Keeping In Touch – December 2019*

Welcome to the December issue of our Newsletter Keeping in Touch.

Firstly we would like to wish all those who are on our mailing list for our newsletter a very Happy Christmas and a Peaceful and Healthy New Year.

2019 has been a successful year for the firm. In 2018 we won the Employment Law Firm of the Year from Irish Law Awards and in 2019 we won the Innovation Award from Irish Law Awards.

In October of this year the firm won the first ever Point of Law Appeal to the High Court relating to the National Minimum Wage Act.

Our Office brought this case to the High Court, as effectively our client could not have afforded the cost of bringing a claim to the High Court. We have to thank the Barristers in the case being Marguerite Bolger SC and Sharon Dillon Lyons BL for agreeing to take on this case. This is a case which was lost in the Workplace Relations Commission and the Labour Court. On appeal, as it is a Point of Law Appeal, only arguments that have been put in the Labour Court could be considered by the High Court. The High Court accepted the submission that the employee was entitled to be paid the higher of the hours actually worked or those specified in his contract. The relevant contract provided for the employee to work up to 66 hours per week after deduction of statutory breaks.

The firm has seen some worrying trends in both employment law and personal injury work. In the area of employment law we have seen a considerable increase in cases involving women being dismissed or not allowed return to their job which they had prior to going on maternity leave. In addition, there has been a significant increase in the number of individuals bringing claims that they are being forced to retire or being placed on fixed term contracts after they get to retirement age. In the area of personal injury work there is still a substantial amount of cases arising relating to accidents in the workplace. This can be a combination of defective machinery. However, in many cases, it involves injuries caused, which could have been avoided by an employer, if

appropriate training had been put in place. Unfortunately there appears to be a continuing level of non engagement with safety training by many employers. Some simply think that having a health and safety statement is sufficient without putting in appropriate training. Without appropriate training the potential for quite serious accidents can arise.

Unfortunately another trend is emerging namely the assault of employees by customers or clients in workplaces. Employers in those circumstances unless there is appropriate training put in place and appropriate measures to protect staff run the risk of successful personal injury claims being taken against them. These cases can include both personal injury claims and employment law claims. Some claims simply relate to an assault in the workplace. Others relate to effectively sexual harassment and sexual assault. This is an issue which employers should be aware of and should put in place appropriate training to protect staff and particularly where there is any element of sexual harassment appropriate action should be taken against those coming into an establishment to ensure that there is no repetition. Unfortunately in many cases the repetition is simply allowed because an employer is seeking to maximise profits.

In the compliance area we are certainly seeing more employers seeking to become compliant with the legislation and putting in place proper policies and procedures and proper training. For us this is something that we are delighted to be involved in. While we are employment law and personal injury solicitors we encourage employers to be compliant with employment law and to take appropriate measures to avoid accidents and injury in the workplace.

Index

- Out and About – page 4
- How are an employer's words which are ambiguous to be interpreted? – page 4
- Frivolous and Vexatious Claims – page 5
- Social Welfare Fraud – page 6
- Legal Representation in Disciplinary Hearings – page 7
- Right to Representation at a Disciplinary Hearing – page 11
- Fair Procedures in Disciplinary Matters – page 11
- Unfair Dismissal – Procedural Fairness – page 13
- Setting Compensation in Unfair Dismissal Cases – page 15
- Dismissing an Employee on Health Grounds – page 16
- Minimising Loss in Unfair Dismissal Cases – page 17
- Forced Resignation and Minimising Loss – page 18
- When do employees need to use the Internal Grievance Procedures? – page 19
- Employment Equality Act 1998 – Failure to provide information- page 20
- Proving Discrimination – page 21
- Burden of proof in Equality Cases – page 22
- Burden of Proof in Equality Claims – Rests on the Employee – page 23
- Does an employer have to advise an employee of promotion opportunities when an employee is out on Maternity Leave – page 24
- Pregnancy Related Dismissal – page 25
- Miscarriages and Employment – A problem not being addressed – page 26
- Organisation of Working Time Act – Reference Period – page 308
- Organisation of Working Time Act – Level of Compensation – Section 15 – page 30
- Entitlement to breaks and the level of compensation – page 31
- Rest breaks at work – page 32
- Setting Compensation – page 34
- Organisation of Working Time Act – Exemption for certain individuals in the care service – page 34
- Breaks for shop workers - 34
- Retained fire-fighters – Working Time- page 35

- New Pension Rules for Employees – page 36
- New Parent Leave – page 38
- Parents Leave – page 39
- Protection of Employees (Fixed-Term Work) Act 2003 – Contract of Indefinite Duration – page 39
- Redundancy – Suitable Alternative Employment – page 40
- Reference – page 41
- Extending time to bring a case to the WRC – page 41
- Review of WRC decisions – page 42
- Gig Workers – page 43
- David Scahill –v- Sean Aughey [2019] IEHC 592 – page 45

Out and About in November 2019

On 1 November a case taken by a client of ours against Ryanair relating to an accident in the workplace was reported in the Irish Times, the Irish Independent and the Examiner along with the Journal. This was a Circuit Court case. The case was run by Michelle Loughnane of our firm.

In November we had two articles published in Irish Legal News.
On Friday 22 November we were quoted in articles by Gordon Deegan in the Irish Independent and Irish Examiner in relation to a pregnancy dismissal case. While we were not the Solicitors on record, we were asked to comment in the principles involved.

On 28 November Richard was quoted by Mary Carolan of the Irish Times on the cancellation of High Court hearings around the country.

On 13 December Richard Grogan of this office will be presenting a training course to the Cavan Solicitors Bar Association on the termination of employment in Ireland.

How are an employer's words which are ambiguous to be interpreted?

This issue arose in case ADJ00017746 where the Adjudication Officer quoted the case of Devaney –v- DNT Distribution Company Limited UD412/1993 where the EAT set out the following objective test.

"Where words are genuinely ambiguous what needs to be decided is what the speaker intended? Did the employer mean to bring the contract to an end? In answering this question, what needs to be considered is how a reasonable employee in all the circumstances would have understood the employer's intention. We find, having regard to the relationship that existed between the parties prior to the termination and the claimants evidence that (the Director of the respondent company) often expressed his feelings in very strong language, that the words uttered by him in an angry mood did not amount to a dismissal and were never intended as such".

The Adjudication Officer in this case held that an objective assessment is therefore required to determine whether the employer intended to bring an employment contract to an end and how a reasonable employee in all the circumstances would have understood that intention.

Again this is a helpful decision by an Adjudication Officer dealing with cases which can be sometimes unclear as to what an employer meant and what an employee thought it meant.

For employers it sets out the dangers at times of saying something when it may be better to hold off and deal with matters by way of correspondence in a cool and clear way.

Frivolous and Vexatious Claims

In case ADJ00012100 the Adjudication Officer helpfully set out the definition of what is frivolous and vexatious. The case of Farley –v- Ireland and Others 1997 IESC60 is one where Mr. Justice Barron in the Supreme Court stated;

"So far as the legality of matters is concerned frivolous and vexatious are legal terms. They are not pejorative in the sense or possibly in the sense that Mr. Farley may think they are. It is merely a question of saying that so far as the plaintiff is concerned if he has no reasonable chance of succeeding then the law says that it is frivolous to bring the case.

Similarly, it is a hardship on the defendant to have to take steps to defend something which cannot succeed and the law calls that vexatious".

In Fay –v- Tegral Pipes Limited and Others 2005 2IR261 the Supreme Court restated the principles where Mr. Justice McCracken delivered the judgement stating;

"The real purpose of the Courts inherent jurisdiction to dismiss frivolous and vexatious claims was firstly to ensure that the Courts would be used only for the resolution for genuine disputes and not for lost causes. And secondly that parties would not be required to defend proceedings which could not succeed".

It is very helpful that the Adjudication Officer has set this out.

It is now becoming common place for some representatives to raise the argument that a claim is frivolous and vexatious. From our experience in the majority of these cases the person making these claims have absolutely no understanding of what the terms frivolous and vexatious actually mean.

In this case the claim was held to be frivolous and vexatious and the Adjudication Officer has done everyone a favour by setting out what the law on this is in a clear and precise way and hopefully those claiming that a matter is frivolous and vexatious in future will actually have regard to this decision before making that allegation. In our experience a lot of the time that this defence is raised it is raised as a last gasp defence when there is nothing else there and in effect in itself is close to an abuse of process.

Social Welfare Fraud

In a case of ADJ00023086 the Adjudication Officer dealt with a situation where an employee was being paid less than the Sectorial Employment Order. The Adjudication Officer held that it was clear that an arrangement had been entered into between the parties regarding the SEO rates of pay and for the purposes of that arrangement it was to facilitate the employee retaining a range of Social Welfare Payments and other welfare benefits that he would no longer qualify for if the

correct SEO rate was applied. In this case the Adjudication Officer made no award of compensation and proposed that the party should consider voluntary disclosures in the Department of Social Protection.

