie in directly discriminatory on the gender and family ground.

What is interesting in this case is that the AO did quote the case of Von Colson and Kamann that the sanction must be "effective, dissuasive and proportionate" and compensation in this case of €38,000 was awarded.

This is a case where the AO did take the time to deal with the issue of the Von Colson and Kamann principles.

Discrimination on Technical Grounds

An interesting case is ADJ0019789 where the AO in this case held that a case for reasonable accommodation was found, technically, in the complainant's favour. We certainly would have a difficulty in a situation where a sum of €1000 was simply awarded.

The position in these cases is, that if there is a breach of reasonable accommodation under Employment Equality Acts then it is either a breach or it is not a breach. In setting compensation of course an Adjudication Officer can take into account what is just and equitable in all the circumstances but finding that a ground for setting compensation was that there was merely a technical breach in our view is not sustainable. The issue of reasonable accomodation derives from European Law. Therefore the well known case of Von Colson and Kamann applies and the obligation on the employer is to set compensation at a level which is designed to be effective , dissuasive and proportionate and following the Labour Court in Lee Trading as Peeking House –v- FOX EED 036 to have regard to;

"Effects which flowed from the discrimination which occurred. This includes not only the financial loss suffered by the complainant arising from the discrimination but also the distress and indignity which he suffered in consequence thereof".

These are the tests that have to be applied rather than that it was simply a technical breach. We are not criticising the AO in this case. It may just be unfortunate that this is the wording that is used. The reason for same is that it is now becoming common case for those representing employers to raise the arguement that any breach, if it occurred, was of a technical nature and this is an arguement which we do not believe stands up to scrutiny. That is just our opinion.

Discrimination – Reasonable Accommodation

In case ADJ0017325 the employee in this case who is still employed claimed that the she was discriminated against as a result of her disability when she was transferred from the catering department to clerical duties and incurred a significant reduction in working hours

and related earnings each week. On the transfer to clerical duties she was provided with only 24 hours per week where as previously she had been working 70 hours per fortnight.

The complainant quantified her losses at €20,000 as a result of the reduction in her hours worked as quoted a case of A Government Department –v- An Employee EDA061.

The respondent quoted the cases of Irish Prison Service – A Prison Officer EDA1837 and Nano Nagle School –v- Daly 2018 IECA11 (It should be noted that the last case has subsequently been the subject of a decision in the Supreme Court under reference 2019 IESC63).

The AO in this case set out the relevant Legislation being Section 2 of the Employment Equality Acts 1998-2015 and Section 6 of the same Act along with Section 85 dealing with the issue of the Burden of Proof and Section 16 concerning reasonable accommodation.

The AO in this case found that while the employee could not have been kept on in her position in the catering department, she had been transferred to a position on the switch board and the cost of keeping her on that subject to appropriate reasonable accomodation to facilitate her doing so would have cost approximately €10,000. The employer contended that this was cost prohibitive which the AO rejected.

The AO held that this did not place a disproportionate burden on the employer. The AO in this case directed the employer to pay the complainant compensation of €20,000, any pension shortfall and to reclassify the complainant as a clerical worker and to make the appropriate adjustments to the switch board and to return her to that post for her contractual hours of work each week.

It is not clear from this decision as to whether the €20,000 is as compensation or is it for the loss of earnings. If it is for the loss of earnings then of course it is taxable if it is compensation it is not taxable. The decision does not specify which it is though it could be assumed as the employee was claiming a loss of €20,000 in earnings that this would be effectively a loss of earnings award. If that is the position then the issue is why would compensation not have been awarded and just the economic loss. Again, the case of Von Colson

and Kamann which we have referred to previously in this newsletter would be applicable as in that case it was held that where there was discrimination it was not simply the economic cost to the employee of bringing the claim.

The counter argument is that possibly the position of having to spend approximately €10,000 to accommodate the employee and to return her to her previous job would be persuasive of an employer going forward. The rationale in relation to the decision is one that makes absolute sense as regards returning the employee and importantly finding that a sum of €10,000 to adapt a switch board would not be unreasonable, particularly as this was against a health care provider who one would assume is a larger employer.

