Welcome to the November Issue of Keeping In Touch

October has been an interesting time for the firm. In October we were involved in three decisions issuing from the High Court on either judicial review or point of law cases. These cases are discussed in some detail in this newsletter.

There is a section in this newsletter dealing with personal injury claims in particular the issue of accidents in the workplace and assaults in the workplace. The issue of assaults in the workplace are now becoming a significant issue and we have produced our guides in relation to this which we hope those reading this newsletter will find useful. Very often in such cases there is an overlap between personal injury claims and employment law claims.

We have dealt with the issue of the format of decisions from Adjudication Officers. A significant issue relating to this was heard by the Labour Court recently. In reviewing decisions from the Workplace Relations Commission over the last month it is quite evident that a significant percentage of the decisions issuing are either unenforceable or have not issued in accordance with the relevant statutory provision using the correct terminology and that some of these are either unenforceable or cannot be appealed. This is a significant issue that needs to be addressed. We were told that the Workplace Relations Commission is going to be a world class service. A simple review of some of the most recent decisions indicates to us that the decisions are not being issued is accordance with the relevant statutory provisions.

It is interesting to note, in the current economic climate, that there are a significant number of redundancy payment act claims arising. The reason we believe a number of these are going to the Workplace Relations Commission for hearing is the fact that previously there was a rebate for employers. That rebate is gone. Now effectively employers can often let employees simply bring their claim to the WRC before they get around to actually paying the redundancy payment. There is no penalty on an employer who delays paying redundancy and who requires an employee to actually bring their claim to the Workplace Relations Commission. This is an issue which currently we see a rise in the number of claims going for hearing. If we get any form of

downturn in the economy we can anticipate that there will be a significant increase in such claims going for hearing because of the fact that there is no penalty on an employer for failing to do so by which we mean paying the redundancy payment. This will put significant extra stress on the service.

It is quite worrying that there appears to be a significant increase in the number of pregnancy related dismissals. Those claims were always there. Only a small portion of them get on for hearing but the issue of pregnancy related dismissal now seems to be a very regular issue being dealt with by those of us involved in employment law.

There is a worrying trend arising in relation to employment. It is that because of the constant availability of individuals and the issue of at sometimes constant pressure being put on individuals particularly those in management roles both middle management and senior management that the issue of stress related psychiatric injuries being caused is on the increase. The Department of Employment Affairs constantly talks about the need for flexibility. They seem to have a complete disregard for the issue of the health of those workers.

Flexibility from the department in our understanding of matters means “availability”. The reality of matters now is that it is well proven that lack of rest, lack of breaks, lack of holidays free from the workplace and free from interruption are all contributing factors to stress related claims. We are very much at a crossroads. The issue of the right to disconnect from work does need to be addressed and sooner rather than later. When these claims arise it can often be for individuals who are over fifty. They are often in senior positions. Some of them will never work again. Many of these are at senior levels earning significant sums. The potential cost to employers in such cases is immense. The psychological and psychiatric impact of actions by employers in failing to address the issue of excessive working can have huge detrimental effect on individuals. Not only can it result in psychiatric illness. It can drive people to suicide. This issue is extremely serious. It needs to be addressed sooner rather than later and there needs to be proper legislation in this country properly enforced which protects individuals and ensures that the right to disconnect from work is there.

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Out and About in October 2019

On Monday 7 October Richard Grogan of our firm was interviewed on The Pat Kenny Show on Newstalk FM on the Ask the Expert section of the show.

On 10th October Richard Grogan was interviewed on the Sean O' Rourke Show discussing the right to disconnect from work emails. This is the day that the Financial Services Union had produced a report from the University of Limerick on the issue of excessive working and the requirement from a Health and Safety perspective for individuals to disconnect from work.

On 17th October Richard Grogan presented a paper to the Roscommon Bar Association on Section 150 of the Legal Services Regulation Act on the issue of costs and fees. This was a practical talk dealing with the practical issues which colleagues would need to deal with.

On 22 October Richard Grogan was quoted in fora.ie on the issue if the Maternity Protection Act. Also, on 22 October Richard Grogan was interviewed on Newstalk FM by Ciara Kelly on the issue of sexual discrimination of men.

On 23 October we had an article published in Irish Legal News on what employees must do to deal with the threat to sexual harassment in workplaces.

National Minimum Wage Act 2000 – A Win for Our Client

In the case of Dimitrij Karpenko and FreshCut Food Services Limited a Judgement was issued by Mr. Justice MacGrath on 18 October 2019.

This case involved the proper interpretation and application of Section 8 of the National Minimum Wage Act, 2000, as amended.

The contract for the employee stated;

"Your normal hours of work are between 9.00pm and 9.00am, Monday to Sunday. Shifts are 6 days a week as per the roster with a 30 minute break and two 15 minute breaks each day. You may be required to work additional hours when authorised and as necessitated by the needs of the business".

The employer in this case contended, in the Labour Court, that the average hours worked were 33.47 in the relevant period. The employee contended, through this firm, that because of the terms of the contract he was entitled to be paid for 66 hours. This is effectively 11 hours per day being the time after breaks are deducted.

Our argument in the Labour Court was under Section 8 (1) (a) (i) that the employee was entitled to be paid on the basis of what the hours set out in his contract of employment.

The Legislation is somewhat confusing in that there is an alternative which sets out the basis of payment being the total hours during which the employee carried out or performed the activities of his or her work at the employees place of employment or is required by his or her employer to be available for work and is paid as if the employee is carrying out or performing the activities of his or her work, whichever, in any case, is a great number of hours of work.

The employer in this case argued that the entitlement to be paid under the National Minimum Wage Act where the employee was being paid €10 per hour and the National Minimum Wage Act at that stage €8.65 was on the basis of Section 4(1) (b). We were contending it was on the basis of what was set out in his contract of employment being the contractual hours.

In the Labour Court after we lost the case before the Labour Relations Commission the matter went to the Labour Court.

The Labour Court held that;

"…The effect of the Act provides that the complainant is entitled to be remunerated at the applicable National Minimum Wage for the hours he actually worked".

The case was lost in the Labour Court.

The case went on Appeal to the High Court on a Point of Law. In a Point of Law Appeal to the High Court the parties are limited to the arguments which were made in the Labour Court. This is not the position if matters are brought up by way of Judicial Review. However, in a Point of Law Appeal, which is what was taken in this case, the employee was limited to the arguments which had been made in the Labour Court and had previously been made before the Labour Relations Commission.

In the High Court Ms. Marguerite Bolger SC submitted that the case was not about the interpretation of the contract but rather the interpretation of the Act. It was submitted that, as a matter of Statutory Interpretation, it is not the actual hours worked, rather the hours of work as determined in accordance with the contract of employment which is relevant and that the Labour Court supplanted the law contained in Section 8 (1) with its own analysis of the stated purpose of the Act, being to establish a National Minimum Rate of Pay expressed in terms of rates applicable to every hour worked. It was submitted both before the Labour Court and in the High Court that the provisions of the Act were unambiguous and ought to be literally interpreted and afforded their ordinary meaning. It was contended there was no ambiguity and no justification to adopt a purposive approach. It was contended that the disjunctive "or" which is used in the Section ought to have led to a consideration to the alternatives. Similarly the expression "whichever is the greater" was also not considered. It was contended in the High Court that the Act implies the phrase "working hours" rather than "every hour worked". In addition Section 2(1) (b) of the Act provides that the term "Working Hours" has the meaning set out in Section 8 and that the phrase working hours is repeated throughout the Act and not the phrase such as "every hour worked" or "hours actually worked". It was submitted that any attempt to rely on the provisions of Section 17 by arguing that a roster constitutes notification of working hours should not be entertained because such arguments were not made in the Labour Court.

