
**Welcome to the January 2020 issue of our Newsletter**

As we head into 2020 we can look back on 2019 with some satisfaction.

In 2019 we were successful in the Irish Law Awards in being awarded the Law Firm Innovation Award. We were honoured to have received same.

Equally in 2019, we had a number of important Point of Law cases and Judicial Reviews in the High Court.

One of the highlights was a relatively small amount of money relating to a claim under the National Minimum Wage Act, 2000, but vitally important for our client. The cases involved the interpretation of the employee's contract of employment. This case was won in the High Court. This was the first ever Point of Law case relating to the National Minimum Wage Act. We were delighted to have won that Point of Law. The employee in this particular case did not have the money to fund a case to the High Court. This was effectively a pro bona case taken by this firm.

In 2019 we sought in our Newsletter and on Social Media not only to highlight issues relating to what the law is and its proper interpretation but also to highlight difficulties and problems we saw with how the law was being applied or where there was a defect in the Legislation or an absence of Legislation.

This firm only operates in the area of Employment Law and Personal Injury work. There is a significant overlap in these areas of work. Our personal Injury practice deals with a significant volume of workplace related accidents. This part of the practice is one where we regularly see that employees suffer injuries often because of failure by

employers to have adequate Health and Safety Policies and a lack of training. Workplace related accidents involving personal injury can be extremely upsetting. These cases can have life changing consequences for employees. Some may never work again because of the type of injury which they have sustained or will not be able to work in the type of job that they had prior to the accident.

In 2019 we set up our Reputational Risk and Crisis Management Practice. This is headed up by Richard Grogan and Michelle Loughnane. There is significant interaction between employment law and the personal injury work in this area of our practice. We come across individuals, particularly senior executives, who are suffering from significant stress and burnout due to excessive working where their health has been impacted to a significant extent. We are also seeing individuals who are being terminated from employment, who are in senior positions, for no apparent reason by which we mean wrongdoing. These individuals fall into two categories. The first is in relation to women who have children later in life and suddenly find that their job in under threat. The second relates to senior individuals who are older, but well short of retirement age, who are suddenly being met with a situation where the employer wishes them to exit the organisation. Both of these are cases where the employee will invariably be under significant stress often having a negative impact on their health because of the actions of the employer seeking to remove them from the workplace while at the same time creating serious issues under employment law. In 2019 we set up the Reputational Risk and Crisis Management Practice solely to act for employees so as there would be no perceived conflict as to how we would operate. We set up the practice primarily because of the fact that we have seen and continue to see a significant rise in the number of senior executives and managers who because of breaches of employment law rights are also suffering either physical or psychological injuries due to the actions of their employer.

In 2019 we were heartened by the very positive feedback we received from those who received our Newsletter. We are intending to keep producing our newsletter Keeping In Touch in 2020. We will continue to review those cases which we believe create important legal precedent but at the same time to raise issues where we have concerns.

We would particularly like to thank both trainee Solicitors, newly qualified Solicitors and those who have recently graduated in the area of Human Resource Management for their kind comments in relation to our Newsletter. These individuals are the future of employment law. They will be the future leaders in the area of Employment Law. To the extent that we can encourage them to be involved and interested in Employment Law then that is something which we are delighted to have an opportunity to do. The area of Employment Law is one of those areas where there is great collegiality. Employment law is complex but it is also extremely interesting. It is certainly challenging. However, the great strength of Employment Law is that those involved from the largest to the smaller firms, in our experience, are all prepared to share their knowledge and information with others. That is the great strength of Employment Law Solicitors in this country.

Finally, we would like to wish all our readers a Healthy and Happy New Year.


**Index**

**Out and About in December 2019**

On 3 December, Richard Grogan was interviewed on Waterford Local Radio on the issue of the lack of Judges in the High Court. This interview arose following the cancellation of the High Court sittings in Waterford. In the interview, Richard Grogan pointed out that sittings in Cork, Dundalk and Kilkenny had also been cancelled. In addition, Circuit Court sitting in Galway was cancelled.

On 10 December Richard Grogan was again interviewed on Waterford Local Radio on the issue of Christmas parties and the high incidents of sexual harassment which can occur at these parties. Richard Grogan pointed out the fact that the availability of alcohol, sometimes on a free bar, and the more relaxed atmosphere can sometimes result in inappropriate behaviour and pointed out the importance of Employers bringing to the attention of Employees, before they go to a Christmas party, the contents of the Employer's Anti-Harassment Policy.