This is a case where the Adjudication Officer had effectively found clear Social Welfare fraud. There is a strong argument that where there is Social Welfare fraud as found by an Adjudication Officer that the issue of not naming the parties or at least the party involved in the Social Welfare fraud should be an issue where the Adjudication Officer can decide to name that party.

There is an equally strong argument that as a State body that where an Adjudication Officer believes that there may have been either Income Tax or Social Welfare fraud that in those circumstances the matter should be reported by the Adjudication Officer and that the Adjudication Officer would be obliged to send the file to the Department.

Social Welfare fraud impacts on every tax payer in this country. Monies are effectively paid to people who are not entitled to same. Where an individual seeks to be paid less than an SEO rate of pay so as to avail of the Social Welfare benefits that is an abuse of the process. Anybody on Social Welfare is supposed to be looking for work and certainly not trying to organise matters in such a way that they retain benefits that they would not otherwise be entitled to.

Legal Representation in Disciplinary Hearings

The Supreme Court recently ruled on this issue in the case of McKelvey and Iarnrod Eireann / Irish Rail Supreme Court 2018/178.

In this case in the High Court the High Court directed that the plaintiff as employee was entitled to legal representation. Both the Court of Appeal and the Supreme Court disagreed with this. It has been reported that the effect of this decision is that a person is not entitled to legal representation in a disciplinary process except in exceptional circumstances. While the word “exceptional” is used in the decision of the Chief Justice the decision in this case is more complex.

The procedures contained in the Iarnrod Eireann Disciplinary Code were agreed between the company and the relevant trade union representing its employees and were accepted by a Ballot of staff in

1994. The Court pointed out that it was accepted by the parties that the code was in compliance with the code of practice set out in the Industrial Relations Act 1990 (Code of Practice and Grievance and Disciplinary Procedures) (Declaration) Order 2000 SI 146/21000 the purpose of which is to provide guidance to employers, employees and their representatives on the general principles which apply in the operation of grievance and disciplinary procedures. That code is silent on the question of legal representation. Paragraph 4.4 the Court pointed out that the code defines an employee representative as including a colleague of the employees choice and a registered Trade Union but not any other person or body unconnected with the enterprise. The Court stated at paragraph 3.13 that notwithstanding that the company code refers only to an employee's right of representation by a fellow employee it was not disputed that the company have discretion to permit an employee to be legally represented. The Chief Justice set out the legal principles and held that it was accepted in the course of both written and oral procedures before the Supreme Court by both sides that the decision of Geoghegan J in Burns –v- Governor of Castlerea Prison 2009 IESC33 represented the law concerning the entitlement to have legal representation at a disciplinary process. The Burns case at paragraph 14 of the Judgement as regards legal representation set out six tests namely;

1. The seriousness of the charges and of the potential penalty;
2. Whether any point of law are likely to arise;
3. The capacity of a particular prisoner to present his own case;
4. Procedural difficulty;
5. The need for reasonable speed in making the adjudication, that being an important consideration; and
6. The need for fairness as between prisoners and as between prisoners and prison officers".

The Chief Justice at paragraph 5.5 referring to the decision of the Court of Appeal stated;

"In particular, Irvine J relied on the proposition set out at paragraph 13 of Geoghegan J's Judgement that "the cases for which the respondent would be obliged to exercise the discretion in favour of permitting legal representation would be exceptional".

Importantly this case at paragraph 6.3 the Chief Justice said the statement of Geoghegan J to the effect that legal involvement may be necessary in some limited circumstances but ordinarily will not be necessary involves a finding that it is only in those cases where legal representation is necessary to achieve a fair hearing that any applied entitlement to such representation can be said to exist".

The issue of "necessity" importantly was addressed by the Chief Justice at paragraph 6.5 when it was stated;

"There may be cases where the forensic skills of an experienced advocate with a legal qualification may enable the presentation of the case in a more favourable light. But it seems to me that to say that a case might be somewhat better presented by a Lawyer falls a long way short of saying that the presence of a Lawyer is necessitated in order for the process to be fair". The above is an important statement by the Court in that the fact that a disciplinary matter may be better presented does not in itself make the process unfair.

While the case has been reported on the basis of exceptional circumstances the Judgement makes it clear that the issue of legal representation being necessary applies where it is necessary to ensure a fair process rather than potentially being merely of some possible advantage to the relevant employee. Therefore the test as set by the Chief Justice is that it is one of necessity. As is clear from the Judgement in the majority of cases representation by an experienced Union Official will be sufficient. The Judgement of Mr. Justice Peter Charleton when coming to the same conclusion arrived at it from a different point. Mr. Justice Charleton in his judgement referred in particular to the provisions of Section 14 (1) of the Unfair Dismissals Act 1977 which provides that an employer shall not later than 28 days after entering into a contract of employment with an employee give to the employee a notice in writing setting out the procedure which the employer will observe before and for the purposes of dismissing the employee. He pointed out that representation is at the core of this. Subsection 3 provides that the procedure referenced is one that has been agreed upon by or on behalf of the employer concerned and by the employees concerned or a trade union or an accepted body within the meaning of the Trade Union Act 1941. The case of Mooney –v- An Post

1998 4IR288 being a Judgement of Mr. Justice Barrington was quoted where at page 298 it was said;

"If the contract or the Statute governing a person's employment contains a procedure whereby the employment may be terminated, it usually will be sufficient for the employer to show that he complied with this procedure…"

It was pointed out by Mr Justice Charleton that here the Grievance Procedure clearly states that an employee is entitled to be represented at a Disciplinary Hearing for the purposes of this Code of Practice. The definition proceeds to state that the employee is not entitled to be represented by any other person or body unconnected with the enterprise. He held that it was a matter of contract that disposes of the argument by the employee that the procedures involved require the presence of lawyers.

It was pointed out by him in a judgement that a difficulty may arise where an employment contract is silent as to grievance procedures this involving a breach of Section 14 (1) of the Unfair Dismissal Acts 1977. He stated at paragraph 12;

"No comment is here made as to whether the appropriate course is to apply the standard grievance procedure promulgated under the Industrial Relations Act 1990. That would appear to many to be a sensible course, bearing in mind the procedures were invented to assist in coming to the truth and, in a proper case, are not an end in themselves". While Mr. Justice Charleton gave a similar judgement but came to a decision on a different basis it does raise the issue that where an employer complies with the provisions of Section 14 (1) of the Unfair Dismissal Act by putting in place a disciplinary procedure which complies with the code of practice that in those circumstances there is a contractual situation between the employer and the employee and in those circumstances the employee is only entitled to the representation as set out in the contract or by extension in the code. This case dealt with the issue of representation by a lawyer at the disciplinary process. If a matter goes to the WRC then an Adjudication Officer will look at the procedure which was adopted. If the procedure at a minimum does not comply with the Code of Practice on Grievance and Disciplinary Procedures then in those circumstances as the burden of proof is on the employer to show that the dismissal was fair failure to comply with

same despite what may be in a contract will not be sufficient to say that the employer complied with their disciplinary procedure and that that is the end of matters. However, if an employer, in our opinion, has a disciplinary process which complies with the Code of Practice on Grievance and Disciplinary Procedures then in those circumstances where the employer complies with same there will be no issue as regards that procedure being in itself unfair. It will depend on the particular circumstances of a particular case whether or not legal representation will be required. Just because legal representation may mean that an employee may be better represented is not in itself sufficient. It would in our opinion be extremely difficult for an employer to exclude representation by a union representation even where the employer does not recognise a union. Limiting representation to a fellow worker who may have little or no skills in the area of representation in a disciplinary matter is going to make it extremely difficult for an employer to contend that the process was fair. It would be our view, through the issue was not covered in those case, that if an employer sought to restrict an employee simply to representation by a fellow employee, that in those circumstances a Court may hold that that is an exceptional circumstance allowing legal representation as a necessity but certainly would be our view that it would be difficult to argue that representation by a Union would not be necessary or could be excluded.

Right to Representation at a Disciplinary Hearing

This issue arose in ADJ00020741 where the Adjudication Officer pointed out that offering a work colleague to a non union worker may not be satisfactory especially if that colleague does not have any representational experience and taking into consideration the fact that dismissal was at stake.

In this case while there were other issues relating to the process the statement by the Adjudication Officer is an important statement of the law.

Fair Procedures in Disciplinary Matters

This issue arose in case ADJ00008734. This is a case where the Adjudication Officer gave a very detailed overview of the law.

It was pointed out in the case that in Glover –v- BLN Limited 1973 IR 388 decided that where there was provision in a contract of employment for some form of disciplinary procedure, it was an implied term of the agreement that any enquiry held under it should be conducted fairly. In addition the case of Frank Shortt-v- Royal Liver Assurance Limited 1988 set out that where the disciplinary process may not be perfect but it should come within the test of what could reasonably be considered a fair response by the employer in the circumstances. The Adjudication Officer pointed out that this was also detailed in Mooney –v- An Post 1994 ELR103 where what exactly is required of an employer to satisfy the requirement of natural justice may differ from case to case. In that case Keane J stated that the two principles of natural justice namely "Audi alteram partem and Nemo Judex in causa sua" cannot be applied in a uniform fashion to every set of facts. Therefore while employers are required to afford natural justice and fair procedures to employees when carrying out a disciplinary process regard must be had for the particular circumstances of the case to ascertain what requirements of natural justice and fair procedures demand in the particular circumstances.