Arguments were made in the High Court by the employer that because there was a reference to a roster that this would have to be taken into account and there was an argument that Res Judicata applied

because of the fact that a Rights Commissioner had made determinations on other matters and had assessed compensation at the rate of €10 per hour. While it was not covered under in the decision the employee had been paid an average of €337.40 per week. Compensation for not receiving a contract of employment was set out at €500 before the Rights Commissioner. The compensation under the Terms of Employment (Information) Act is actually up to four weeks wages and under Section 7 of that Act the issue for a Rights Commissioner is to award compensation on a figure that is just and equitable.

In relation to the Res Judicata argument it was contended by Ms. Bolger that that could not apply in the context of different pieces of protective Legislation. It was also argued that it had never been the appellants case other than he was paid €10 per hour which he in fact worked and therefore estoppel could not arise. Ms. Bolger argued that evidence before the Labour Court of another employee about rosters is not evidence of notifications of a roster to the appellant and is not in accordance with a letter of reply to particulars in which the company identified the contract is containing the times of work. A case was never made in the Labour Court that the employee had been provided with rosters.

In this case the Court set out that the role of the Court and referred to the well-known case of Fitzgibbon –v- Law Society 2015 1 IR156 where Mr. Justice Clarke, as he then was, stated that were a legislature confirms a right to a statutory appeal it must be assumed that it was intended to have some purpose and affect. In the case of An Post –v- Monaghan 2013 IEHC404 was referred to where it was set out that the Court is limited to finding that a decision is based on an identifiable error of law where or an unsustainable finding of fact.

In this case the Court accepted that the provisions of the Act under consideration are unambiguous and therefore it is appropriate to construe them in accordance with a literal interpretation. The Court pointed out that Section 8(1) required the meaning of “working hours” under the contract to be addressed and assessed. The Court pointed out it has a particular Statutory definition. The Court went on to state;

"In the context of this case, it requires that the hours (including a part of an hour) of work of the appellant be determined in accordance with the contract of employment or the total hours during which he carried out or performed the activities of his work at his place of employment, or was required by his employer to be available to work, whichever is the greater number of hours. The assessment of the alternative is mandated by Section 8 of the Act, which notably contains no reference to the expression "hours worked".

The Court pointed out that the Labour Court in its approach erred by equating hours actually worked with working hours. The Court stated that the Labour Court did not engage in the necessary exercise of the assessment of whichever is the greater the hours of work determined in accordance with the contract of employment and the total hours during which the employee carried out or performed the activity of the work. The Court stated that it was only in the analysis of these two issues, in the context of the facts as found, could the Labour Court have arrived at a conclusion as to which was the greater number of hours of work. On that basis the Court concluded that the Labour Court fell into error of a type envisaged by Kearns P. in Earagail Eisc Teoranta –v- Ann Marie Doherty and Others 2015 IEHC 347 where it is appropriate for the Court to intervene.

While this case was won by the employee the Court did point out that the roster is also mentioned in the contract in the context of holiday pay and it is evident from the contract that the roster is likely to assume importance in the determination of constituted hours of work under the terms of the contract. The Court pointed out in the assessment of the appropriate "working hours" under Section 8 the provisions of Section 17 of the Act of 1997 are also likely to be relevant but that it could not be said that the Labour Court engaged in an analysis of whether and to what extent a roster existed and the effect, if any, that this may have had in terms of the application of Section 17.

This case is important in determining that where an Act is unambiguous that a literal interpretation must be applied and not what anybody might consider the intention of the Act was.

This case has confirmed that where Legislation is unambiguous then it is appropriate to construe them in accordance with that literal interpretation.

This is a case where this office brought the claim initially to the Labour Relations Commission. We lost. It went on appeal to the Labour Court. We lost. The matter then went on a Point of Law to the High Court and our client won. The same arguments before the Labour Relations Commission, the Labour Court and the High Court were made.

This is a case where we do wish to thank the Counsel who became involved in this case. There was no hesitation by Counsel when we went to them with a case setting out the history of the case and our arguments. They were immediately on board both Marguerite Bolger SC and Sharon Dillon Lyons BL. We would also like to thank our client for the faith and confidence he put in both this firm and the Counsel we proposed to run this case. This is a case where our client was earning, at the relevant time, a little over the National Minimum Wage. In reality there was no way he could have afforded the legal costs of bringing a case the whole way through to the High Court on a Point of Law. Both this office and the Counsel whom we instructed all recognised that in reality there was little potential and by little we mean none, of him being able to discharge the legal fees unless we were successful. If we were successful then we would be limited to the fees which we would recover on taxation. There are times as Lawyers whether Solicitors or Barristers that we are called upon to represent those who would not otherwise have access to justice. By justice we mean their entitlements under the law in Ireland. At times it is necessary to do what is right and by right we mean representing a person who would not otherwise have the means to be represented. We as a firm are not unusual. We know of no firm who does not take on such cases for people.

It is a part of the legal profession which rarely gets any publicity. It is not a part of work which we as a profession look to have recognised. The reason for this is that it is a matter of fact that all Solicitors do it and also all Barristers.

The Labour Court in this case took the view, in our opinion, that the intention of the Act was to provide that an employee would be paid

only for the hours actually worked. However in our view the provisions of the Act being ones which provide alternatives including what is set out in the contract as the hours of work or the hours actually worked, make absolute sense. The Act also provides for persons being paid under a Collective Agreement or a Sectoral Employment Regulation Order. The issue in relation to contractual hours is very important. If that clause was not in there an employer, and there is no question that the employer was attempting to do this, could simply provide that an employee's contractual hours would be between midnight up to midnight the next day, The employee might only work one or two hours a day but the contractual provision could be used to limit the employee taking on any other employment. The National Minimum Wage Act does not preclude an employer providing that an employee has to be available 24 hours a day 7 days a week 365 days of the year provided the employer pays the National Minimum Wage for those hours. This case is important in stating the Law. It is the first ever Point of Law case under the National Minimum Wage Act 2000.

We are honoured that we were the first office to bring a claim to the High Court, on a Point of Law under this Act. We can be a bit like Bulldogs. When we read the Legislation and make a determination that a client of ours has a good case we are prepared to bring it all the way. Equally if we decide that a case is not a good case we will not take it on. We do not win every case. There are many cases which we would like to bring by way of Point of Law but for various reasons that is not a realistic option. However, we are very much a section and subsection office. We read the legislation. We consider the Legislation and we make decisions to take cases on the basis of the Legislation. At times there will of course be cases which will also be taken on the basis of decided cases on how the legislation has to be interpreted.

National Minimum Wage Act Claim – Are Discounts to be Taken Into Account

This issue arose in ADJ /00021430. The employee claimed that she was paid €8 an hour. The respondent company contended that she was paid €8 an hour but because she got a 15 /20% discount in relation to shop credits that this should be taken into account.

The Adjudication Officer in this case rejected that argument.

This is not the first time that this sort of argument has been raised.

The idea that a reduction or store credit or even that product would be provided would in some way would be deemed to be payment under the National Minimum Wage Act (or in fact payment for the purposes of the Payment of Wages Act 1991) is a totally alien concept. This goes back to the Truck Acts which were brought in to stop a situation where employers could require an employee to take store credit in lieu of wages.

It is surprising that despite the fact that the Truck Acts were brought in in the far distant past that this argument still arises.

It is useful that the Adjudication Officer in this case set this matter out and firmly rejected this as an argument.

Sunday Premiums – Recent High Court Case

In the case of Trinity Leisure Holdings Limited Trading as Trinity City Hotel and two employees the High Court 2017/81 MCA is a Judgement of Mr. Justice Binchey delivered on 7th October 2019. In this case we acted on behalf of the respondents who were employees of the Appellant Company.

Before the Labour Court the employees were successful in the claim for seeking a Sunday Premium. The relevant clause of the employee's contract stated, after setting out their rate of pay that;

"This includes your Sunday premium based on you getting every third Sunday off (i.e. you work two Sundays out of three)…

In this case we contended before the Labour Court and the Rights Commissioner that where a Sunday Premium is included in an employee's rate of pay then some element of the employees pay must be specifically referable to the obligation to work on Sundays. The employers in this case contended that the determination of their pay did take account of the fact they were required to work on Sundays because it was expressly stated to be so in the contract.