On 12 December we had a piece published in Irish Legal News on Bonus Payments.

On 13 December we presented a seminar to the Cavan Solicitors Bar Association entitled "Termination of Employment". As is usual, our fee was not paid to us but to the Solicitors Benevolent Association. We also made a submission on Flexible Working.

**Flexible Working**

The Government launched a consolidation on flexible working under Future Jobs Ireland on 12th December. In relation to the issue of the Right to Disconnect, we have made a formal submission as part of the process. Our submission is on page 33.

Effectively now due to the use of smart phones, employees are available 24/7/365. We are concerned that there are significant

health and safety risks to employees if they do not have the Right to Disconnect.

We do not know whether our submission will be accepted or rejected but we certainly have made the submission in the hope that the Government will recognise the importance of employees having appropriate rest and break periods. Having a Right to Disconnect is probably the only way of ensuring that employees rights, in this area, are properly protected.

**Legal Aid in the WRC**

The issue of the lack of Legal Aid in the WRC is one where arguments are just starting to arise. The argument coming from the Department of Justice is effectively that nobody needs Legal Aid in the WRC.

The reality of matters is that the exact opposite is the position. When you review the decisions of the WRC it is quite clear that a considerable number of individuals, who put in their own claims, without the benefit of legal representation, issue the claims under the wrong legislation and the case is therefore dismissed. In this country there are a little over 870 pieces of either legislation, statutory instruments, or, Directives which have a direct bearing on employment law. The law in this county is not codified. We have different definitions of who is an employer and who is an employee for different pieces of legislation. The argument that individuals do not need Legal Aid is quite frankly an issue which is incorrect and is not sustainable.

We also then have a situation of what can only be described as one of the most appalling claim forms that anybody has ever devised. The claim form is not user friendly. Individuals regularly submit claims under the wrong Act or not understanding exactly what claim they should be putting in because of the way the claim form is set out. When the WRC was being set up there were various focus groups. All of those focus groups were saying that claim forms needed to be put in place in conjunction with those who are hearing cases at that stage, employer and employee representatives from the legal side, employer and employee representatives from the non-legal side to include the unions and IBEC. This was rejected. Instead what we got was a claim

form which was clearly designed by somebody with IT knowledge but absolutely no comprehension whatsoever of the realities of employment law. The claim form was put together on the basis that an individual would have one claim and one claim only. That is not the reality of matters. At the present time we do not even have a statutory claim form. We probably never will have a statutory claim form. We are now four years since the Workplace Relations Act came into operation and no such form is in place. Of course there is a reason for this it is that the claim form has consistently being wrong. Various Acts and claims who are not covered in it and are only know getting up to date.

You then have the issue of putting claims in the WRC. The WRC according to the Supreme Court is an inquisitorial process. Now while this issue was not argued in the case before the Supreme Court when you get to the Unfair Dismissal legislation because it is still covered by the Redundancy Payment Act rules that is an adversarial process. So you now have a situation in the WRC that some Acts are under the Inquisitorial process and some are under the adversarial process. In reality the WRC appears to disregard the process as set out by the Supreme Court and works on an adversarial process. When challenged the WRC Adjudication Officers do take account of same and work on an inquisitorial process. However, when it comes to the issue of putting forward legal arguments an unrepresented individual has very little chance of being able to put forward all the legal arguments that they should be putting forward in their case. When the system was set up we were told that we were going to have a world class service with a world class back up facility. The reality of matters is that we do not have any proper support services. There is a section that you can phone. However you are not going to be given the person's name. They are not going to give you anything in writing and they are not going to take responsibility if they give you wrong advice. That's a pretty worthless facility.

Those who argue against providing Legal Aid are not pointing out the Charter of Fundamental Rights of the European Union specifically sets out the issue of Legal Aid being available and that is not limited to criminal law. In addition we have the case as what is known as Von Colson and Kamann being the EU decision relating to the issue of the setting of compensation. The alternative is in relation to Legal Aid is that the Von Colson and Kamann principles would apply and in those

circumstances where an employee wins a case that the economic cost of the employee bringing a claim would have to be met. That may seem hard on employers but that is probably the easy way out to avoid having to introduce Legal Aid. However there is then the issue of whether employers in certain circumstances should be entitled to Legal Aid. Certainly there would be smaller employers who would need Legal Aid.