The Adjudication Officer pointed out that certain fundamental requirements of fair procedures were outlined in Glover –v- BLN Limited 1973 IR388 that cannot be dispensed with regardless of the particular circumstances which arise in an individual disciplinary matter. The Adjudication Officer set these out by stating that they are not limited to;

1. The requirement to make the employee who is the subject of the investigation aware of all the allegations against him/her at the outset of the process.
2. The requirement that the employer who has published a disciplinary procedure to its employees follows those procedures scrupulously when conducting a disciplinary process, and,
3. In the event that an allegation against the employee is upheld any disciplinary sanction imposed is proportionate to the complaint that has been substantiated.

The Adjudication Officer pointed out that the rationale is clear as to why the person who is the subject of a disciplinary investigation should be made fully aware of the complaint against him.

The Adjudication Officer pointed out that this is to ensure that the complainant has a meaningful opportunity both to prepare and to present his defence as detailed in Preston –v- Standard Piping 1999 ELR233.

The Adjudication Officer pointed out that where an investigation if carried out there may be occasions where as detailed in Kelly –v- Minister for Agriculture 2012 IEHC558 that full range of fair procedures might not apply at the investigative stage. Where in that case it was stated;

"I am satisfied that there is no entitlement to invoke the panoply of rights identified by the Supreme Court at the information gathering stage of the inspectors work. The procedure identified by the inspectors followed the outcome of the first stage accord in my view with the requirements of fairness and justice and guarantee, where appropriate, the exercise of the rights identified in Re Haughey. I gratefully adopt the dictum of the late Shanley J. It is fairness and justice which is to be sought in any investigative process and it is to this process as a whole that the Court must look to determine those basic requirements were met".

In the present case the Adjudication Officer was critical of the fact that the respondent company did not provide a credible rationale for their failure and their refusal to transcribe the minutes of the investigation meeting with the employee. It appears that the person holding the disciplinary meeting never listened to those recordings and had no transcript and could not have taken into consideration the contents. The Adjudication Officer was also critical of the investigation as to how it was run particularly as the investigator rather than dealing with the grievances appears to have asked a number of individuals whether they wish to continue working with the worker. This is a very useful case in setting out the law in some detail.

Unfair Dismissal – Procedural Fairness

An interesting case on this arose in the case of ADJ21190. The Adjudication Officer in this case set out some of the more important decisions on this. He quoted the case of Looney –v- Looney UD83/1984 where the EAT referred to its role as "to consider, against the facts, what

a reasonable employer would have done". Secondly he referred to the case of Bunyan –v- United Dominions Trust 1982 ILRM404 which states;

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

He also pointed out that it was relevant to consider the decision to dismiss and whether it is proportionate to the gravity of the complaint and as Mr. Justice Flood observed in Frizelle –v- New Ross Credit Union 1997 IEHC137 "the decision must also be proportionate to the gravity and effect of dismissal on the employee".

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

He also pointed to the EAT case in Gearon –v- Dunnes Stores UD367/1988 that an employee in this case had an entitlement to have her

"Submissions listened to and evaluated".

It is helpful that the Adjudication Officer in this case has set out the important cases clearly. In this particular case an award of €15,000 was made but the Adjudication Officer did take into account the fact that the employee in this case had failed to mitigate losses fully and had contributed to their own dismissal.

In a further case ADJ00019437 which involved a different Adjudication Officer the Adjudication Officer in that case also quoted the High Court case of James Reilly and the Governor and Company in Bank of Ireland 2014 IEHC241 where Mr. Justice Noonan stated;

"An assessment of the reasonableness and proportionality of the employer's response must have regard to the surrounding circumstances, including the impact of the conduct on the employer as against the impact of the dismissal on the employees."

Setting Compensation in Unfair Dismissal Cases

In the case of Apple Distribution International Limited and Marcagse UDD1960 the Labour Court addressed the issue as to whether losses which accrue after the termination of further employment should be taken into account was considered. The Court in that case quoted the English Employment Appeals Tribunal case of Courtaulds Northern Spinning Limited –v- Moosa 1984 IRLR43 which held

"…it is clear that the new employment has endured long enough to be protected by the Unfair Dismissal legislation the Industrial Tribunal should treat the loss flowing from the original dismissal as coming to an end at the start of the new employment"

They also quoted the case of Susan O'Kelly and WYG Engineering Limited 2013 24ELR279 which considered the previous decision and where again it was stated

"…it seems to the tribunal that this is a useful guide considering the permanence of further employment"

The Labour Court applying those principals to the facts of the case found that the employee secured permanent employment at a higher rate. The employee had been unemployed from the 24th November 2017 until the 4th January 2018. The case came before the Labour Court on the 2nd October 2019. In this case therefore the employee had the protection of the Unfair Dismissal legislation in respect of her new employment.

The Court awarded a sum of €15,000. It was accepted by the parties that the maximum loss was €16,670.

This is an important decision setting out the principles for setting compensation in these cases and confirms that where an employee obtains new employment and is protected then by the Unfair Dismissal legislation and is at a similar or higher rate of pay that the loss can be fully calculated at that time.

The interesting aspect of this is what will happen if the WRC start getting cases heard a lot quicker and where appeals would come before the Labour Court where an employee would not have acquired the protection of the Unfair Dismissal legislation. This is something which was at the start envisaged as going to happen. In reality the delays in the WRC in dealing with cases and having decisions issued is resulting, in effect in cases running over the 12 month period.

Dismissing an Employee on Health Grounds

In Case ADJ00020430 the Adjudication Officer helpfully restated the law on this and quoted the case of Bolger –v- Showerings (Ireland) Limited 1990 ELR184. This case set out the key requirements to be met when an employee is being dismissed for incapacity namely;

1. Ill health must be the reason for the dismissal;
2. This must be a substantial reason;
3. The employee must be notified that dismissal for incapacity is being considered; and
4. The employee must be given a chance to be heard.

While it is not set out in the decision it would be our view that where an employee is being dismissed for incapacity any medical report which the employer has must of course be furnished to the employee and the employee must be given an opportunity of producing their own medical evidence.

In this case the Adjudication Officer stated that the employee was currently in receipt of disability pension but had been earning €1,300 monthly when she was employed by the respondent. An award of €10,000 was made. The Adjudication Officer had held that her dismissal due to incapacity had not been notified to the complainant and that she did not have an opportunity to be heard. The reasoning of the Adjudication Officer in relation to the decision is quite correct. The issue however is in relation to the issue of the compensation. The employee had been dismissed in June 2018 and her claim was submitted to the WRC on 11th March 2019.The first issue is that the issue of an extension of time does not appear to have been dealt with in the decision but if she was dismissed in June 2018 a complaint was received on 11th March 2019 there would have needed to be an application for an extension of time. On the issue of the compensation

the position is the employee was receiving disability. There is a requirement for an employee to minimise her loss. Where an employee is unable to minimise their loss then in those circumstances the employee has no loss.

The Adjudication Officer had noted that the employee was registered for partial capacity employment. However, there is no evidence of any effort to obtain employment. From the facts of this case this is a case where there must be an awful lot of sympathy for the employee but the issue is in relation to the Legislation whether the employee is in fact entitled to anything more than effectively 4 weeks wages if they are not in a position to minimise their loss.

Minimising Loss in Unfair Dismissal Cases

ADJ00021078 is a case where quite frankly quite absurd and incorrect advice was given to an employee. The Adjudication Officer pointed out that the employee had told the hearing that he had been advised not to look for work as this would damage his chances of making a successful complaint and that he had even turned down an offer of work as it might damage his case.

We would have to agree with the comment by the Adjudication Officer on this when the Adjudication Officer in the decision stated;

"The Author of this advice has a lot to answer for and demonstrated a shocking ignorance of the requirements of the Unfair Dismissal Act and case law in relation to the requirement to mitigate one's loss. The fact that the complainant acted on it is very damaging to his case for compensation."

In this case the employee received an award for Unfair Dismissal of only €1,500. He still received two weeks compensation for not getting Minimum Notice which amounted to €1,200 and an award for not receiving a contract of employment of €1,800. The compensation that the employee received in this case was less than 3 weeks wages for the Unfair Dismissal case. This is because the employee acted on quite crazy and absurd advice. There are a number of Bar Room Lawyers operating in Ireland who seem to believe that where an employee is bringing a claim for Unfair Dismissal that the last thing the employee should be doing is looking for a job. This is absolutely contrary to the

law. The obligation on an employee in an Unfair Dismissal case is to seek to minimise their loss. Unfortunately this misconception every now and again catches the employee out.