Before the Labour Court they held that the employer failed to present any evidence to the Court in relation to what if any element of the

employee's hourly rate of pay was specifically referable to the contractual hours.

This case revolved around Section 14 (1) of the Act of 1997 being the Organisation of Working Time Act and in particular sub section 1 which provides;

"an employee who is required to work on a Sunday (and the fact of his or her having to work on that day has otherwise been taken into account in the determination of his or her pay), shall be compensated by his or her employer for being required to so work by the following means, namely…".

In the High Court a number of decisions of the Labour Court were opened relating to the issue as to how the Labour Court had traditionally dealt with situations relating to Sunday Premiums.

In this case the Court held that Section 14 (1) of the Act imposes an obligation on employers to pay a reasonable remuneration to employees in respect of Sunday work by reference to stated criteria set out in Section 14 (1) (a) (d) unless the requirement to work on Sundays is otherwise taken into account in the rate of pay of the employees.

In this case it was argued on behalf of the employees by Marguerite Bolger SC and Conor E Byrne BL that the Court ought to take account of the vulnerable position of employees such as the respondents who were employed as cleaners in the hotel and that it was a duty on employers to ensure that the contract clearly identified the portion of the hourly rate of pay that relates to Sundays.

The Court held that the difficulty with this line of arguement is that it ignores not just the clear and unambiguous language of the contract of employment but also the fact that the respondents do not appear to given any evidence on the question. If they did, it is not recorded either in the decision of the Adjudication Officer or the Labour Court and nor were any submissions made regarding evidence they gave on the question.

The Court in this case stated that while a statement in a contract that the rate of pay takes account of the requirement to work on Sundays

this may not always be conclusive. If an employee wishes to assert that the rate of pay does not do so then his Honour stated in his opinion he or she must advance some credible evidence to rebut the expressed provisions of the employment contract or at least to shift the proof in the matter to the employer although he or she will have to overcome the parole evidence rule. The Court pointed out that it may be possible to do so. The Court pointed out that for example if the rate of pay provided for in the contract, was at the time the contract was completed, greater than the statutory minimum wage, but is no longer so at the time the complaint is advanced, it would be difficult to see how the rate of pay could still be said to reflect the requirement to work on a Sunday, since that is the minimum rate of pay which the employer must in any event pay.

The finding of fact was arrived at by the Labour Court on the basis that the appellant failed to tender any evidence to the Court in relation to what, if any, element of the complainants hourly rate of pay was specifically referable to their contractual obligation to work on Sundays. The Court pointed out that this is a conclusion on a matter of law because in so deciding the Labour Court in deciding that a clear statement in a contract of employment signed by both parties may not be relied upon and instead must be proven in a particular way. The Court pointed out that the Labour Court had made an error of law.

In this case this matter ran before the High Court. The appellants who were the employer won. In the normal course of events the employer having won would be entitled to their costs. In this case when the case came back for arguement in relation to the issue of costs the employer very fairly waived any claim that they would be entitled to costs against the employees.

From our perspective this was a case which we had taken in the Labour Relations Commission and to the Labour Court on the basis of the existing jurisprudence of the Labour Court. There has always been some arguement in relation to Section 14 of the Organisation of Working Time Act, 1997, that there were two arguments.

The first arguement was effectively that if a contract of employment provided for even a one cent premium per annum that this took the case out of the jurisdiction of the Labour Court to review same. The counter arguement was that regardless of what might be set out in the

contract that the provisions of Section 14 (1) (a) – (d) had to be taken into account.

While this case was lost by the employees there have been some views, expressed by some but effectively now that once a contract sets out a premium that that is the end of matters. That is not what was held in this case, in our opinion. The Court pointed out that if a contract did provide that it included a Sunday Premium in the original contract and the employer was paying just over the National Minimum Wage and that when a case came on before an Adjudication Officer or the Labour Court and the National Minimum Wage had increased to a level above that figure then in those circumstances an Adjudication Officer or the Court would not be limited to considering whether this was reasonable in line with Section 14 (1) of the Act. Clearly an issue is going to arise for example where an employer pays, for example, an additional premium of 25 cent per hour over the current National Minimum wage. The current National Minimum Wage is €9.80 per hour since the 1st January 2019. Let us assume an employer puts in a contract a rate of pay of €10.05 per hour and says that this will include any Sunday Premium. What happens if the National Minimum Wage increases to €10.10 per hour but the employer increases the wage so as to pay €10.35 per hour. Clearly in those circumstances the original contract is less than the new National Minimum Wage but the employer is paying in excess of the National Minimum Wage. It is therefore unclear as to whether the employer in those situations can rely upon the contract by simply saying. While the contract does not specify a rate of 25 cent per hour as the premium that that would be applied into it because of the fact that they are now paying an additional 25 cent per hour.

The High Court has left open the arguement that an employee who wishes to assert that the rate of pay does not include a proper Sunday Premium must advance some credible evidence or at least to shift the onus of proof to the employer. This might be read as meaning that for example if an employer sought to put in a premium of 0.01 cent per annum as a Sunday premium that an employee in those circumstances might well be able to argue that that could not be reasonable on any construction or to produce evidence in relation to what type of premium would be normal in a particular industry. However, as the Court points out an employee would still have to

overcome the parole evidence rule which even in these circumstances we would see as being extremely difficult.

The decision does leave open the issue as to whether the Labour Court can undertake an investigation as to whether the premium being paid is reasonable in line with section 14 (1). While this issue is not addressed in this particular case the issue in relation to a claim under the Organisation of Working Time Act, 1997 is whether the Labour Court is an adversarial entity or whether it has an inquisitorial role. If it is an inquisitorial role then it would appear to us that an arguement can be made that it is open to the Labour Court to put in place an inquiry in relation to the level of the premium and then to determine whether in line with section 14 that this is a reasonable premium. If the role of the Labour Court under section 14 is an adversarial role then in those circumstances it would appear to be a matter for the employee to produce the relevant evidence and to get over the parole evidence rule. When you look at the provisions of the Workplace Relations Act the Supreme Court has held that the Workplace Relations is an inquisitorial process. The Legislation relating to appeals to the Labour Court in respect of the Organisation of Working Time Act would appear to put them in that position also. What is however clear is that the Workplace Relations Commission is an inquisitorial process and therefore an arguement can be made that regardless as what is in the contract as an inquisitorial process on a reading of Section 14 that an Adjudication Officer must inquire into matters and that that would include looking at what would be a reasonable premium. In such situations the parole evidence rule would not apply and it would not be a matter for the employee to produce the relevant evidence. In reality it is going to be virtually impossible for an employee to have the relevant knowledge of premiums in particular industries where they are not legally represented and even then this information is more akin to information which Industrial Relations Consultants will have the knowledge on. However, the Workplace Relations Commission and the Labour Court as they both have relevant Industrial Relations experience would have the relevant knowledge.

This has been an important decision. The issue in relation to this case is clearly that while it is a case where our clients lost it is one where there are still questions that are going to have to be asked.

The intention behind the Act was clearly that employees who would be required to work on a Sunday would receive a Sunday premium. The Legislation in Section 14 has like a lot of Legislation in Ireland been very badly drafted. It would be a simple enough matter then and now for Section 14 to be amended by;

(a) The deletion of the words "and the fact of his or her having to work on that day has not otherwise been taken account of in the determination of his or her pay". or
(b) By adding after the words "his or her pay" in those brackets the word "regardless of what might be stated in their contract of employment".