The system that we have as regards employment law in Ireland is to an extent dysfunctional. We have no codified legislation. We have disjointed legislation as regards definitions. We have claim forms which are not user friendly. We have a WRC which is not properly resourced to have research facilities which would be up to date facilities so that a person bringing a claim would be able to get up to date information as to what the law and interpretation of various sections and sub-sections of legislation would be. We have an advice section of the WRC that takes no responsibility for the advice that they give.

We have virtually no proper investment in the WRC. When Richard Bruton TD as the relevant Minister brought in this legislation he said it was going to be a world class service. He has departed the scene so it is no longer his problem. We have the situation now that we have one department which is run by Minister Heather Humphreys responsible for running the WRC. However the Department of Employment Affairs is one department most likely to be introducing legislation on a practical level along with the Department of Justice. Even in the management of the WRC as regards the management and the departments who would be issuing legislation which would be covered by the WRC we have various Departments with various agendas and various Ministers and there is no joined up thinking.
In relation to the issue of Legal Aid this is an issue which is going to be end up before the courts. It will be very interesting to see whether those in the Department of Justice who have been most vocal in saying that Legal Aid is not required will actually seek to be involved in those proceedings. The reason why that is that any of these cases that go to the High Court will be by way of a Point of Law or Judicial Review and the relevant Department will not be involved. There are interesting times ahead.

**WRC Hearings – Inquisitorial**

We are commenting on this because the reality of matters is that the WRC is still applying its rules of practice which are effectively an adversarial process. The Supreme Court has ruled they are an inquisitorial process. The WRC appears to have taken an ostrich approach to the Supreme Court decision. They have stuck their head in the sand and downright refused to apply a determination of the Supreme Court. This is simply not acceptable. The Supreme Court has ruled on what the legislation says. Despite the fact that the WRC may not like it they are bound to apply it. The fact that the WRC may state that they don't have the resources for Adjudication Officers to undertake an inquisitorial process is quite frankly irrelevant. The WRC cannot decide not to apply the law.

This matter is going to start coming to a head. We have put in submissions, which we have sent to the WRC quoting the Supreme Court decision and requesting by which we mean our client's, would receive an inquisitorial hearing. We fully expect that our request is going to be simply ignored. On that basis our client's will have three choices. The first is to proceed with the hearing and accept the ruling. The second is that we issue judicial review proceedings against the WRC for failing to apply a Supreme Court decision.

Thirdly the option is to simply state that it is an inquisitorial process that the claim has been but before the Adjudication Officer, that our client does not wish to engage in an adversarial process and if the Adjudication Officer will not consent to have the matter dismissed and that it would be brought on appeal.

We intend to undertake whichever course of action our client wishes. There will be some who will be quite happy to simply get their case over. There will be others who for one reason or another would rather their case effectively be heard in public and would be quite happy to have the case dismissed and for one reason or another to have the matter dealt with before the Labour Court. There will be others who may rather that they have an opportunity of bringing matters to the High Court by way of judicial review.

Our approach may not find favour with the WRC. That is not something which is going to worry us to any extent. We are a professional firm. We are there to act in accordance with the law. We are there to promote the law. We are there to speak out when we see the law being flouted by entities such as the WRC where they refuse to apply the law as determined by the Supreme Court.

These are issues which you will hear about further in our newsletter in future but this office is not going to have a situation where a Supreme Court decision is effectively being ignored and that there is an effective snub by the Workplace Relations Commission to the Supreme Court.

No body and no entity is above the law and ultimately in this country it is a Supreme Court who interpret the law and State entities such as the Workplace Relations Commission must respect the Supreme Court. That is just our view. We are sure that our view is going to be the one that will not be accepted by the Workplace Relations Commission. We are sure that they have absolutely no intention of being compliant with the decision of the Supreme Court and it will only be when this issues goes to the Courts that they may be forced to comply with the law. That is an appalling vista that we will have a State entity which is effectively refusing to apply a ruling of the Supreme Court which is the highest judicial body in this country.