The issue of mitigating loss is an issue which we have constantly raised in our Newsletter. There is however a significant issue that employees still believe that they are not going to receive the maximum compensation if they get another job. There needs to be a bit of reality in matters. Compensation for an Unfair Dismissal where a case can run depending on when a case is heard for currently up to 2 years if matters have to go the whole way on Appeal then unless the employee gets the absolute maximum compensation they are never going to be compensated for their actual loss. Where an employee is dismissed the reality is they need to go and find a new job and move on with their life. Of course they may need to bring an Unfair Dismissal case but then that is limited to what their economic loss is. It is much easier to get the maximum where an employee has sought to minimise their loss and where their actual loss may be quite small then when they try to maximise the value of the claim. Anybody who advises an employee not to seek work is in our view doing a huge disservice to the employee. Unfortunately it is very difficult to bring negligence cases against Bar Room Lawyers. In the case in question the employer was represented but the employee was not.

Forced Resignation and Minimising Loss

In case ADJ0001744 both of these issues arose.

In this case the Adjudication Officer held that the issue was whether the employee voluntarily submitted her resignation or was forced to do so. The Adjudication Officer noted the decision of the Labour Court in Millett –v- Shinkwin 2004 ELR319 where it held

"There are occasions in which an apparent unconditional and unambiguous resignation may be vitiated by the circumstances in which it is proffered"

The Adjudication Officer also quoted the decision in Sheffield –v- Oxford Controlled Company Limited 1979 IRLR133 where Arnold J held
"…where an employee resigns and that resignation is determined upon him because he prefers to resign rather than be dismissed (the alternative

having been expressed to him by the employer in terms of the threat that if he does not resign he will be dismissed), the mechanics of the resignation do not cause that to be other than a dismissal"

This is a helpful restatement of the law by the Adjudication Officer.
The issue then related to minimising loss. The Adjudication Officer held that the complainant had not done everything in her power to minimise her loss. The employee had accepted employment on a substantially reduced salary and brought forward her end date to take up this employment. The Adjudication Officer held that the employee was happy to remain in this employment. Where ongoing financial loss cannot be entirely attributed to the respondents behaviour.
This case restates the requirement of an employee to minimise their loss.

In this case the Adjudication Officer awarded a sum which was a gross payment to be taxed in accordance with Revenue rules. This issue comes up on a regular basis. It is our understanding of matters that in an Unfair Dismissal case the obligation is to award the payment net of tax.

When do employees need to use the internal Grievance Procedures?

In a lot of cases in the Workplace Relations Commission employers or their representatives will raise the issue that an employee should have used the internal grievance procedure before issuing proceedings. In the majority of cases they are wrong. There are a limited number of situations where the employee must use the internal grievance procedure before issuing proceedings;

Claims under the Industrial Relations Act. Neither the WRC nor the Labour Court will hear the case, normally, unless the internal grievance procedures were first used if an objection is raised.
In Constructive Dismissal cases the employee except in exceptional circumstances must use the internal grievance procedure before resigning.
In all Employment Rights cases the employee does not have to use the internal grievance procedure before issuing a claim.

Even in Unfair Dismissal cases the employee while required to go through an appeal process, even if the employee believes it is a waste of time, should issue the proceedings and go through the internal appeal process. This is because the time limit to issue claims is only six months.

In all other cases from discrimination cases, harassment cases, working too many hours being a claim under the Organisation of Working Time Act, not receiving a fixed term contract or not being treated the same as full time workers where the employee is a part time worker and every other claim the proceedings in the WRC should be issued as soon as practicable. This does not stop the employee going through the internal Grievance Procedure subsequently. The reason for issuing the proceedings is to stop the time running. There are a considerable number of cases in the WRC and the Labour Court where there has been a refusal to extent the time where an employee goes through the internal grievance procedure or appeal process and misses the time limit. We are simply setting this out as an issue where some employees are getting caught at the present time.

In employment law cases it is important the employees get advice from an employment law Solicitor. There are many Bar Stool Lawyers who will advise employees as to what their rights are. However, these people are not qualified even though they may claim to be. In dealing with employment law advice should always be obtained from a Solicitor.

Employment Equality Act 1998 – Failure to provide information

In many Equality cases the Form EE2 is provided. This goes to the employer. The employer does not respond.

In ADJ19545 the Adjudication Officer referred to Section 81 of the Employment Equality Act which provides a mechanism to address a vacuum in the supply of requested information under Section 76. The Adjudication Officer pointed out that the Labour Court addressed this in Irish Ale Breweries –v- O Sullivan 2007 18ELR150 and accepted that rebuttal evidence could be accepted and inferences drawn from a void in requested information. In this particular case no request was made under Section 76. The Adjudication Officer pointed out that the Adjudication Officer can exercise functions under Section 95 of the Act which in turn had been ignored by the respondent. The Adjudication

Officer considered this vacuum in response and reflected on the powers allowed under Section 96 of the Act to refer a failure to comply with Section 95 to the Circuit Court.

The issue of Section 95 is one of those Sections which is often overlooked. Section 95 provides that the Director General or the Labour Court may require any person in possession of or who has in his or her power or control any information that is relevant to the exercise of those functions to furnish that information. Where appropriate they may require any such person to attend before the Director General. Where a person or body fails or refuses to supply relevant information then under Section 96 either the WRC or the Labour Court can apply to the Circuit Court for an Order under that Section to compel the information to be furnished.

This is not one of these issues which regularly arises but it is useful that it was considered by the Adjudication Officer in this case. While the Adjudication Officer did not exercise the powers under the Act it is important that the Adjudication Officer has raised the issue that this is a power which the WRC are prepared to exercise.

This is particularly important for employers who might decide to put their head in the sand and find that suddenly they find themselves in a more difficult situation.

Proving Discrimination

This issue arose in ADJ00016437 where the Adjudication Officer set out that the relevant Legislation in Section 85A of the Employment Equality Acts 1998-2011.

The Adjudication Officer quoted the case where the Labour Court in Nevins, Murphy, Flood –v- Portroe Stevedores Limited 2005 16ELR282 confirmed the English position that discrimination can be conscious or subconscious and can therefore be difficult to prove when it was stated;

“Discrimination is usually covert and often rooted in the subconscious of the discriminator. Sometimes a person may discriminate as a result of in-built or unrecognised prejudice of which he or she is unaware. Thus a person accused of discrimination may give seemingly honest evidence in rebuttal of what is alleged against them. Nonetheless the

Court must be alert to the possibility of unconscious or inadvertent discrimination. A mere denial of a discriminatory motive in the absence of independent corroboration must be approached with caution".

In the particular case an award of €5000 was awarded. What is however interesting in relation to this case is the statement of the law by the Adjudication Officer.

Burden of Proof in Equality Cases

In Case ADJ00014857 the Adjudication Officer in this case set out the facts that in early May 2018 the employees manager asked the complainant would she be retiring later that month and the employees stated she would not. Subsequently on the 11th May 2018 the employee received a letter stating that her employment would cease on 23rd May owing to the retirement. A retirement age had been detailed in her contract of employment. Three other employees had been allowed to stay on after the age of 65 one of them had been allowed to stay until the age of 70.

The Adjudication Officer set out Section 6 of the Act and recitals 14 and 25 of Council Directive 2000/78/EC being the general framework for equal treatment in employment and occupational. The Adjudication Officer quoted Section 85 A (1) which puts the Burden of Proof on the employee. The Adjudication Officer set out that the complainant must establish primary facts upon which a claim of discrimination is grounded and then the burden of proof passes to the employer. The Adjudication Officer pointed out that in case EDA082 McCarthy –v- Cork City Council the Labour Court pointed out that at the initial stage the complainant is merely seeking to establish a prima facie case. Therefore it is not necessary to establish that the conclusion of discrimination is the only or indeed the most likely explanation. It is sufficient that the presumption is within the range of inferences which could reasonably be drawn. The Adjudication Officer pointed out that it was significant that the letter was only sent two weeks before the retirement date. The Adjudication Officer pointed out that SI no. 600/2017 – Industrial Relations Act 1990 Code of Practice on Longer Working Declaration Order 2017 sets out;

"It is good practice for an employer to notify an employee of the intention to retire him/her on the contractual retirement date within 6-12 months of that date".

In this case the failure to allow the employee continue which was found in the employees favour and an award of €14,000 was awarded.

In relation to valuing this case unfortunately the decision does not set out what the employee was earning and therefore it is difficult to know the level of compensation which was awarded. Saying this, as the parties were named this is possibly not unusual.

Burden of Proof in Equality Claims – Rests on the Employee

To a certain extent the heading is correct. The issue is that the employee does not have to prove everything. They need only prove a prima facia case. In this case the employer contended that the test is set out in Southern Health board –v- Mitchell 2001 E.L.R. 201 which held;

"The test required the complainant to prove the primary facts upon which he or she relies in seeking to raise an inference of discrimination. It is only if this initial burden is discharged that the burden of proving that there was no infringement of the principles of equal treatment passes to the respondent. If the complainant does not discharge the initial probative burden which he bears, his case cannot succeed".

They also quoted the case of Graham Anthony & Co. Limited –v- Margretts EDA038 where an additional element is required namely;

"The complainant must adduce other facts from which it may be inferred on the balance of probabilities that an Act of discrimination occurred".