We do believe that the issue of Sunday pay does need to be addressed. We do not need to see further cases going to the High Court as to how Section 14 is going to be determined. There is now an issue as to whether the Oireachtas determines that the rate of pay will be as per the contract subject to a right of an employee to challenge same or alternatively that we get back to a situation where an Adjudication Officer in the Workplace Relations Commission or the Labour Court on appeal will taking into account their specific knowledge of Industrial Relations in Ireland determine whether in all the circumstances a premium is or is not a reasonable premium. This is an issue which we have made a submission to the Minister on.

The Use of Pro Forma Decisions in the Workplace Relations Commission maybe leading Adjudication Officers in to errors of law.

For those of us who are regularly appearing in the WRC it is quite clear that there are pro forma decisions.

This issue recently came to a head in the case of Dunnes and Karen Walsh under reference TED1923 and UDD1959.

It is not necessary to get into the full detail of the case but in relation to this matter this office represented the employee. On the day of the hearing before the Adjudication Officer a submission was produced. It had been produced the previous evening at 7pm. Richard Grogan of this office who was running the case was involved in finalising a

submission to the Labour Court which was time sensitive. The case came on the next day before the Adjudication Officer. What was clear was that the submission, from the employer, relating to the Unfair Dismissal Act claim had not been submitted within the timescale specified in the WRC rules. Richard Grogan of this office submitted that the employee had been left opened to "ambushing" before the Adjudication Officer. As we were not able to get confirmation as to getting an adjournment on quickly and taking account of the fact that the Adjudication Officer was proposing the matter would proceed and if necessary time could be given to read the submissions, but not very long, we determined that this was a form off ambushing. That it was not fair and withdrew from the case saying that we would bring the matter to the Labour Court where ambushing was not allowed. In his determination the Adjudication Officer held that compliance with the rules of the WRC were more observed in their breach than their observance. This is a pretty appalling indictment on the WRC in itself but so be it. The Adjudication Officer then decided on the decision in the following terms;

"Section 41 of the Workplace Relations Act, 2015, requires that I make a decision in relation to the complaints in accordance with the relevant redress provisions under Schedule 6 of that Act. For the reasons set out above complaints…both fail for want of prosecution and they are dismissed".

The employee in this case appealed. The employer in this case made a preliminary submission to the Labour Court relating to their jurisdiction under both the Terms of Employment (Information) Act and the Unfair Dismissal Acts 1977 -2015.

A hearing took place before the Labour Court.

In relation to the case under the Unfair Dismissals Act the Labour Court went into some detail in detailing with the provisions of the legislation and in particular Section 8 (1).

In relation to the Unfair Dismissal case the Court specifically noted that that Act gave an Adjudication Officer an explicit power to dismissal a claim for redress under the Act. That power is set out in section 8 (1) (c) (iii) of the Act which provides that an Adjudication Officer shall

"(iii) Make a decision in relation to the claim consisting of an award of redress in accordance with Section 7 or the dismissal of the claim".

The Court held that in the decision the Adjudication Officer held that the claim failed for want of prosecution and was "dismissed". The Court pointed out that it was not for the Court to look behind the decision of the Adjudication Officer or to enquire as to the basis for an assertion that a claim referred to him under the Statute can, in exercise of his explicit statutory functions, by an Adjudication Officer to "fail for want of prosecution". The Court however noted that the Adjudication Officer in this matter had made a decision that the claim was dismissed. The Court pointed out that under the provisions of Section 8 (1) (C) (iii) that it was within the jurisdiction of the Adjudication Officer to make a decision that a claim was dismissed. The Court held that the Adjudication Officer had made a decision to dismiss and therefore that matter was open to being heard on appeal by the Labour Court.

In relation to the claims under the Terms of Employment (Information) Act the Labour Court in this case held that the Adjudication Officer had no power to make the decision which he did and that therefore they have no right to hear the appeal. In relation to this Act Section 7 is the relevant part and the Court pointed out that the relevant provision was Section 7 (2) (a) which states;

"Declare that the complaint was or, as the case may be, was not well founded".

In this case the Labour Court noted that on a plain reading the Adjudication Officer had made a decision to dismiss the claim. The Court pointed out;

"That decision does not, by reference to the Act at Section 7 (2), appear to fall within the jurisdiction of an Adjudication Officer to make and is not in the form set out in the Act for a decision of an Adjudication Officer".

The Court specifically set out that the decision made was not within the jurisdiction of the Adjudication Officer.

The Court therefore held that there was no valid appeal before it.

It is clear from these two decisions that the jurisdiction of an Adjudication Officers under various pieces of legislation are different. There is no conformity. An Adjudication Officer dealing with any case is obliged to consider what their powers are to make an adjudication on and what form of decision they can make.

In relation to a claim under the Unfair Dismissal Legislation, it would appear that they have a choice to do two things. The first is to find in favour of an employee and to award redress. If they are finding against the employee then in those situations they must dismiss the claim. In other Acts it will be a question of determining whether a claim is well-founded or not well founded. That means that they must set out using the words "well-founded" or "not well founded" in a decision.

Therefore in a case under legislation like the Terms of Employment (Information) Act an Adjudication Officer in finding for an employee will have to set out that they find the case "well founded" and award x". If they are finding against the employee then it is to set out "I find the case not well founded".

When you look at the decisions that are coming out of the WRC currently it is quite evident that there is, as pointed out by the Labour Court, the use of a pro forma form of decision. Some of the Adjudication Officers are clearly not applying the appropriate statutory remedy. The WRC was set up on the basis that we were going to have a world class service. When you review recent decisions of the WRC it is quite clear that some Adjudication Officers are not making decisions in conformity with the statutory provisions. This means that in theory employees to not have a right of appeal to the Labour Court. Adjudication Officers have a statutory duty to apply the law. To a certain extent we have a lot of sympathy for them. The Workplace Relations Act is an abomination of Legislation. It is badly drafted. It is contradictory. There is no conformity. It is absolutely crazy that we will have separate forms of decisions having to use separate wording. This can only lead to lack of clarity and these type of arguments in the labour Court.

We do hope that these two decisions of the Labour Court will be distributed to Adjudication Officers and that they will read them.

Within the WRC itself if they are using pro forma forms then it would appear absolutely imperative that depending on the relevant Act, for example being a claim under the Unfair Dismissal Acts, that the word dismissed is used in any case where a claim is being dismissed and in relation to other Acts that the "well founded" or "not well founded" will actually be used.

If you take a situation where an employee brings a claim under for example the Terms of Employment (Information) Act and an Adjudication Officer was to hear the case and simply in the decision refer to Section 41 and then state "I award the employee €x". In such circumstances the employer if they do not appeal and the employee would have no right of appeal lets the 42 days go and the employee then seeks to enforce same in the District Court an arguement can be made by the employer that no valid decision had issued and that therefore there is no decision to enforce.

In Payment of Wages claims some Adjudication offices have made awards of "one week's pay" without specifying the amount despite the fact that Section 6 requires an award of an "amount".

It is quite clear that it is going to be a number of challenged to decisions Adjudication Officers unless they get this issue rectified.

Payment of Wages Act, 1991 Awards must be specific to be enforceable

A case in question is ADJ00020655. In this case the Adjudication Officer to be fair to the Adjudication Officer sets out the law and arguments at some length and then set out in the finding that the complainant's pay should be adjusted by 1% in line with the HSE Admin Scale and backdated to October 2018. The issue is whether such a decision is enforceable. The Payment of Wages Act, 1991 is specific. The Act provides that an Adjudication Officer can make an award of an "amount". It would be our view that following on from a recent case before the Labour Court relating to the jurisdiction of an Adjudication Officer and on a literal interpretation of the legislation that an Adjudication Officer must specify an amount. There will be of course cases where they don't need to specify an amount. For example in a Redundancy Payment Act Claim it is sufficient to set out the start date, the finishing date, the date of birth of the employee, their salary

and any breaks in service. It is then a calculation in accordance with the Redundancy Payment Acts but it is not necessary for an Adjudicator to actually undertake that calculation. In relation to the Payment of Wages Act the Legislation however is very specific as to what an Adjudication Officer can award. The Act is clear that an Adjudication Officer can award an amount. A 1% increase, backdated, is not an amount in our opinion.