The difficulty in these type of cases is determining what the tax treatment is and it is beneficial that an AO would specify whether a matter is compensation for loss of earnings or whether it is compensation per say so that there would be no difficulties for those representing either an employer or an employee knowing what the tax treatment should be.

Service required to bring an Unfair Dismissal Case

The Unfair Dismissals Acts 1977-2015, except in limited circumstances, provide that an employee must have worked for an employer for twelve months to obtain the protection of the Act.

In the case of BDO and Eimer Stynes UDD1947 the Labour Court addressed this issue and quoted the case of Maher – B&I Line UD271-1998 which addressed this issue and pointed out that the Minimum Notice and Terms of Employment Act 1973, as amended by Section 20 of the Unfair Dismissals Act, applies for the purposes of calculating the period of service of an employee and whether the service has been continuous. The Act of 1973, as the Court pointed out, makes no provision for calculation of untaken holidays as service for the purposes of the Act.

In this case, while the issue was not raised, of course notice periods to which an employee is entitled to would be taken into account in calculating service.

Giving an employee an option of resigning or being dismissed

This issue arose in case ADJ13218 where the AO found in favour of an employee in a constructive dismissal case where the AO found that this was the choice given to the employee.

Again, this is a very useful case where the AO has set out the law in some depth, in particular Section 1 of the Unfair Dismissal Acts, the case of Reid-v- Orricle EMEA Ltd UD1350/2014, Donnegan –v- Co. Limerick VEC UD828/2011, McCormack –v- Dunnes Stores UD1421/2008, O Riordan –v- Great Southern Hotels UD1469/2003.

In addition, the case of Joseph Brennan Bakeries –v- Rogers UDD1821 which is the decision of the Labour Court was quoted. That latter case dealt with the issue of fair procedures.

Again, it is useful that the AO has taken the time to set out the legislation in some depth. The issue of constructive dismissal is one which is regularly misunderstood by parties and it is helpful that the AO in this case has set out the law with such clarity.

Mitigation of Loss in Unfair Dismissal Cases

In Case ADJ00012648 is an interesting case where a sum of €5333 was awarded. In that case a Financial Controller brought a claim. The AO in this case pointed out that the complainant had stated that she had not worked since the termination of the employment and had never returned to the workplace. Effectively the employee had not sought new work. The AO in this case pointed out Section 7(1)(c)(ii) of the Unfair Dismissals Act 1977 which limits the compensation where no financial loss occurred to a sum not exceeding four weeks wages. It appears in this case that the full four weeks was awarded.

This case is a reminder to employees of the importance of seeking a new job, if they cease their employment so that they are not limited to a maximum of four weeks compensation.

Fair Procedures in Investigations

In case ADJ00013218 an issue arose where the argument was that a single individual was involved in the entire process. In that case the AO quoted a case of Joseph Brennan Bakeries –v- Rogers UDD1821 where the Labour Court stated;

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

It is useful that the AO in this case quoted that case of the Labour Court. Of course in small organisations we would be of the view that it may well be difficult to find different individuals to carry out each step of the process. In large organisations it will be relatively easy. In mid sized organisations it should be possible.

Even in smaller organisations it is advisable that if you have a situation where there is a business which is owned and run by one person that the company policies would have in place a procedure to allow for an outside person to either undertake investigations or disciplinary hearings.

In cases whether they are an Unfair Dismissal case or a Constructive Dismissal case the issue always comes down to fair procedures.

One of the ways in which employers constantly get caught out is that fair procedures were not allied to any dismissal.

Constructive Dismissal –
Use the Internal Procedures before Resigning

This is an issue which we constantly come back to as there are a significant number of cases that go by way of constructive dismissal. The vast majority of these are lost. An exception to this arose in case ADJ0013218 where a sum of €10,200 was awarded. What is useful in this case is that the AO did set out the law in some detail. The AO quoted the case of Allen –v- Independent Newspapers (Ireland) Limited 2002 ELR84 where it was stated that;

"The onus is on the claimant to prove his case".

In that case it went on to state;

"The test for the claimant is whether it was reasonable for him to terminate his contract".