The Adjudication Officer in this case also pointed out that the Labour Court in the case of Dyflin Publications Limited –v- Spasic EDA823 stated;

"The Court should consider the primary facts which are relied upon by the complainant in their proper context. It also indicates that in considering if the Burden of proof shifts the Court should consider any evidence adduced by the respondent to show that, when viewed in their

proper content, the facts relied upon do not support the inference contended by the complainant".

It is helpful that the Adjudication Officer in this case has taken the time to set out relevant case law.

Does an employer have to advise an employee of promotion opportunities when an employee is out on Maternity Leave – or is it that "life goes on" without them

This issue arose in the case of Siobhan Nolan and Gino's Italian Ice-Cream.

In this case the employee sought to establish a right to be included in consideration for promotions during maternity leave. The employee in this case referred to a case of Byrne –v- Minister for Defence 2017 IEHC453. The Adjudication Officer found that Byrne was not authority for such a general proposition which in any event would fly in the face of maternity leave as a period of protective leave. The Adjudication Officer held that he did not think that an employer is obliged to defer all promotional opportunities which may arise and for which a person on maternity leave may have a general eligibility until the person concludes their leave and returns to employment. In this case the claim was dismissed. There is a different opinion in relation to this when the case of Gardiner –v- Mercer Human Resources Consulting DEC-E-2006-007 is considered. That is a case which admittedly goes back some years now where the equality officer in that case specifically held that there was a right to an employee on maternity leave to have rights protected which could and in that case held that the employer in that case was ordered to

"Put in place a mechanism to ensure employees who are absent from work on any sort of statutory leave, but maternity leave in particular, are advised of any issue which have a potential to impact on their employment with the respondent"

In the case before the Adjudication Officer the claim was dismissed. The issue as to the protection of a woman on maternity leave and her rights is an important issue.

In our view the law is there to protect individuals during statutory leave and in particular maternity leave and the idea that a woman would be excluded from a promotional opportunity and not even advised of it would in our opinion be contrary to the Act and the Directive.
This is clearly an issue which is going to arise in other cases. We had in November ourselves run a case on similar grounds which was resolved. Certainly from our perspective if a woman is being excluded from a promotional opportunity, while they are on maternity leave then that in our view is a case which should go to the Labour Court. We do appreciate as the Adjudication Officer stated that "life goes on" while somebody is on maternity but it is a specially protected period and there is no difficulty we would believe in somebody being included in the process. They may or may not be successful. If successful there is nothing to stop an employer appointing somebody to cover that post on a temporary basis until they return from maternity. The fact that we disagree with the Adjudication Officer does not mean that we are right and the Adjudication Officer is wrong. The particular case before this Adjudication Officer is an important case. The decision is important. It is however a decision we believe does need to be addressed and we understand the case is under appeal to the Labour Court.

We will await the decision of the Labour Court with interest and wish our colleague the best with the appeal on behalf of his client.

Pregnancy Related Dismissal

In the case of the Elms Furniture Limited and Ciara Leeson the employee brought a claim on the basis that she had been dismissed while pregnant. The claim was brought under the Unfair Dismissals Act 1977 – 2015.

The employee in this case did not have 1 year's service. The Court pointed out that an employee who is dismissed by reason of her pregnancy is exempt from the requirement to have 1 year's continuous service with their employer to qualify under the Act.

However, the Court pointed out that the burden of proofing that the dismissal was wholly or mainly as a result of her pregnancy rested on the employee in such a case under the Act. The Court held that the employee was pregnant on the date of her dismissal. The employer, the Court held, was aware of this. The Court found that three other

employees of the respondent employer were also made redundant in or about the same time as the complainant was let go. The evidence in relation to the financial performance and the reasoning underpinning the respondent's decision to change the nature of the catering business from that of a Deli to a restaurant was not challenged. The Court found that there was a genuine economic basis for effecting redundancies. The Court held that a redundancy existed in the business and as a consequence four employees lost their job. The Court concluded from the evidence before the Court that the complainant was selected for redundancy that was not wholly or mainly because of her pregnancy.

This case was brought under the provisions of the Unfair Dismissal Legislation. If it had been brought under the Equality legislation there was no service requirement. In those circumstances the mere fact of being pregnant and proving the dismissal was unrelated to her pregnancy would have put the burden of proof on the employer rather than on the employee.

In addition, following a decision of the CJEU in the case of Paquay case C460-46. The dismissal of an employee by way of redundancy where they are pregnant, except in the case of a collective redundancy, is prohibited by European Law and therefore under the Equality legislation.

In this particular case the relevant reference is UDD1955.

Miscarriages and Employment – A Problem not being addressed

Recently Eilish O'Regan wrote an article in the Irish Independent where Lisa Finnegan spoke to her about enduring the sadness of two miscarriages in silence not daring to tell her colleagues or managers about her pain and loss.

This is quite shocking in this day and age that any woman would feel that way.

At the time I did post on LinkedIn the article. I did point out that this is a challenge for employers. It is a particular challenge in the legal profession. In the legal profession we are totally ill-equipped to deal with the issue of a miscarriage particularly for litigators. With 50% of

Solicitors being female this is an issue for both the Solicitors profession and the Barristers profession. For those involved in litigation especially the Courts have not looked at this as an issue. If you take a case before the Labour Court in employment law to get an adjournment a letter has to be sent to the other side setting out the grounds and their consent requested. In reality no woman should have to notify the other side of such a situation for seeking an urgent adjournment. In the Courts an application has to be made for an adjournment in open Court. To be fair neither would require the details furnished but the fact of having to apply is the issue. The legal profession in conjunction with the Courts and Tribunals need a protocol for cases to be automatically adjourned in such cases. In the past the collegiality of the profession was such that a Solicitor phoned to say they had a personal issue or a phone call was made on their behalf stating this. It was never questioned what that was. Consent automatically issued from the colleague contacted. We do need collegiality or a protocol or better still both to deal with this matter.

This issue will clearly affect not only those in the legal profession but in other professions also. We do need to have a proper discussion on how we take account of various issues which effect both men and women in the workplace. This is one of those issues which need to be addressed in a constructive and sensitive way.

We do need woman in workplaces to know that if such an issue is raised that it will be treated with sympathy and respect and understanding. The idea that any women would need to feel that she had to suffer in silence and not tell anybody and to feel that isolated in a workplace is a sad indictment. Unfortunately the reality is that many women are in that position. In our firm we would regard it as a failure and an indictment on us if anybody working for us felt that they could not tell us or if they believed that they would not get the appropriate sympathy, respect and understanding.

We do need a change in attitude. That sea change has to be led to a certain extent by men but it does mean that men need to be educated about these issues. We as men need to be aware of what they are and we must be open to deal with them in a caring and supportive way.

Not everything about Employment Law is about the law. Employment Law is there to help create a fair working environment. Employment

Lawyers in the work that they do for employers in putting in place handbooks and contracts are not only there to protect the employer but also to assist employers in creating the type of working environment that employer wants to have. Employers who create a positive working environment designed to support and respect everybody in the firm or company are more likely to attract and retain the best people. A firm or company which is supportive of men and women equally but takes account of the differences between men and women is the way forward to creating a good working environment which leads to a successful firm or company.

On a personal level the idea that anyone in a workplace would fear raising any medical issue or personal issue for fear of not being supported runs counter to the ethos I was raised with and which all right thinking people would also have.

Organisation of Working Time Act – Reference Period

Normally the four month working period is the reference period for a claim under the Organisation of Woking Time Act. In this case the employee only worked for the employer for a period of twelve weeks. Therefore the reference period was a period of twelve weeks only. The timesheets show that the employee worked 823.10 hours during the twelve week employment. The Adjudication Officer held that this represented an average of 68.59 hours per week which is clearly in excess of 48 hours.
Section 15 of the Act is clear and that the reference period has to be a four month period even if the employee only works for three months. Saying that in this particular case taking the hours worked and dividing same by 16 still equates to a period of an average of 51 hours over that sixteen week period and therefore would have been in itself a breach of the Act.

If you take an employee who works for an employer for an extended period of time and let us assume that they worked for 768 hours over a three month period of time which is an average of 64 hours a week but in the fourth month the employer simply says to the employee that the employee goes home but will be paid for that month then in those

circumstances that average comes down to 48 hours and is not a breach of the Act.

The legislation when it comes to excessive working hours in Ireland is worked on the basis normally of a four month period of time. Provided in that four months the employee does not work in excess of 48 hours on average then in those circumstances there is no claim. For example if an employer arranges with an employee that they will work for 60 hours one week and 36 hours the next week and that goes on for a period of four months the actual average will still just be 48 hours. The fact that in that four month period eight of the weeks will be in excess of the 48 hour rule does not mean that the employer is in breach. The other issue which is relevant is that the legislation refers to four months. Each month does not necessarily have four weeks. Therefore some months will have five weeks. Depending on the number of months the issue then arises are to whether or not the 48 hour rule has been breached.