Assault at Work - Part of the Job?

There are many jobs that carry an exposure to a risk of injury. Some examples include An Garda Síochána dealing with violence, prison officers dealing with criminals, nurses, midwives, psychiatric nurses and healthcare workers dealing with patients or residents who can be volatile. We frequently meet with these type of employees who have suffered either physical or psychological injuries, or sometimes a combination of both, as a result of an assault during the course of employment.

Simply because an employee's work exposes him/her to a risk on a daily basis or because there is a high level of risk associated with the job does not mean that they cannot recover compensation for injuries and financial losses if assaulted while carrying out their duties of employment.

An example of such a case is *Donal Cronin –v- Minister for Finance and Public Expenditure [2019] IEHC 396.* In this case, the sum of €286,630.00 was awarded to the applicant following his application to the High Court for compensation pursuant to the Garda (Compensation) Acts 1941 – 1945, being €95,000.00 for pain and suffering to date and €25,000.00 for pain and suffering going into the future. In addition, the sum of €166,630.00 was agreed between the parties in respect of pecuniary loss. The pecuniary loss was broken down as follows: -

(i) €129,224 in respect of past and future loss of earnings as a sergeant;
(ii) €26,894 in respect of the claim for medical costs associated with knee replacements; and
(iii) €10,512.00 for other expenses.

The Plaintiff in this case was injured during the course of his work as a Garda while he was attending Limerick Circuit Court and attempted to restrain a prisoner who was trying to escape the execution of a bench warrant. The prisoner struck the Plaintiff a number of blows and tripped him, causing him to fall awkwardly on his left knee with the prisoner and a colleague falling on top of him.

The applicant's injuries included a depressed fracture of the lateral tibia plateau. He was obliged to have surgery and after a number of outpatient appointments, it became apparent that he would never again be medically fit to undertake full policing duties. He subsequently developed cellulitis on the left shin and was experiencing a lot of pain in his injured knee joint. This resulted in him being admitted to hospital on two occasions for intravenous anti-biotics before ultimately having to undergo further surgery for the removal of the plate which had been used to fix the knee fracture. He had physiotherapy treatment and continued to be symptomatic. He developed post traumatic osteoarthritis of the left knee which is likely to progress to a requirement for a total knee replacement. In addition to his physical injuries, he also developed psychological injuries in the form of flash backs, sleep disturbance, irritability, social withdrawal and anxiety.

An employer has a legal duty to ensure the safety, health and welfare of employees and is obliged to limit, in so far as is reasonably practicable, an employee's exposure to a risk of injury. This includes injuries to both an employee's physical and mental health. If the employer has failed to take appropriate steps to comply with these responsibilities which would have prevented the assault from taking place, this will result in an employee being successful with a personal injuries claim for compensation and financial losses. There may also be certain employment law cases for breaches of employment rights legislation.

Examples of steps to minimise exposure to injury to employees in a high risk environment or steps to limit the severity of an assault on employees in a high risk environment include the following:

- Implementing appropriate policies and procedures in the workplace dealing with exposure to violence and communicating these policies to employees. For example, tasks which should involve two or more employees.
- Providing task specific training to employees so that they can deal with an incident of violence in such a manner that will minimise their exposure to injury or limit the severity of the assault. Such training should be updated at appropriate intervals during employment.
- Providing functioning panic buttons so that employees can seek help quickly, when required;
- Installing security screens where appropriate.

An employee will have 2 years from the date of the assault or 2 years from the date of knowledge of the injury within which to bring a claim for compensation and financial loss. If there are any associated employment law claims for breaches of employment rights legislation, these claims must be brought within 6 months of the breach occurring. A case for assault and battery can be brought within a period of 6 years from the date of the assault. A solicitor with experience in both employment law and personal injuries litigation can assist you with the appropriate legal avenues. A solicitor will also help you obtain a medical report setting out your injuries, treatment and prognosis. It will then be necessary to lodge your medical report and completed application form with the Personal Injuries Assessment Board (PIAB). PIAB is a State body and all cases for injuries must be submitted to PIAB before they can go to court. Sometimes cases will finalise in PIAB. Other cases will have to go through the court process. A solicitor will advise you at each stage of the process.

Alternatively, there are certain workplace schemes for An Garda Síochána and psychiatric nurses to compensate these employees if they have been injured while carrying out their duties. A solicitor can advise you about any appropriate scheme.

If you have been involved in an assault in the workplace and suffered injuries as a result, you should: -

- Speak to your GP and discuss the incident and the impact which it has had on both your physical and mental health. Follow all medical advice given to you, including attending for counselling sessions or any referral to the mental health services.
- Report the incident and details of your symptoms to your direct line manager. Ensure that you comply with any company reporting requirements such as recording details in an incident report form or incident book.
- Record the names of all witnesses. Obtain a copy of the CCTV footage, if possible. You, or your solicitor, can obtain a copy of the CCTV footage pursuant to data protection legislation.
- If your GP is certifying you as unfit for work, submit all medical certificates to the employer.
- Speak to a solicitor with experience in both employment law and personal injury litigation and obtain advice about bringing a claim for compensation and your financial losses.

When an employee has suffered injuries at work, either physical or psychological or both, it may result in having to take some time off work to recover. In the absence of a sick pay policy at work, this can have a big financial impact on a household. Loss of income is a financial loss and can be included in the personal injury claim. Provided certain requirements are met, employees may be able to receive their public holiday payments if the sick leave falls on a public holiday.

Assault at Work – Robberies / Burglaries

We often meet employees who have suffered psychological injuries and/or physical injuries, or sometimes a combination of both, following an assault in the workplace during a robbery or burglary. Such incidents can be very traumatic which occur very suddenly and unexpectedly without any warning. In such incidents involving psychological symptoms, it can take a while for the symptoms to manifest. This adds to the distress and upset.

Simply because an employee's injuries were caused by a robber / burglar does not mean that you will not be entitled to compensation for the injuries. The assailant will most likely not have any assets worth pursuing. Accordingly, any case for compensation will usually

be against the employer or sometimes both the employer and the assailant. If a security company had personnel on site who were not carrying out their duties properly, the case for compensation will also be against the security company.

An employer has legal responsibilities to ensure the safety, health and welfare of it's employees and to prevent exposure to the risk of injury to it's employees. If the employer has failed to take appropriate steps to comply with these responsibilities which would have prevented the assault from taking place, this will result in an employee being successful with a personal injuries claim for compensation and financial losses. There may also be certain employment law cases for breaches of employment rights legislation.

An example of a case is *Sabrina Douglas –v- Michael Guiney Limited and Rogerio Joao [2019] IEHC 301.* This personal injuries case involved the assault of Ms. Douglas during the course of her employment with Michael Guiney Limited on 21st September 2011. While at work, Ms. Douglas was verbally abused by Mr. Joao and then assaulted with a bicycle locking chain. She was struck on the right hand and the right side of her face.

The case against Mr. Joao involved trespass to the person but he did not appear in court and Ms. Douglas did not proceed against him. The case against Ms. Douglas' employer, Michael Guiney Limited, was for negligence and breach of statutory duty pursuant to the Safety, Health and Welfare at Work Act and the regulations applicable thereunder. A full Defence was filed.

Mr. Justice Barton of the High Court found that Ms. Douglas had in fact discharged the burden which the law places on her to establish the case made against Michael Guiney Limited on the balance of probabilities. Barton J indicated that it follows that Ms. Douglas' employer is liable in negligence and for breach of statutory duty for what befell Ms. Douglas and the consequences thereof. Barton J addressed the issue of contributory negligence and breach of duty raised by Michael Guiney Limited. Barton J found that it would be wrong in law to find Ms. Douglas guilty of contributory negligence and breach of statutory duty in circumstances where she had received no training or instructions on how to deal with a confrontational situation such as the assault on her by Mr. Joao.