The AO in this case stated that it was well established that a complainant is required to initiate and exhaust the company's internal Grievance Procedures. This is for the purposes of seeking to resolve their grievance prior to resigning and submitting a claim for constructive dismissal. The AO pointed out that in the case of Reid –v- Orricle EMA Limited UD1350/2014 where the EA stated;

"It is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show the said remedies are unfair".

Of course the behaviour of the employer is relevant as the Adjudication Officer pointed out quoting the case of Donnegan –v- Co. Limerick VEC UD828/2011 where the EAT stated;

"In particular the claimant must show that the respondent acted in such a way that no ordinary person, could or would continue in the workplace".

The case of McCormack –v- Dunnes Stores UD1421/2008 is one where it was stated;

"The notion places a high burden of proof on an employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formally or otherwise in an attempt to resolve her grievance with his or her employers. The employee would need to demonstrate that the employers conduct was so unreasonable as to make the continuation of the employment with a particular employer intolerable".

This was a useful restatement of the law by the Adjudication Officer.

European Communities (Road Transport) (Organisation of Working Time of Persons Performing Mobile Road Transport Activities, Regulations, 2012 SI36 of 2012)

In ADJ00021001 two issues arose which are of interest and which anybody involved in the haulage industry should be aware of.

The Regulations provide that an employer must keep records for each worker setting out the pattern of the mobile worker in relation to driving, other work, breaks, daily and weekly rest periods and periods of availability, keep records that are adequate to show that these regulations have been complied with, retain those records for at least two years after the end of the period covered by those records and provide at the request of the mobile worker a copy of those records. Where an employee is not provided with the said records the employee is entitled to make a claim for compensation as happened in this case.

The second issue is that an employer is obliged to advise an employee who is a mobile worker of these regulations. Again, failure to do so, as arose in this case, resulted in an award of compensation being made.

Issuing Claims

Do you delay issuing a claim until the internal procedures are used?

This issue arose in a case of Beaumont Hospital and Kaunda EDA1930. In many cases where an employee will bring a claim to the

WRC arguments will be made that the employee should first have gone through the internal grievance procedures. In this particular case the Court came to the conclusion that the employee did not submit her complaint until January 2018 as she was processing an internal grievance.

The Labour Court in this case referred to its own decision in Brothers of Charity Services Galway –v- O Toole EDA177 where it held;

"The Court cannot accept that deploying the respondents internal procedures operated to prevent the complainant from initiating the within complaints within the statutory time limit provided under the Acts".

The Court also in this case quoted the case of Business Mobile Security Limited and McEvoy EDA1621.

This is a case where the Labour Court held that the claim was statute barred. It is extremely helpful that the Labour Court have issued this decision. Hopefully in other cases before the WRC where individuals have issued proceedings that those representing employers will understand that there is no requirement for an employee to use internal grievances and in fact the employee is best to issue the proceedings.

There is nothing, in our view, to stop an employee issuing proceedings in the WRC and advising the employer that they are happy to go through the internal procedures and are requesting the WRC to hold listing the case for hearing while those procedures are gone through and to advise the employer that the issuing of the proceedings is there to stop the time running.

Time Limit for Claims to the WRC

This is an issue which regularly comes up. This was addressed in the case ADJ-00020930. While this is a case which the employee lost the AO in this case helpfully set out the law relating to the time limit to bring a claim.

It was set out that Section 41 of the Act of 2015 sets out that the claim must be presented within 6 months of the relevant issue and can be extended for reasonable cause to twelve months.

The AO pointed out that in HSE-v- McDermot 2014 IEHC331 the High Court considered in detail the wording of the time limit in Payment of Wages cases and stated;

… The key question is the *"date of contravention to which the complaint relates".*

In other words, time runs for the purposes of the Act not from the date of any particular contravention or even the date of the first contravention, but rather from the date of the contravention "to which the complaint relates". As the EAT pointed out in its ruling on the matter, had the Oireachtas contended that time was to run from the date of the first contravention it could easily have so provided. 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 employer had been unlawfully making deductions for a 3 year period, then provided that the complaint which has been presented relates to a period of 6 months beginning *"on the date of the contravention to which the complaint relates, the complaint will none the less be in time".*

In that case the AO also pointed out that it was stated;

"It follows, therefore, that if an employer has been making deduction 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 the Rights Commissioner in June 2014 will still be in time for the purposes of Section 6 (4). If, on the other hand, the complaint were to have been framed in a different manner, such that it related to the period from January, 2010 onwards, it would have been out of time".