This is not unusual when it comes to them. The Labour Court applies the highest ethical standards. The Labour Court consistently set out how they are bound by decisions of the High Court and the Superior Courts. The WRC which in theory and in law is supposed to follow decisions of the Labour Court have set their stall effectively in many cases simply refusing to apply decisions of the Labour Court even in cases where the jurisprudence of the Labour Court not only arises from decisions of that Court itself but as a result of decisions of the Superior Courts in Ireland and even in some cases the CJEU. Our view is that unfortunately a number of Adjudicators believe and this is only some, that they are the ultimate deciders.

We have a significant number of cases where decisions of the Labour Court have been quoted to the WRC and effectively ignored by Adjudicators and the matter has then had to go on appeal to the Labour Court. This is entirely unacceptable. It is unacceptable that

they refuse to follow decisions of the Labour Court. It is an egregious breach of their duties that they refuse to follow the determination of the Supreme Court as to how they will run cases. In the case of decisions of the Labour Court there can be arguments that cases can be distinguished on their facts. That is often semantics. However when it comes to how cases are run the Supreme Court has been absolutely emphatic and there can be no misinterpretation or distinguishing facts.

The reality of matters is that and we are probably going to be criticised for saying this, that the standard and quality of Adjudication before the Labour Relations Commission, the Employment Appeals Tribunal and the Equality Tribunal was far more consistent and of a higher standard than we are currently having before the WRC. Many of the Adjudication Officers in the WRC provide an excellent service.

Unfortunately others do not. In the Labour Court we have consistency in their decision making. In the WRC it is a bit of a lottery. You can have one Adjudication Officer whom you know will work on a particular interpretation and another on a different interpretation.

This is just simply not acceptable.

We were promised that we would have world class service. We currently have a third world service from the WRC. I do not blame the staff. I do not blame those in a professional and managerial function within the WRC. They are doing their best with inadequate resources and funding. However that's not an excuse. The WRC is there to apply the law and the issue of consistency and certainty is a very basis of ensuring that individual's rights can be dealt with and resolved.

Currently there are unnecessary appeals going to the Labour Court. Effectively the WRC as an exercise has to date been a failure.

**Claims in the WRC – Can They Be Heard in Private**

The WRC contend that the legislation provides that cases will be heard in private. This is completely contrary to the Charter of Fundamental Rights of the European Union which provides that cases shall be heard in public. The argument that cases should be heard in the WRC

in private does not stand up. Where cases go on appeal to the Labour Court those hearings are in public except in a very limited number of cases where there would be particular reasons why the identity of the parties and normally the employee would not be disclosed. This would never apply in an Unfair Dismissal case or an Organisation of Working Time case. It normally will only apply in cases involving Employment Equality Act and even then in very limited circumstances.

The Charter of the European Union is now part of Irish law.

At some stage a claim is going to be made by a journalist seeking access to a hearing, who is denied that access that that journalists rights which derived from the Charter had been infringed. In other cases it may well be an employee or even an employer who wishes the case heard in public who may well have claims against the State and in particular the WRC for not applying the Charter.

The reality is that the WRC have a rigid approach in relation to matters. Yet the reality of matters is that the fact of cases before the WRC is in fact public. If you walk into the WRC any morning there is a board. On that board is the names of the employers with the room number. The employee's names are not set up. Therefore it is a matter of public record because it is in public as to whom claims are against.

In many cases before the WRC Adjudication Officers are saying that they don't want to hear about the case being commented on outside of the hearing. This is complete and utter rubbish and they have no power or right to make such an order. The fact that they may hold a hearing in private in itself is contrary to the Charter. They have no power of any kind shape or description under the Workplace Relations Act to stop anybody commenting in relation to the case either before or after. In respect of claims under the Employment Equality Acts this is the only Act which states a party cannot disclose what happened at the hearing itself nor comment or publish the decision until the WRC does. In that those cases are unique. They have no right to stop anybody commenting in relation to what occurred in a hearing before the Adjudication Officer. There is no penalty in the Workplace Relations Act for doing so and any such penalty would, in the normal course of events, be completely contrary to the Charter referred to previously.

The issue of the WRC complying with the law is one that at some stage is going to be addressed and is a serious issue. The Charter is there. It is part of Irish law. On the issue of equivalence the issue is that the hearings should be in public.
Now if they are going to be in public we would certainly be of the view that the standard of reporting by journalists in this country of cases before the WRC as they currently stand will need to be addressed.