Mr. Justice Barton awarded Ms. Douglas the sum of €40,000.00 for pain and suffered to date, together with the sum of €10,000.00 for pain and suffering going into the future. He also awarded the sum of €18,636.14 in respect of loss of earnings and special damages. The total award amounted to €68,636.14.

If you have been assaulted during the course of a burglary / robbery in the workplace and suffered injuries as a result, you should: –

- Speak to your GP and discuss the incident and the impact which it has had on both your physical and mental health. Follow all medical advice given to you, including attending for counseling sessions or any referral to the mental health services.
- Report the incident and details of your symptoms to your direct line manager. Ensure that you comply with any company reporting requirements such as recording details in an incident report form or incident book.
- Record the names of all witnesses to the robbery / burglary. Obtain a copy of the CCTV footage, if possible. You, or your solicitor, can obtain a copy of the CCTV footage pursuant to data protection legislation.
- If your GP is certifying you as unfit for work, submit all medical certificates to the employer.
- Speak to a solicitor with experience in both employment law and personal injury litigation and obtain advice about bringing a claim for compensation and your financial losses.

An employee will have 2 years from the date of the burglary / robbery or 2 years from the date of knowledge of the injury within which to bring a claim in negligence for compensation and financial loss. If there are any associated employment law claims for breach of employment rights legislation, these claims must be brought within 6 months of the breach occurring. A case for assault and battery can be brought within a period of 6 years from the date of the assault. A solicitor with experience in both employment law and personal injuries litigation can assist you with the appropriate legal avenues. A solicitor will also help you obtain a medical report setting out your injuries, treatment and prognosis. Depending on the legal avenue pursued, it will be necessary to lodge your medical report and completed application form with the Personal Injuries Assessment

Board (PIAB). PIAB is a State body and all cases for injuries must be submitted to PIAB before they can go to court. Sometimes cases will finalise in PIAB. Other cases will have to go through the court process. A solicitor will advise you at each stage of the process.

When an employee has suffered injuries at work, either physical or psychological or both, it may result in having to take some time off work to recover. In the absence of a sick pay policy at work, this can have a big financial impact on a household. Loss of income is a financial loss and can be included in the case. Provided certain requirements are met, employees may be able to receive their public holiday payments if the sick leave falls on a public holiday.

Assault at Work – Sexual Harassment / Assault

Sexual harassment in the workplace is prohibited by the Employment Equality Acts 1998 (as amended). The legislation places responsibility on an employer to prevent the sexual harassment of it's employees. Employers will be legally responsible for the sexual harassment of it's employees by other employees, it's customers/clients and/or it's business contacts.

Examples of sexual harassment can include lewd comments, suggestive texts /emails, asking an employee about his / her sex life or unwanted gifts of a romantic or sexual nature. However, sexual harassment can also include unwanted kissing, the touching of breasts and/or genitals, slapping, uninvited massaging and other forms of sexual assault.

Compensation under the Employment Equality Acts 1998 (as amended) is for having suffered the sexual harassment and/or assault. It is not compensation for the effect of the sexual harassment and/or assault on a person's health. Sexual harassment and/or assault can be traumatic and can have a damaging effect on an employee's health. It can cause a lot of stress and anxiety which can lead to an employee becoming very ill. It can cause an employee to develop depression or post traumatic stress disorder. It can lead to an employee having to take time off work and this brings it's own financial difficulties. This can be a difficult time for an employee and he/she may be under the care of a General Practitioner and/or a Psychiatrist. If an employee has suffered a recognisable psychiatric

injury, it may be appropriate to submit a claim to the Personal Injuries Assessment Board (PIAB) to claim for compensation for the injuries, any out of pocket expenses and any loss of wages. These type of personal injuries cases would be based on individual tortious acts committed by employees/customers/business contacts during the course of employment which caused another employee to suffer injuries for which the employer is vicariously liable. These cases would also be based on negligence by the employer in failing to provide a safe place of work. However, such cases would not be the usual type of personal injuries case. Accordingly, it is very important that an employee would seek the appropriate legal advice before embarking on such a case.

There are strict time limits for these cases. A claim before the Workplace Relations Commission under the Employment Equality Acts 1998 (as amended) must be brought within 6 months of the most recent incident of sexual harassment / assault. Any negligence claim for personal injuries must be brought within 2 years of the first incident of harassment / assault, if each incident of harassment / assault is to be included. A case for assault and battery can be brought within a period of 6 years from the date of the assault. A solicitor with experience in both employment law and personal injuries litigation can assist you with the appropriate legal avenues.

If you have been involved in an assault in the workplace and suffered injuries as a result, you should: -

- Speak to your GP and discuss the incident and the impact which it has had on both your physical and mental health. Follow all medical advice given to you, including attending for counseling sessions or any referral to the mental health services.
- Report the incident and details of your symptoms to your direct line manager. Ensure that you comply with any company procedures for reporting sexual harassment / assault in the workplace. Given the very sensitive nature of reporting such details, a solicitor can assist you with this process, if you require such support.
- Record the names of all witnesses. You, or your solicitor, can obtain a copy of any CCTV footage pursuant to data protection legislation.

- If your GP is certifying you as unfit for work, submit all medical certificates to the employer.
- Speak to a solicitor with experience in both employment law and personal injury litigation and obtain advice about pursuing the appropriate legal avenue.

When an employee has suffered injuries at work, either physical or psychological or both, it may result in having to take some time off work to recover. In the absence of a sick pay policy at work, this can have a big financial impact on a household. Loss of income is a financial loss and can be included in the personal injury claim. Provided certain requirements are met, employees may be able to receive their public holiday payments if the sick leave falls on a public holiday.

Pregnancy Related Dismissal

This issue arose in the case of the Elms Furniture Limited and Ciara Leeson UDD1955. The Court pointed out in this case that the decision of the Adjudication Officer was being set aside as it was clear that while the employee was pregnant and her employer knew this three other employees were also made redundant in or about the same time as the complainant was let go.

This is a case that was brought under the Unfair Dismissal Legislation. If this case had been brought under the Equality Legislation then the employee could have relied on a case of Pacquay. In that case the CJEU has held that even planning to make an employee redundant (except of course in the case of a redundancy where an entire unit is being made redundant or a business is being closed down) is contrary to the Directive.

We are surprised the number of times that people bring claims under the Unfair Dismissal Legislation rather than the Employment Equality Acts.

Redundancy Payment Acts 1967 -2014 – Suitable Alternative Employment

This issue arose in a case of Browne and Di Simo RPD1914. In this case the Labour Court looked at the law on this. The Court stated that in determining the within appeal the Court was required to consider firstly the suitability of the offer of alternative employment and secondly whether or not the complainants decision to refuse that offer was reasonable in all the circumstances. The Labour Court quoted the case of Cambridge & District Co –Operative Society Limited –v- Ruse 1993 IRLR156 where the English EAT, when considering a similarly worded provision of the British Legislation, said that the question of;

"The suitability of the employment is an objective matter, whereas the reasonableness of the employee's refusal depends on factors personal to him and is a subjective matter to be considered from the employee's point of view."

In this case the employee had been in one location and was offered a position in Nutgrove Shopping Centre. The Labour Court correctly pointed out, in our view, that while the employee was naturally concerned about the potential loss of clients as her earnings were dependent on the amount of business she conducted. At no point did the employee endeavored to test out that concern. The Labour Court pointed out that in accordance with Section 15 of the Act there is a facility for her to carry out her work in the new premises on a trial basis while retaining her right of possible redundancy payment. The Court was satisfied that the offer to continue the employment on the same terms and conditions amounted to suitable alternative employment within the meaning of Section 15 of the Act and that the refusal to accept the option of working in Nutgrove Shopping Centre Salon was unreasonable.
It is sometimes forgotten by employees that the redundancy Payment Legislation specifically provides that an employee is entitled to effectively take an alternate position for a trial period and if that does not work pout then to seek redundancy.