This is a useful restatement of the law by the AO. It is an issue which many employees, who bring their own claims fall into the trap of bringing the claim for outside the relevant period.

Bonus Payments

Case ADJ14396 being a case of a Solicitor and a Solicitors firm is a claim relating to the non payment of a bonus payment. The employee in this case claimed 10/12 of an annual bonus payment. His employers, a firm of Solicitors. Argued that the bonus was not a contractual bonus and it was a discretionary bonus. The AO in this case held that because there was nothing in the contract or office manuals to state that it was discretionary the AO decided to award the employee, who is a Solicitor, a sum of €3,600.

The interesting aspect of this case is the fact that the issue of the bonus payment was not set out in writing, in any format, to the employees.

Where an employer has a bonus scheme it is important that the employer sets that out in writing. If it is to be discretionary, as was claimed in this case and subject to the turnover of the employer and effectively that the employment is profitable then it is important that this is also stated in any policy. As regards it being discretionary this should be clearly stated. If there is a requirement that somebody is in employment on the date of payment then again this also needs to be stated.

Unfortunately in Ireland, very often these issues can cause unnecessary claims to the WRC and disputes between employers and employees. All contractual terms relating to bonus or productivity payments should be in writing. They should be clearly set out and the rules relating to same should be clear and precise.

There is nothing to stop an employer having in place a discretionary bonus scheme. There is nothing to stop the employer providing that that is only paid provided the employee is in employment on the date that it is paid.

Holiday Rights – Do Employees have to seek them?

This issue arose in a case ADJ00017837 being a case of a legal secretary in a Solicitors firm. The AO held that an employee who is on

sick leave and is not able to take up their annual leave or able to carry over annual leave accrued during sick leave for a period of 15 months after the leave year in question. The AO pointed out that the Organisation of Working Time Act which was amended by the Workplace Relations Act 2015 does not refer to public holidays.

The AO pointed out that no evidence was presented to the AO to indicate that the complainant took any action during her employment to assert her rights under the Organisation of Working Time Act and that she only did so after her employment terminated.

The AO stated that these factors do not excuse the Respondent from liability for its failure to pay holiday pay during sick leave. The facts were admitted and therefore the AO awarded a sum of 29.5 days payable at €100 per day gross. The AO awarded a total of €2,950 as remuneration to be taxed in the normal way.

We do have an issue in relation to this. There is no requirement whatsoever for an employee to make a complaint or assert their rights. It is a matter for the employer to ensure that the employee gets their employment rights and in particular their right to holiday pay. The AO in this case may have simply been mentioning this that this was not an excuse. It most definitely is not an excuse.

In this case the employer accepted that the employee was due holidays. The AO in this case simply awarded the economic loss. This is an issue where there is a question mark in relation to the holiday pay being one that comes under the Directive as to whether such an award will comply with the requirements to be effective, dissuasive and persuasive of an employer. It is simply the economic loss. It is the amount that they were due to pay.

It is hard to see that this case would comply with the Von Colson and Kamann Principles were only economic loss is granted.

It is an entirely different matter if a person had contacted the employer and when the proceedings issued they had immediately discharged the holiday entitlement. In those circumstances that issue of compensation would be minimal because of the fact that the employee did not have to bring her claim to the WRC. Where an employee has to bring a claim to the WRC then it is our view that in

those circumstances where the employee wins there is an obligation for compensation to be set. Where the breach is admitted very early on then in those circumstances the compensation may be minimal.

This is simply our opinion but it will be interesting to see how these types of cases develop into the future. This is a case where the legal secretary represented herself as did the Solicitor firm.