A further issue in relation to the legislation is that it refers to the word "month" therefore the issue is if an employee commences work on say the 15th of July is the four months calculated from the 15th July to the 15th November or because the legislation uses the word "month" can a reference period only run from the start of a month in this case would be the 1st August and would be up to the 30th November. It would appear to us that because the legislation uses the word "month" and that word is very specific and has a specific meaning then effectively in doing the calculation is has to be on calendar months rather than on part of a month. In the particular case under ADJ00017050 the employee commenced work on the 26th March 2018 and finished on the 17th June 2018. In those circumstances the question is whether to work out hours worked whether it was from the 26th March as the Adjudication Officer found or whether it should have been from the 1st April to the 17th June. As the average from the 26th March to the 17th June worked out at 51 hours on average it may well be that if the strict statutory interpretation was applied the employee would not have worked in excess of 48 hours over a relevant reference period.
This is an issue which is somewhat unclear and at some stage will be determined by the Labour Court. However in determining the issue an Adjudication Officer or the Labour Court are bound by the Interpretation Rules and as the legislation is precise it would appear to us that the calculation has to be on the basis of a statutory month.

Organisation of Working Time Act – Level of Compensation – Section 15

The case of Stablefield Limited and Manchiu DWT1924 is an important case from the Labour Court. This case dealt with in particular breach of the 48 hour rules. The Court in this case found that the regular reality of matters was that that the employee worked 80 hours a week. The Court pointed out that the Court was not satisfied that compensation by a simple formulistic application of an hourly rate to the difference between the maximum 48 hours per week permitted by the Act and the actual hours worked is appropriate as the Act provides that such hours should not be worked in the first instance.

The Court determined that payment of compensation to the complainant to which the Court was satisfied was a conscious breach of the rights under Section 165 of the Act. It is the appropriate means of dealing with this matter. The Act as the Court pointed out requires the Court to have regard to the level of compensation which is just and equitable subject to a limit of two years pay. The Court pointed out that the ECJ as it then was set out in Von Colson and Kamann that sanctions for breach of community rights must ensure that they are effective, proportionate and dissuasive and that they must reflect the gravity of the breaches and should act as a disincentive against further infractions.

The Court also noted the case of Edward James Feeney –v- Baquiran 2004 15ELR304 that the provisions of the Act and the Directive on which it is based are health and safety imperatives.

The Court pointed out that the Court examined also the concept of proportionality in determining the scale of compensation for a conscious breach of an employee's rights under Section 15 in the case of HSE South and Kerry General Hospital and Lukco DWT1560. In this case an award of €20,000 was awarded.

Of course there will be very few employers who will work employees 80 hours a week. Saying this, the Court has clearly set out that breaches

of Section 15 being the maximum working hours will be looked at in a very serious way by the Court.

Entitlement to Breaks and the Level of Compensation

In case ADJ0002190 this is a case where an employee earned a little over €293 a week. The employee contended in relation to claims under Section 12 of the Organisation of Working Time Act 1997 that she would normally go to the shop at 8:30am and work until 7pm and that she never got a break. On Fridays and Saturdays she worked on her own in the shop and if she was having lunch and a customer came in she would have to leave her lunch and serve the customer. The employer stated that the shop opened at 9am and closed at 6pm and contended there was a lot of down time in the shop. The employer accepted that where the complainant was having lunch and a customer came in she would have to serve the customer. He stated the shop remained opened throughout the day.

The Adjudication Officer in this case helpfully quoted the case of Antanas and Nolan Transport 2011 22ELR211 and set out the Labour Court in DWT1914 in relation to this issue where the Labour Court had said that the Act imposes an obligation to provide workers with the opportunity to take breaks and is a positive obligation on the employer quoted the case of C-484/04 being the case of the Commission and the United Kingdom. The Adjudication Officer in this case clearly set out the important decisions of the Labour Court and the ECJ. In relation to the issue of compensation the Adjudication Officer then quoted the case of Von Colson & Kamann 1984 ECR1891. This is a case where it provides that the redress should not only be compensation for economic loss sustained but must provide a real deterrent against future infractions. The Adjudication Officer stated that they were taking into account the seriousness of the infringements and the sustained nature of those infringements and awarded the sum of €3,000. Effectively the employee received compensation of a little over ten week's wages.

At some stage this issue as to the level of compensation to be awarded will need to be addressed. We do not have any employment law cases with a test which sets out what is likely to be persuasive of an employer going forward. Certainly if the employer had come in and admitted there had been breaches that would be one issue. In this case the employer sought to defend matters on the basis that there would be downtime

and a requirement to serve customers. The issue of downtime is a complete irrelevancy when it comes to setting rest periods. The requirement to serve employees is an issue which some employers take as being more important than providing what are classified as health and safety breaks under the Legislation and the Directive. Of course an employer is entitled to defend a case but where a defence is put up that is so blatantly contrary to their requirements which they are supposed to understand as ignorance of the law is no defence it does raise the issue as to what level of compensation needs to be put in place. It's entirely different we would contend where an employer admits the breach and contends that they are rectifying and by rectifying we mean have rectified matters.

This is very much a personal view of this office. We are not criticising the Adjudication Officer. We don't even check to see which Adjudication Officer gave this decision. The current decision would be in line with current reasoning within the WRC. However, the issue of breach of health and safety legislation is one that is constantly arising. The same defences are regularly arising and it is an issue that really needs to be addressed where these type of defences constantly arise that they do need to be addressed as being effectively not appropriate defences.

Rest Breaks at Work

This issue arose in Case ADJ00021252. The employee in this case contended that he did not get his rest break. The employer contended that the employee was an assistant manager and was required to set his own rest periods. The Adjudication Officer held that the complainant was responsible for scheduling breaks and was in a position to schedule his own breaks as and when appropriate.

The Adjudication Officer found that the respondent did not "require" the employee to work in a manner which infringed Section 12 of the Act.

There is an issue in relation to this case as to whether it fully complies with the determinations of the CJEU as discussed in previous issues of our Newsletter.

This issue also goes back as far as the case of the Commission –v- The United Kingdom where the CJEU held that it is not sufficient that these entitlements would be in writing but that an employer must take active

steps to see that such entitlements to rest and break periods actually apply. More recently the CJEU have put the obligation on the employer to maintain records of the relevant working hours. This is in line with Section 25 of the Act. The records which the employer had, had no particulars as to rest and break periods. Therefore, in those circumstances it would be our view that the obligation therefore is on the employer to show effectively on a day by day basis what time an employee got their breaks at. In the absence of same the burden of proof is most squarely on the employer. The employer, in our opinion, could have dealt with this matter by putting a simple provision in the contract advising the employee of the provisions of Sections 11, 12 and 13 of the Organisation of Working Time Act and advising the employee that in the event that they did not get their scheduled break that they should advise the employer.

It is reasonably easy for an employer to put in place a proper contract and provided the employee is advised of their rights the employer in those circumstances can protect themselves. Where they do not put those in place the issue is really whether the provisions of Section 12 actually comply with the provisions of Article 4 of the relevant Directive. The Directive nowhere has this exemption for "require".

The issue of Section 12 and how it interacts is an issue which regularly arises in the WRC. This issue at some stage is going to have to be dealt with in the High Court. Recent cases from the Labour Court seem to indicate to a greater extent that the Court is looking at Section 25 of the Act to put the burden of proof on the employer and therefore the particular decision of the Adjudication Officer would be one which we have concern with. However there are clearly different views in relation to the Section 12 of the Organisation of Working Time Act and what needs to be done is we get a definitive determination. To an extent Adjudication Officers are left in a difficult situation where our Legislation is not in line with the Directive. Some will argue that it is. Others will argue that it isn't but clearly the Directive does not use the word "require" and therefore this issue will rumble on for some time until there is a definitive decision.

Setting Compensation

In the case of a security officer in a security company ADJ00023513 the case involved the issue of a Sunday Premium. The Adjudication Officer held that an allowance of 33% for working on Sundays was a reasonable rate to be awarded to the employee. A total compensation of €1110 was awarded. In this case the Adjudication Officer awarded €553.60 for the economic loss plus compensation of the same amount. Therefore in this case the economic loss would be subject to tax whereas the compensation would not be subject to tax. This is a well set out decision which makes it easy for practitioners to know what element is subject to tax and what element is not subject to tax.

Organisation of Working Time Act – Exemption for Certain Individuals in the Care Services

This issue arose in case ADJ00017634 in respect of a social care worker.

The employee claimed there had been breaches of Section 11 and 12 of the Organisation of Working Time Act in relation to the non provision of rest periods and time off between shifts.

The Adjudication Officer referred to S.I No. 21 of 1998 being the General Exemption Regulations which exempt employees engaged in the provision of services relating to the reception, treatment or care of persons in a residential institution, hospital or similar establishment. The Adjudication Officer held that such persons engaged in the care of a person in a respite centre that this is a residential institution and that the employer is exempt. This does not mean that employees do not get their entitlements under Sections 11, 12, 13 or 16 of the Act. It is that they must get compensatory rest periods.

Breaks for Shop Workers

In Case ADJ00021192 the employee was a retail employee. The employee relied on SI No. 57 of 1998 being the Organisation of Working Time (Breaks at Work for Shop Employees) Regulations 1998 in support of his complaint that he did not receive a break of 1 hour during the relevant times. Those Regulations provide that shop workers whose hours of work include the period 11.30am to 2.30pm shall after 6 hours

work is allowed a break of 1 hour which must commence between those hours provided such commencement would not result in the break occurring at the end of the working day.