Setting Levels of Compensation

In Case ADJ0012469 the Adjudication Officer in this case dealt with amongst other claims a claim under the Payment of Wages Act. The Adjudication Officer found that the employee was entitled to be paid while on suspension for two periods of time and directed that the employee would be paid those wages.

This is an issue which we have raised on a number of occasions in this newsletter. The issue is how can this decision ever be enforced. The wages are not set out in the decision. The decision does not set out what compensation is to be awarded. The legislation on this is covered in Section 6 of the Payment of Wages Act 1991 which clearly sets out that it would include directions to the employer to pay to the employee compensation of such amount as the Adjudication Officer would consider reasonable. The Statutory provision requires that the relevant compensation being an amount is set out. Where this has not been done then there is no proper determination under Section 6 of the Act which can be enforced. That is our view.

Again, this is an issue which at some stage is going to go to the Courts and an issue will arise as to whether or not a proper decision which can be enforced has been made. In the alternative where an Adjudication Officers continue to issue decisions of this basis it will mean that employees will have to bring an appeal to the Labour Court so as to have the amount specified so that they can enforce any decision.

We are not being critical of the particular Adjudication Officer in this case. This format of setting out decisions appears to be one which is regularly undertaken by various Adjudication Officers at various stages. In this particular case the Adjudication Officer, as would be standard in the pro forma decisions, has set out the provision of Section 6 but has not set out a monetary amount.

Mitigation of Loss in Unfair Dismissal Cases

In case UDD1952 being a case of St Colmcille's (Kells) Credit Union Limited and Lonegan UDD1952. The Labour Court addressed this

issue. The Court set out that it was common case that the salary was €60,000 per annum. The employee gave evidence of his efforts to mitigate loss following his dismissal. The Court stated that he had advised them that he had registered with a number of named agencies and had applied for some 250 jobs in financial services and sales. He had been invited to only 6 interviews. No copies of job applications or letters of reply from potential employers in supporting his evidence was furnished.

The Court pointed out that the failure to produce credible evidence to the Court that he had made sufficiently rigorous attempts to mitigate his loss in the period between his dismissal and the date of the hearing was an issue that had to be taken into account.

It is clear from this decision that where an employee is dismissed in line with the jurisprudence of the Labour Court the employee must seek to mitigate their loss. In addition it is necessary to produce the relevant documentary evidence. Where an employee fails to do so, this is going to have an impact on the compensation, if any, which is awarded.

Compensation in Claims where an employee is unable to work

This issue arose in case ADJ00020487 being the case of an Administrator and a Chamber of Commerce.

The Adjudication Officer in this case referred to the Unfair Dismissal Act 1977 stating that it was designed to provide redress and loss of remuneration. He specifically referred to Section 7 of the Act where redress must be;

"Just and Equitable having regard to all the circumstances. Section 7 (c) (1)".

In this case the complainant was on long term sick leave and therefore unavailable for work. The Adjudication Officer pointed out that thereby in theory this reduced her eligibility for compensation to a maximum of four week remuneration.

In relation to the issue of the long term illness in question the Adjudication Officer referred to the legal precedent in Allen –v-

Independent Newspapers (Ireland) 2002 ELR84 and that this is discussed at some length by Ryan in Redmond on Dismissal Law Third Edition 2017 at Section 24.70. He pointed out that in essence it is argued that the case allowed for the fact that the employer's behaviours were contributory to the illness of the employee. In this case the Medwise report at Section 5 (2) identified the need for;

"The stimulus of stressors is dealt with and resolved".

The Adjudication Officer stated that he took this to allow for the fact that the element of the complainants illness was due to issues not totally in her own control and related to the respondents behaviour. In this case the Tribunal made a substantial award. However, in the case before him the complainant had lodged a personal injury action citing stress against the respondents in February 2019. He quoted the case of Maryland –v- Citywest Golf and Country Club UD1438/2004 where it was stated;

"The EAT concluded that a claim for psychological injuries resulting in financial loss constitutes a claim for personal injuries under common law and was not properly within its jurisdiction".

The Adjudication Officer had set out that regard had to be had to prospective loss of income by virtue of Section 7 (3) of the Act.

The Adjudication Officer on that basis made an award of €7,500 being equivalent to 25 weeks gross pay.

There are two issues in relation to this which we find interesting.

The first is whether such a claim now can result in a defence to the personal injury claim that the issue has been dealt with before the Workplace Relations Commission and that the rule in Henderson and Henderson would apply to any loss of income.

The second issue is that the Adjudication Officer held that the taxation of this amount is a matter for discussion with the Revenue Commissioners. This we do not agree with, Compensation under the Unfair Dismissal Legislation is for net loss of earnings but in itself is subject to tax. The Workplace Relations Commission is supposed to provide a world class service. On that basis it should be possible for

them to make a determination as to whether an award is or is not subject to tax.

Requirement to use internal Procedures in Constructive Dismissal case

This is an issue which comes up regularly in various issues including claims under the Industrial Relations Act 1946 and in constructive dismissal cases.

In ADJ0002000 the Adjudication Officer in this case quoted two cases. The first in McCormack –v-Dunnes Stores UD1421/2008 where the EAT in that case 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 formal or otherwise in an attempt to resolve her grievance with his / her employers. The employee would need to demonstrate that the employer's conduct was so unreasonable as to make a continuation of the employment with the particular employer intolerable".

The importance of exhausting internal grievance procedures was also highlighted in the case of Terminal Four Solutions Limited –v-Rahman UD898/2011 where it was stated;

"Furthermore it is incumbent on any employee to utilise all internal remedies made available to her unless she can show that the said remedies are unfair.

It is useful that this issue has again been restated.

Penalisation under the Organisation of Working Time Act, 1997

In case ADJ-00020529 the Adjudication Officer firstly set out that following the decision in Toni & Guy Blackrock –v- Paul O Neill 2010 21E.L.R.1 that this case established that the Burden of Proof is on a complainant to establish that on the balance of probabilities;

a. He reported and made a complaint of a protected act; and

b. That having regard to the circumstances, it is apt to infer from subsequent events that the protected act was the operative consideration leading up to the detriment.

The Adjudication Officer set out that what can be a protected act is broad. The Adjudication Officer set out that for example a request for a copy of a bullying and harassment policy was sufficient for the Labour Court in Board of Management of St. David's CBS Secondary School Artane –v- McVeigh HSD118 to find a protected act.
The Adjudication Officer also pointed out that it was well established that an employee does not have to use an employer's grievance procedure for their act to amount to a protected act. The Adjudication Officer referred to the case of Stobart Ireland Driver Services –v- Carroll 2013 IEHC 581. In that case a truck driver asked that he not be rostered due to fatigue. This act was held to be a protected act by the Labour Court and the High Court and that on appeal Kearns P spoke in the broadest term of the Act of 2005 by stating at paragraph 26

"There is no requirement in the Act to report any complaint via a grievance procedure. The Act specifically states "report…as soon as practicable". Thus the respondent in this case can be deemed to have made his complaint when it reported that he was too tired to drive".

Annual Leave During Sick Leave

This arose in a claim under the Organisation of Working Time Act in ADJ00017947. The employee had an accident in 2017. As a result of this the employee required knee surgery. As the surgery is expensive in Ireland the employee opted to return to Poland to have the surgery performed in that jurisdiction. The Adjudication Officer held that the employer was aware of the reason for the journey and agreed that it would leave his position open for his return. The employer asserted that the agreement reached between the parties was some form of unpaid leave of absence and therefore should not be considered sick leave for the purposes of the Organisation of Working Time Act and on that basis annual leave could not accrue. The Adjudication Officer held that the employer was bound by Section 19 of the Organisation of Working Time Act (Section 1A) which provides that where an employee is absent from work by reason of certified illness then annual leave continues to accrue as if the employee was at the place of work and at

the employees disposal. This is a very useful restatement of the law by an Adjudication Officer. To be fair this is probably the first time we have heard this argument arise that an employee who went to get treatment would be excluded from the Act. It is useful that the Adjudication Officer has given such a comprehensive decision on this issue.