Holiday Entitlements

In case ADJ-00016543 the AO in this case helpfully set out a decision of the Labour Court in Waterford City Counsel –v- O Donoghue DWT0963 where the issue of the entitlement was set out by the Labour Court in the following terms;

"The purpose of the Act is to provide employees with an entitlement to 20 days annual leave per year. Section 20 of the Act provides, inter alia, that the leave year must be granted within the leave year "or within six months thereafter where the employee consents to its deferral." Section 19(1) provides that the full statutory entitlement accrues to an employee in respect of the leave year in which he or she works at least 1365 hours but the entitlement still relates to each year of employment and not to a shorter period. Thus, the effect of Section 19(1) (a) is that if an employee is employed for a full year but is absent from work during the year, his/her full entitlement still accrues if they work the requisite hours during the year. The only leave year which is cognisable for the purpose of determining if an employee received his/her statutory entitlements is that prescribed by the Act itself, that is to say a year starting on 1 April and ending on 31 March the following year. While different arrangements may be put in place for administrative purposes in determining if a contravention of the Act occurred the Court can only have regard to the leave allocated to an employee in the statutory period.

While it was not relevant in this particular case, Section 86 of the Workplace Relations Act, 2015, provides for an entitlement for leave, where a person is on certified sick leave, for a period of 15 months.

In relation to the decision of the Labour Court, the issue of 20 days annual leave is one which appears to be constantly arising as regards

the entitlement of an employee. This is whether it is put in a contract or when cases go before the WRC. The entitlement in Section 19 of the Organisation of Working Time Act nowhere refers to 20 days. It actually refers to 4 weeks. The Interpretation Act defines a week as commencing on midnight on Saturday and finishing on midnight on the following Saturday being effectively a Sunday to Saturday period. The entitlement in Section 19 is to four weeks. This makes actual sense. An employee who works six days a week would be entitled to four weeks pay when they are out and four weeks leave, not an entitlement to 20 days pay only. An employee who works four days a week is not entitled to 20 days. They are entitled to get four weeks holidays but will in fact be paid for 16 days as that will be their normal working week.

When it comes to overtime the Labour Court has consistently said that other than regular rostered overtime it is not taken into account in calculating holiday pay whereas the CJU has recently held that it would be so included.

The case of the Labour Court which was quoted is however extremely useful in clarifying two issues which regularly come up in cases and which are wrong and contrary to both the Act and jurisprudence of the Labour Court.

The first of these, which is regularly raised, is that an employer has a different annual leave year. As is clear from the decision of the Labour Court that is a decision for an employer but whether or not an employee has obtained their entitlements is determined by the Statutory Leave year, being the period from 1 April ending on the following 31st March. This decision of the Labour Court, on that point, is absolutely in line with the decision of the Labour Court in Royal Liver Assurance and Macklin. There is no right in Irish Legislation to put in a different leave year for the purposes of calculating entitlements. There is a provision in the UK Legislation that employers can do so and in default there is the statutory leave year. In the Irish Legislation we simply have a statutory leave year with no right to opt out or change same. What an employer does for administrative proposes, for example using the calendar year, is a matter for the employer, but the employer must still make sure that in a period from 1 April to the following 31 March, the employee receives their entitlements.

In cases before the WRC it regularly arises that arguments are made relating to how the employer has structured the annual leave year. The decision of the Adjudication Officer in this case quoting the decision of the Labour Court should be a reminder that such defences do not hold any merit.

The particular decision of the AO is extremely useful in clarifying the law and in acting as a reminder. The law in this area is very clear but it appears and it is continually arising that those representing employers will seek to put forward a different interpretation. This simply wastes time and involves unnecessary argument being made which do not have to be.

Recent Decisions of the Workplace Relations Commission

In speaking to the Director General recently we raised the issue with him of having a function on their website that would set out recent decisions of the WRC. The reason for this was to facilitate colleagues wishing to keep up to date with recent decisions. The way the website is set up it does not always make it easy to work out which are the most recent decisions for the purposes of reviewing the cases. There is quite a large volume of decisions which issue.

We are delighted to see that the WRC has introduced a new facility whereby recent decisions, of the WRC, are put up under a separate heading where it is then easy to review these. In addition, we must congratulate the WRC for doing so but also for putting this up on social media such as Twitter.

This is a great assistance to those who are seeking to review the decisions. These may be Solicitors, Barristers, HR professionals, Union Officials and members of the press. We are delighted that this proposal which we made was taken on board.

***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.**