Rather than the headline cases which, often when you read the decision, bear little resemblance to actually the written decision in itself is one which needs to be addressed. There is sloppy reporting of cases. The cases which are reported are invariably the ones that are going to get the big headlines. Of course it is recognised that journalists and papers are there to sell newspapers. However there is an issue that if hearings before the WRC are to be opened up it would be on the basis that journalists attending should abide by a code which would set out what is reasonable for journalists to do or not to do.

It is quite interesting that in the Labour Court there now appears to be more journalists attending and this can only help in understanding the complexities of employment law if we have journalists who will report accurately on what occurred.

Many years ago The Irish Times used to have a section every Friday on reports of court cases. These were then in bound books called The Irish Times Law Reports. These were reports which those appearing in court cases could actually quote from. That was the level of journalism which we had at that stage. That level of journalism and the level of integrity and the manner in which matters were reported are standards that we really need to see in Employment Law.

Employment Law is not just about the headline cases. It's about the real cases that determine matters. It is about the cases that are won and lost and the reasons why cases are won and lost which will enable a greater understanding of Employment Law in this country. That is a role which journalists have which will have the effect of reducing in the incident of breaches of Employment Law because the matters will be better understood.

This is just our opinion. What standards journalists have is really outside our expertise. We are however absolutely confident that the right of the WRC to insist that hearings are in private is contrary to the Charter and we are absolutely confident that some stage this issue will arise and a case will be taken to the High Court against a decision of an Adjudication Officer to refuse a journalist a right to attend and report on a hearing.

**Delay in bringing cases to the WRC**

This issue was addressed in Case ADJ00007390. The Adjudication Officer in this case set out that the test for Cementation Skanska Skanska DWT03380338 draws heavily on the decision of the High Court in *Donal O'Donnell & Captain O'Donnell –V- Dun Laoghaire Corporation 1991 ILRM* where Costello J. stated as follows:

*"The phrase ''good reason'' is one of wide import which it would be futile to attempt to define precisely. However, in considering whether or not there are good reasons for extending the time I think it is clear that the test must be an objective one and the Court should not extend time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings. What the plaintiff has to show is that there are reasons which both explain the delay and afford a justifiable excuse for the delay.*

The Adjudication Officer pointed out that the Labour Court in the case of Brothers of Charity Services Galway –V- O'Toole EDA 177 held choosing the internal procedures does not of itself extend statutory time limits where in that case, the Labour Court stated;

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

The Adjudication Officer in this case held that the employee had failed to establish primary facts from which it could be inferred that discrimination has occurred.

We have raised this issue in previous issues concerning the issue of using internal procedures. In many cases before the WRC, employers will complain that an employee did not use internal procedures. They will claim that the employee should have used those before issuing proceedings. In other cases where the employee does use the internal procedures and then brings the claim out of time, the argument will be made by employers in those circumstances that the employee should have issued the proceedings even if going through the internal procedures.

Where an employee has an issue where there is a time limit which is normally 6 months in relation to Employment Cases, then in those circumstances even if the employee wishes to use the internal procedure, the Employee should ensure that the proceedings are issued in the WRC. The Employee in those cases can always advise the WRC that matters are being dealt with through the internal procedures and ask that matters be put on hold until those procedures have been finalised or the employee comes back and requests that the case is listed for hearing. The alternative is simply to tick the box requesting mediation.

Under no circumstances should employees hold off issuing proceedings while they go through the internal grievance procedures. If they do, then in those circumstances if the claim subsequently comes, before the WRC or the Labour Court outside the 6 month period of time, the employee may not be able to pursue their claim even though they will argue that they used the procedures as set by the employer.

**Lodging Appeals**

In the case of Claire Rushe and the Health Service Executive while this would not relate to an employment law matter it does at the same time raise relevant issues in relation to the issue of extending time to appeal.

In the case in question a perfected order of the Master of the High Court issued on the 19th July. An intention to appeal that order appears to have been made. Under the Rules of the Superior Courts

there was a six day time limit on making a suitable application to the court.

The Court pointed out that the six day period in accordance with the Interpretation Act 2005 Section 18 (h) includes the date that the order issued being the 19th July.