In this case the Adjudication Officer stated that no evidence had been provided that the employee was denied the break times as provided in the Act and the Regulations. We would have to disagree with that conclusion. The employer in this case had contended that the matter had been dealt with by way of an ex gratia payment. The issue in relation to breaks in the matter where the jurisprudence of the CJEU and the Labour Court are clear that the burden of proof is on the employer to prove that the employee actually got the breaks. It is not an issue of the employee coming and saying anything other than they did not get their breaks. It is not a matter for the employer to say that they did not deny the employee the breaks. The issue if for the employer to show that the employee actually got those breaks.

Retained Fire-fighters – Working Time

This issue arose again in case ADJ/00019895 in a case involving a retained fire fighter and a local authority. The employee in this case stated that he was employed by the Local Authority as a retained Fire-fighter and was required to reside and work within a five minute response time to the fire station while on call.

The employee relied on the case C-518/15 Ville De Nivelles –v- Matzak. In that case the employee a volunteer Fire-fighter who was required to remain at home and report to the fire station within 8 minutes of receiving an alert was deemed to have been engaged in working time while on call on the basis of the requirement placed on him by the employer.

The response in relation to this was detailed but effectively was that the employee was not required unlike in the Matzak to remain at home and was free to undertake other activities. The employer relied on case C-303/98 known as the SIMAP case and case C-151/02 being the Jaegar case which provides that the times spent on standby can only be regarded as working time if the workers are required to be present at the workplace whereas workers who are not required to remain at a place determined by the employer but who must be reachable if

required are only engaged in working time while actually involved in the provision of services.

The Adjudication officer in this case held that having regard to the factual differences between this case and the Matza case the Adjudication Officer was satisfied that the decision was distinguishable and the complainant cannot advance the claim.

The differences were that in this case the employee had to be available within 8 minutes but could freely travel around effectively an 8 minute travel time to get to the fire station whereas in the case before the CJEU the employee had to remain at home. It would be interesting to see do any of these cases end up in the CJEU coming from Ireland as there is an argument that being required to be in a particular place could reasonably include being required to be within a particular radius of a place.

At the present time the employee has lost but it will be interesting to see if any of these cases ultimately proceed to Europe.

New Pension Rules for Employees

The Minister for Employment Affairs and Social Protection Ms. Regina Doherty has announced that workers earning over €20,000 per annum age 23-60 will be automatically enrolled for a pension with the scheme starting in 2022.

Anyone who meets the criteria and is not already enrolled in a workplace Pension Scheme will be automatically enrolled. Under the scheme due to begin in 2022 employers will be required to match the contributions made by the employee towards their pension. The contribution to be made by the Government of course is still under consideration. The minimum contribution will be 1.5% every three years which will be increased by 1.5% every three years to a maximum of 6% by year ten. Effectively the maximum contribution that will have to be made by an employer will be 6% of an employee's salary. It would appear if the employee decides to contribute more the employer will still be liable only for a maximum of 6%.

The idea is that the scheme will provide a pension pot and will be one which employers and employees will have to contribute to. It appears

that everybody will be automatically enrolled and will have to stay enrolled for at least 6 months, after this they can opt out if they so wish.

The issue of an opt out is going to cause difficulties. It is going to have to be set out as to the criteria for an employee to opt out. Clearly one of the issues is that an employee is going to have to be advised of the benefit of not opting out. It would be advisable if the Minister introduced a standard notification which would have to be given to employees about their right to opt out and the benefit of not doing so. It would be helpful if that notification document would have to be signed by the employee and that that would be the only way which an employee could opt out. There will also be the issue of those who may not have English as their first language and that there would appear to be a requirement to avoid employers getting employees to opt out of something that they do not know what they are opting out of that it would be produced in various languages so that there would be no misunderstanding.

From an employer's side we now have a situation where the employer's tax on employing individuals will increase from 10.5% to 16.5%. Those employers who are self-employed and earn over €100,000 per year have an additional 3% USC which they have to pay. If there is to be automatic enrolment then it would make sense that those who are self-employed could equally be automatically enrolled and could receive a full tax rebate for any matching contribution up to the maximum allowed for an employee as a full credit against tax. It would also be beneficial if they could get whatever the Government contribution is. This additional cost on employers is one which may have the effect of reducing salaries. There will be great pressure on those on the minimum wage, which is below the living wage, to opt out. These are the very people where there should be no opt out.
If we are going to bring in an automatic enrolment for pensions then it would appear reasonable that there would be no opt out provision and that everybody would be included in the scheme. There is a pension time bomb. This has been talked about for the last 15 years. The pension time bomb is actually here and has gone off and for planning for the future where matters are only going to get worse there does need to be immediate action taken. At the same time the idea of opting out really undermines the whole scheme. As we have said equally the cost being put onto employers now must be in some way rebated through either reduced employers PRSI or additional benefits for employers. It will be those in the small and medium industries who will be most

affected by this scheme. These are the industries which receive the least amount of support from the government.

New Parent Leave

From the start of November new Mothers and Fathers will each be entitled to 2 weeks of paid Parent Leave. This can be taken any time within the first year of their child being born. They will receive a state benefit of €245 per week.

This is the same rate which is paid for existing Maternity and Paternity Leave.

These new two weeks are in addition to the existing Maternity and Paternity Leave and unpaid Parental Leave.

For a Father they can take two weeks paid Paternity Leave. This must be taken within 6 months of the birth of the baby. They are entitled to another two weeks within the first year of the baby's birth meaning a total of 4 weeks in total.

For Mothers they have the entitlement of 26 paid week's Maternity leave. They also have an additional 16 weeks of unpaid leave. A mother can now avail of the additional 2 weeks paid Parent Leave. All of the 28 of these weeks are paid at the benefit rate of €245 per week.

Some areas of confusion arose. This mainly arose as to whether a Mother could take the initial 26 weeks, and then the 2 weeks Parent Leave and then the 16 weeks unpaid leave or whether the 2 weeks of Parents Leave would have to be taken at the end of the additional unpaid leave if a Mother was claiming same.

It would appear that the Department of Employment Affairs and Social Protection will be running a media campaign and positing on Citizens Information and the Departments website.

At the present time we have a considerable number of different Acts covering different rights of Mothers and Fathers. It would be beneficial, to say the least, if we had one codified piece of Legislation. It would make matters much easier for new parents or those expecting a child. It would make it a lot easier for HR Personnel and for employers. It

would also make it easier for those of us in the legal profession advising on these rights. Currently many people are unsure of their rights. It makes sense that matters would be dealt with in a much more codified way.

Parent's Leave

SI No. 553/2019 being the Parents Leave and Benefits Act 2019 (Commencement of Certain Provisions of Part 5) Order 2019 was made on 1st November 2019. This provides for a period of 2 weeks Parent's Leave. This is in addition to Parental Leave, Paternity leave and Maternity Leave. The paid leave is paid by the Department of Social Protection at the same rate as applies to Maternity pay and is paid to both men and women at the same rate.

Protection of Employees (Fixed-Term Work) Act 2003 – Contract of Indefinite Duration

This issue was addressed in case ADJ00017926.
In this case the Adjudication Officer quoted two important cases. The first was the case of Health Service Executive –v- Khan 2006 FTD4/2006 where the Labour Court ruled that the contract of indefinite duration to which a fixed term employee might become entitled

"Is identical in its terms, including any express or implied terms as to training and qualifications, as the fixed term contract from which it resulted from"

The Adjudication Officer also quoted the case of Trinity College Dublin –v- Moriarty 2012 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"

The Adjudication Officer in this case upheld the claim of the employee and required the employer to comply with the Act and to issue a contract of indefinite duration in line with the previous existing terms and conditions.

The issue of amending contracts when an employee becomes entitled to a contract of indefinite duration is an issue which regularly arises. That simply is not allowed. The Adjudication Officer has clearly quoted the law on this as held by the Labour Court and has applied same. This is an issue which should not be arising and is one which employees need to be aware of as regards their rights and employers equally as regards what their duties are.

Redundancy – Suitable Alternative Employment

In case ADJ14263 this issue arose. The employee in this case had worked in a shop. The employer operated a retail and wholesale smoked meat business.

The Adjudication Officer held that if a shop closes an employee is entitled to redundancy to reflect the years spent working in the shop unless a Section 15 offer is made. As the Adjudication Officer pointed out this does not mean that the redundancy has not occurred but rather means that if an offer is made in proper compliance with Section 15 the redundancy payment which would normally arise is not payable. In this case the employer had to accept that the specific of retail work in a unit within a factory was never put to the complainant. The employer contended that the employee dismissed the offer out of hand as soon as it was raised and therefore he did not proceed to precisely inform her what the nature of the job offer was. The Adjudication Officer held that a precise description of the alternative position should have been documented in order to prove compliance with Section 15 but it was not. The Adjudication Officer held that they did not need to consider whether the offer constituted suitable alternative work because Section 15 was not complied with.