Protection of Employees (Fixed-Term Work) Act 2003

In case ADJ00017926 the Adjudication Officer looked at the law on this issue and quoted two important cases being one of the Health Service Executive –v- Khan 2006 FTD4/2006 where the Labour Court ruled that the a contract of indefinite duration to which a fixed term employee might be entitled must be "identical in its terms, including any express or implied terms as to training and qualifications, as the fixed term contract from which is resulted from".

In relation to the issue of any change the Adjudication Officer referred to the case of Trinity College Dublin –v- Moriarty FTD5/2012 where the Labour Court ruled that the respondent cannot;

"Carve out part of a contract of employment and create an entirely new contract for the purposes of the Act".

This case confirms that an employee is entitled to exactly the same contract as the fixed term contract where they become entitled to a contract of indefinite duration.

Time Limits for Bringing a Case – Using the Grievance Procedures

In UDD1956 being a case of SCE Renewables (Ireland) Limited and Tymon The issue arose in relation to an extension of time. The Labour Court in this case held that the Court does not accept that the processing of an internal grievance cannot be considered as a cogent reason which prevented the lodging of a complaint under the Acts in time. The Court pointed out that it was of the view that a complainant cannot circumvent the time limits set out in the Act by seeking to rely on an internal procedures that did not prevent him from bringing his complaint with the statutory time limit. The Court pointed out that they addressed this issue in the case of Brothers of Charity Services Galway –v- O Toole EDA177 where the Labour Court held;

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

The Labour Court also quoted the case of Mobile Security Limited and McEvoy EDA1621.

The reality of matters in our view is that where an employee has a claim and there is an issue of going to mediation other than through the WRC, or using some internal procedure of appeal of a complaint or otherwise, that the employee issues the complaint to the WRC. The WRC can be advised at the time the complaint is being lodged that an internal appeal process or mechanism is being used or other procedure to resolve the matters and that matters would be put on hold pending the outcome of same.

In dealing with the claims before the WRC the reality of matters is that parties should issue proceedings as the first available opportunity.

There is an alternative where the employer states that the time limit will not run and will not be claimed against the employee where the employee agrees to utilise an internal procedure. It would even apply in a case where an employer proposed for example a resolution procedure outside of their own grievance or disciplinary procedures. Unless that is clearly set out in writing it would be our view that the employee should issue the complaints.

Lodging Claims in the WRC – The difficulties with the Claim Form.

In case ADJ00011062 an issue arose as to the fact that the legal representative of the employee had difficulty with the drop down boxes on the online form.

The Adjudication Officer rightly held that this was not a reason to extend time.

Where anybody has a difficulty with the online form it should be remembered that this is not a statutory form. The reason that it is not

a statutory form is for the simple fact that the Workplace Relations Commission; at various stages have not had all the relevant complaint provisions on their form. For example, for a period of time claims under the Protected Disclosure Act were not included on the form. In the past issues under SI 36/2012 was absent from the form for a considerable period of time and submissions had to be made to the WRC to get it included. So how, should a Solicitor, seeking to lodge a claim, deal with matters where there is a difficulty with the drop down box. It is very simple. You complete the form as best you can. Then if there is a particular Act or issue which you cannot find the box for you write out the relevant claim on a piece of paper. You print off the form online. You attach the additional complaint quoting the relevant Act the claim is being brought under and you send the entire lot by post to the Workplace Relations Commission O'Brien Road Carlow and at the same time you scan the documentation and send it to submissions@workplacerelations.ie.

The reason that we do not have a Statutory Form of course is the fact that the Workplace Relations Commission is terrified that if they had a statutory form that they could then be sued if they did not keep it up to date. In addition it would of course mean that every time a new piece of legislation was passed into law a new form would have to issue with the new Statutory Instrument.

The Workplace Relations Commission wants people to use the online form. Unfortunately the form is not user friendly. It is not always up to date. For that reason this office never uses the online form.

Postponement of WRC Hearings

The WRC have introduced a new facility for looking for a postponement. If seeking a postponement you need to send an email to postponements@workplacerelations.ie

You must remember that they have used the word "postponements" with and not "postponement".

We would advise if sending in such a request that you send it with a delivery receipt so that you have confirmation that it was actually delivered.

Mental Health Illnesses

The issue of mental health issues are increasingly prevalent in various employments.

Mental health issues are a significant factor in long term absences. Much of the research about workplace mental health is targeted on preventative actions. These actions include creating a positing working environment. Unfortunately very little of the debate in Ireland is about preventative action.

There is even less debate and action relating to the roll of employers in facilitating an employee coming back into the workplace after a mental health illness. The issue of first time employees obtaining work where they have a history of mental health problems is not being addressed in the general workplaces.

There is a significant issue with employees both those looking for work and those in work seeking assistance if they believe they have a mental health issue. By mental health issue we mean suffering from stress. It can be also anxiety and depression caused often by excessive working hours or an excessive work load.

It appears to be an unfortunate fact that individuals with mental health issues have a higher rate of unemployment. The reality from research appears to state that suitable employment can enhance a person's psychological well being. It can provide individuals with structure, purpose and social outlets. It provides a sense of identity and dignity.

The discussion on this area is to what can be done to make sure that individuals are provided with an opportunity of getting jobs or returning to workplaces. The Employment Equality Acts do provide for "reasonable accomodation" being provided. However, Legislation is only one area. For this to be an issue which is seriously addressed there is a requirement that employers look on this in a positive way. By this we mean what they can do to facilitate opening up workplaces to individuals who may have had a history previously of mental health issues. However, probably the most pressing issue is that employers

recognise the benefit and work in a positive way to reintegrate an employee who has suffered a mental illness back into the workplace.

In a recent report by the mental Health Reform it highlights that barriers impeding individuals returning to employment are not clinical. Rather these barriers centre on stigma and discrimination.

There is a requirement for a great understanding of mental health. This is needed to counteract perceptions about the illnesses in workplaces.

Of course employers will have concerns. These include issues of trust, the issue of the capability of the individual, the cost involved in possibly extra supervision and often the issue of future absenteeism. A lot of these concerns can be addressed by creating awareness of mental health illness. Supporting inclusion in workplaces is a significant issue in addressing mental health in workplaces.

This is a social issue that needs to be addressed. Of course there are legal provisions as we have set out previously. Employers are obliged by law to meet the requirements of the Employment Equality legislation.

It must be remembered that there is no obligation on an employee to disclose any mental health problem which they may have to an existing or future employer. There is an exception where there may be a health and safety risk to the employee themselves or other individuals including the employer.

The issue of mental health in the workplace due to recent research by See Change SCH in Ireland is that 46% of people under the age of 35 would conceal a mental health difficulty.

Employers do need to look at what actions they can take both internally in the organisation which would better support employees returning to it or working for them for the first them. Unlike Ireland the NHS in the UK has practice recommendations. We do not have these from the HSE in Ireland.

The sad reality of matters is that mental health issues are now becoming a significant issue in many workplaces. By addressing the

problem and having a supportive working environment this can assist individual employees providing a positive return for an employer. An employer is more likely to have a loyal employee in the future. Mental health illnesses should not be regarded as a negative but rather a fact of life and one that if properly managed enables potentially positive and loyal employees to remain or to join an organisation. We are very far behind other countries in the area of mental health illness awareness in workplaces. The first issue which we need to discuss and address is making sure that those who are in the workplace and suffer a mental illness get the appropriate support and if they have to take time off that there are proactive procedures in place to reintegrate them into the workforce.

***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.**