Mr Justice Barrett in delivering the judgement on the 9th December 2019 stated

*"Unfortunately, these facts yield a near classic example of that mistake of counsel or solicitor as to the meaning of the relevant rule to which Lavery J referred to Eire Continental Trading Company Limited –v- Clonmel Foods Limited 1955 IR170 as generally not offering a basis for an extension of time."*

His Honour referred to the decision of Brewer –v Commissioner of Public Works 2003 3IR539 at 548 that when propounding the so-called Eire Continental test that the Court has to

*"Consider all the surrounding circumstances in deciding how to exercise its discretion".*

The Court pointed out that a mistake had been made by a Solicitor acting on the advice of Solicitors is a case of contrary to correct advice from Counsel and nothing more. The Court said that while the Court had sympathy that this mistake occurred there was no reason why the HSE should not benefit from the operation of the time limitation.

It is vitally important in cases in the Courts and in the Labour Court that the time limits are complied with. Failure to appeal in time is one where there would need to be very strong reasons to get an extension.

**Emails Outside Working Hours – They May Well Be Against Employment Law**

It is common for many employees to send, read and reply to work emails after their standard working hours. Emails and contacts from employers and customers can come in at all hours of the day and

night and over weekends. There was a time that a person would need a laptop to be able to access work emails. Smartphones now mean that emails are often immediately available.

Some workplaces appear to have a culture of long working hours. Contracts may refer to a person working a 40 hour week or working from 9 – 5:30pm. However, we now have a situation of effectively presenteeism due primarily to smartphones.

The argument from some employers is that they have arranged this with the employees. They argue that there is freedom to contract. There is no freedom to contract out of the Working Time Directive. The Working Time Directive provides for individuals not working for more than 48 hours a week on average which is over a four month period of time and that they have an entitlement to an 11 hour rest interval. There are issues relating to daily rest, weekly rest and annual holidays. There is no option in Irish law to opt out of same. There is no derogation in respect of same.

This is health and safety law. It is the basis under which the Directive was passed.

There are serious issues in relation to excessive working. Excessive working can result in stress, burnout, and can in some cases create heart disease issues.

The Department of Business Enterprise and Innovation has introduced a new public consultation in relation to the issue of flexible working and one of the issues that is being looked at is the issue of the employee's right to opt out. It would be our view that an employee not only can opt out of taking emails after hours but effectively is absolutely entitled to do so and further that the employer is obliged to make sure that the employee gets the relevant rest and break periods and there can be no opt out of the Irish legislation as there is no provision for an opt out of the Directive as the Irish government never sought such a derogation.

**Bonus Payments – The Importance of Having Matters Set Out in a Contract or Bonus Policy**

The issue of bonus payments regularly arises particularly where an employee is leaving close to or at the time of the payment of a bonus.

A leading case on this is the case of Bord Gais Energy Limited –v- Thomas PWD1729 where the Labour Court held that an employee was not entitled to be paid a bonus because the company bonus rules required employees to be employed at the time the bonus was due to be paid.

There are many companies who will calculate the bonus on a particular date but will then have a provision that the bonus is not paid unless the employee is in employment on the date that the bonus is due to be paid which can sometimes be a number of months later.

An issue that often arises as to what happens if an employees has put in their notice. Take a situation where an employee must give notice of one month. The bonus is calculated on say the company accounts at 31 December 2019. The bonus payment is due to be paid on the 27th April as part of the April payroll. The employee gives notice on the 1st April. Clearly they will be still in employment on the 27th April but will be leaving a few days later. To avoid this situation some policies will now have a provision that not only must an employee be in employment but that if the employee has served any notice of termination or has been served with a notice of termination even though that termination date may be after the date that the bonus would be payable that in those circumstances no bonus is payable.

The reality of matters is that a bonus payment is there to normally encourage employees to remain and is seen as a way of rewarding employees who are committed to the company or firm.

Once matters are properly set out in a contract or bonus scheme and communicated to employees then it is effectively a contractual term.

It is also important in relation to any bonus scheme that it is quite clearly set out that any bonus scheme is discretionary. If that is not done then by virtue of what could be called “custom and practice”

employees could seek to enforce bonuses. Some companies will have a provision that a bonus scheme applies for a particular year and that it is subject to being renewed but that there is no contractual right to have it renewed as it is a purely discretionary scheme.

It is evident that a considerable number of cases are now going through the WRC relating to bonus payments. In many of these the employees are being successful due to the fact that the employer does not have the appropriate documentation in place.