This case is a useful reminder to employers that if offering suitable alternative work the provisions of Section 15 must be fully complied with. To an extent we can have a lot of sympathy for an employer but the legislation is there and employers need to comply with same. It is one of the reasons why, when making somebody redundant appropriate advice from a solicitor with experience in employment law should be sought. In this case the employer had to pay redundancy.

References

The issue of a reference for an employee also often causes a problem. Currently there is no requirement in Irish law nor in UK law for an employer to provide even the most basic reference. In the UK the UK Government has said it will consult on the idea that employers should be required to provide, as a minimum a basic reference. This would include for example confirming that the employee had worked for that employer and the dates of their employment.

In the UK there is no statutory obligation for an employer to provide a reference. It is a matter for individual employers whether to provide a reference.

Extending Time to bring a Case to the WRC

This issue arose in the case of SSE Renewable (Ireland) Limited and Tymon case UDD1956.

In this case the issue related to an employee waiting for a grievance process to issue before bringing a claim.

The Court quoted the case of Business Mobile Security Limited and McEvoy EDA1621 where the Court held that the claim was statute barred where;

"There was a delay in processing the grievance which lasted for more than 6 months. In the meantime, the complainant was out of work on sick leave. Again, he decided to allow that procedure to take its course while time was running under the Act. When the matter was eventually brought to a conclusion under the Grievance Procedure the time limit for bringing a complaint under the Act had expired....

The Court finds that in the particular circumstances of this case the complainant made a choice and must take the consequences of that choice. He chose not to pursue a complaint under the Act, allowed time to pass, and found himself statute barred when his chosen procedure did not resolve the matter to his satisfaction".

The Court in the current case set out that they did not accept that the internal Grievance process can take its course and operate to extend the period for submitting a claim.

The message from this case is very clear.

Where an employee has a claim under any particular Act whether it is an Unfair Dismissal claim or any other claim and the matter is being dealt with under a grievance process the employee should issue the claim. The WRC can be requested to put the claim on hold pending the outcome of the grievance but under no circumstance should an employee wait until a grievance is dealt with before issuing a complaint.

Review of WRC Decisions

In our newsletter we review a number of decisions of the WRC. In some we can be very positive about the decision. In others we might be critical. The procedure we apply in relation to reviewing these cases is that we actually do not check who the Adjudication Officer was.

From reviewing decisions of Adjudication Officers over the last number of years we do have to say that we have seen a very marked increase in the quality of the decisions which are issuing. Even if we might not always agree with them it is very clear when reading the decisions the basis under which an Adjudication Officer has come to the decision which they have. The decisions are useful in setting out the law in some depth. It is clear to see what has or has not been taken into consideration in arriving at a decision or the level of compensation. It is therefore relatively easy if a case has to go on appeal to be in a position to argue why a level of compensation should be increased or decreased or a decision overturned or upheld. In this the Adjudication Officer service in the WRC is providing a very valuable service.

Unlike the Labour Court where there is significant consistency in the decisions there is an issue which we regularly see that there is a lack of consistency in the WRC currently. To an extent that is understandable. There are a large number of Adjudication Officers and it is difficult to have consistency. The WRC no longer have effectively a law officer. The WRC has not resourced that particular service with personnel who can review decisions for compliance with the law to advise Adjudication Officers on particular matters or to assist in

bringing consistency. That is a resource issue which the government does need to address if we are to have a world class service.

In the WRC the decisions are now coming out. We did propose that they would produce a section dealing with recent decisions. We are delighted to see that that proposal was taken on board. We still however do not have a website similar to what was the old Labour Court website. The old Labour Curt website was fantastic. You could search cases on the basis of section and sub-section which is not currently available in the WRC. In the Labour Court if you were aware of even who the representatives were for a case it was relatively easy to find those cases by simply putting in the names of the representatives. That facility is no longer there. At the present time we have an immense number of decisions issuing from the WRC. The difficulty with them is that they are not very easily researched. In that respect significant numbers of important decisions which would be of benefit to those currently working in the employment rights field and those who would be coming in the future will not have the benefit of being able to easily research same. This is a defect that does need to be addressed if we are going to have decisions which are useful precedents going into the future.

Gig Workers

The Competition Commissioner for the EU has said that gig workers should be able to form unions. Ms Vestager said that EU competition regulations must not stop gig workers coming together to fight for better rights in a reference to rules that effectively stop freelance workers colluding to fix prices. What she referred to as “platform workers” she said should be able to team up to defend their rights. She pointed out that the fact that their employers label these workers as self-employed does not make these collective agreements into cartels which when that label is just a way to disguise that they are really employed. She stated that the EU may need to make it clear that nothing in the competition rules stop those workers from forming a union.

The figures in the UK show that one in ten working age adults being around five million people work in the gig economy. A similar percentage would apply here in Ireland. She stated that many businesses were stepping up and taking responsibility for providing decent working conditions for the workers who made their products even if they don’t directly employee those people. She added that their

review of the rules and guidance on horizontal co-operation could be another opportunity to explain how companies can put together sustainability agreements without harming competition.

In September in California a law was passed to recognise gig workers as employees and giving rights.

It is clear that there is a discussion taking place now in Europe in relation to the issue of gig workers. A similar discussion has not started here in Ireland. In fact when the issue of the gig economy is raised we have the fact that the Department of Employment Affairs either kicks the issue down the road, uses their great term "flexibility" and then goes back to the tried and tested defence that a number of these workers do not want to be tied into employment contracts because of a lifestyle choice. The sad reality in Ireland is that we have actually no data on which to place any of these allegations as being the truth from the Department. The Department of Employment Affairs effectively does not want to address this issue. The question is why. The answer is simple. There is a fear in the Department that if they seek to address this issue it will have a negative impact on larger multinationals particularly in the IT business.

Currently because of the fact that the Department is not prepared to address the issue of the gig economy a huge amount of money in the area of employer PRSI and tax is being lost by the State. Effectively now those in employment are subsidising the gig economy. If the attitude of the Department of Employment Affairs was taken to its logical conclusion then effectively every employer in the country would convert their staff to gig economy workers. On that basis virtually nobody would pay any tax or USC.

We do need to have a reasoned debate in this area and the reality of matters is that the issue of the gig economy can easily be dealt with for 95% of all workers by having a very simply provision that if a person is being paid less than twice the National Minimum Wage or less than twice a Sectoral Employment Order rate of pay that in those circumstances for all purposes they will be regarded as employees for employment law legislation. You will then have to deal with a very limited number of people where we would need to look at appropriate legislation. The reality of matters is, as we have stated before, that the Department of Employment Affairs has set its face against any

regulation of the gig economy and by their actions are effectively creating an environment where the exploitation of workers is effectively condoned by the Department. On the other side of the coin these actions by the Department of Employment Affairs is penalising good employers who seek to take people on, give them contracts of employment, pay USC and tax and deal with their employees in a fair and reasonable way. Effectively the government has set their face against those employers who seek to treat their employees in a fair and reasonable way. It is a sad indictment that effectively the Department of Employment Affairs is incapable of acting to regulate the gig economy out of fear of large multinationals.

David Scahill –v- Sean Aughey [2019] IEHC 592

The Plaintiff in this action was awarded €89,938.06 for injuries suffered in a road traffic accident, being €80,000.00 in general damages and €9,938.06 in special damages which included the cost of future surgical treatment.

The Plaintiff was driving a motor vehicle when the Defendant drove his motor vehicle in such a manner which resulted in a collision. The Plaintiff described the accident as being quite traumatic in that large pieces of wood entered through the body of the motor vehicle. The Plaintiff believed that his facial injuries were caused when an object, possibly a timber stake, hit him in the face. The case was heard as an assessment of damages.

The Plaintiff's injuries included a swollen and deformed nose with an abrasion thereon. He had a marked nasal blockage on the left side with cosmetic deformity of the nose which revealed a dorsal hump appearance at the bridge of the nose and a deviated septum on the left side anteriorly and posteriorly to the right hand side. The Plaintiff was obliged to undergo a septorhinoplasty to correct the nasal septal deviation. He also suffered with discomfort in the right shoulder and right arm power was noted to be reduced with anterior shoulder tenderness. The Plaintiff also suffered with trauma following the accident and also required dental treatment but did not claim compensation for these injuries.

The Plaintiff continues to suffer with a hump on the bridge of the nose and the septum is partly obstructing the right nostril. The appearance

of the nose is abnormal. The Plaintiff continues to suffer with numbness on the tip of the nose and has difficulty getting air, especially through the right side of the nose. There is also mild congestion on the lining of the nose. Further rhinoplasty surgery will be required, the results of which were noted to not always be predictable.

Ms. Justice O'Hanlon noted that the Plaintiff had suffered a troublesome injury and that he has been left with both functional and cosmetic problems which will require further surgery. She also accepted the Plaintiff's evidence as truthful and that he did not overstate his claim. The court assessed general damages in the sum of €80,000.00 and special damages in the sum of €9,938.06 which included the cost of future surgery.

***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.**