***Published in Irish Legal News 12 December 2019***

**Unfair Dismissal – The Test**

This issue arose in the case of Permanent TSB PLC and Callan UDD1968.
In this case the Labour Court helpfully set out the law in some detail.

The Court noted that the test for reasonableness was set out in the case of Noritake (IRL) Ltd –v- Kenna UDA/1983 as follows:-

- Did the company believe that the employee misconducted himself as alleged?

- If so, did the company have reasonable grounds to sustain that belief?

- If so, was the penalty of dismissal proportionate to the alleged misconduct?

The Court pointed out that the issue was further considered in Bank of Ireland –v- Reilly 2015 IEHC241 where Noonan J noted that Section 6 (7) of the Unfair Dismissal Act makes is clear that the court may have regard to the reasonableness of the employers conduct in relation to the dismissal however

*"That is not to say that the court or other relevant body may substitute its own judgement as to whether the dismissal was reasonable for that of the employer. The question rather is whether the decision to dismiss*

*is within the range of reasonable responses of a reasonable employer to the conduct concerned"*

The Court in this case pointed out that the employee did not raise any procedural issues. On that basis the Court held that there was no issue in relation to procedures. A significant percentage of Unfair Dismissal cases are actually determined solely on the issue of procedures. In this case the Court had to decide whether the decision to dismiss fell within the range of reasonable responses of a reasonable employer and the Court determined that that was the position and therefore the claim by the employee failed.

**Unfair Dismissal – Fair Procedures – What is required**

In case ADJ/00020080 the Adjudication Officer quoted the Code of Practice on Grievance and Disciplinary Procedures S.I 146/2000 and set out that the general principles of natural justice and fair procedures include;

- That any allegation or compliant are put to the employee concerned;
- The employee concerned is given the opportunity to respond to any such allegation or compliant
- The employee concerned has the right to a fair and impartial determination of the issues concerned taking into account any representation made by or on behalf of the employee and any other relevant or appropriate evidence, factors or circumstances.

The Adjudication Officer held that no effort was made by the respondent to comply with fair procedures.

What is also interesting in this case is that the Adjudication Officer correctly, in our opinion, in awarding compensation set out that the payments are gross payments and are taxable in accordance with the Revenue rules on termination of employment.

**Dismissal on the Grounds of Redundancy**

This issue arose in a case of ADJ-00017960.

This is a case which was fully fought. It is clear that the sides in this case had exchanged submissions and therefore they were in a position to comment on various arguments that were put forward.

The employee had argued that the first hurdle for all employers to cross in a claim for Unfair Dismissal relating to redundancy is to prove that a redundancy is genuine. The employee quoted the case of Lyons –v- Grangemore Landscapes Limited UD541/2008 where the Tribunal held it was essential for a Tribunal to look at every case in detail to determine the genuine nature of any redundancy. The employer responded that it is true that this case is one where the EAT focused on whether the position was a genuine redundancy. The employer argued that the case was not relevant as the particular role in this case remained unfiled whereas in the Lyons case effectively the position had been replaced.

The second hurdle raised by the employee was that the employer must prove that the selection was impersonal. The case of Maloney –v- Deacon & Sons Limited 1996 ELR230 is one where the EAT held that

*"One of the essential features of redundancy is impersonality".*

The third hurdle raised was the issue of the reasonable approach of the employer and the conduct of the employer and the employer referred to Section 6 (7) of the Unfair Dismissal legislation which was introduced in the Protection of Employment Act 1977. The employee referred to the case of Tolerance Technology Limited and Joe Foran UD/16/50 where the Labour Court had found that the dismissal by way of redundancy was procedurally unfair. In that case the Labour Court had noted that the employee was not consulted adequately and not afforded representation and denied the opportunity to engage with the board when he requested the said facility. They pointed out that the Labour Court specifically referred to Section 6 (7) of the Unfair Dismissal Act which sets out that consideration must be taken of the reasonableness or otherwise of the conduct of the employer in relation to the dismissal. The respondent argued that was a case where the employer had failed to adequately consult with Mr Foran. The

employer argued in this case that from the 1st August 2017 the employee was on notice that her contract with the employer would end on the 31st July 2018 and had the opportunity to appeal the decision but was unsuccessful in her appeal.

The case of Limerick County Council and Richard Moran UD/17/46 was also introduced in which this was a case where the Labour Court found that having established that the expiry of a fixed term contract was not the only factor giving rise to a decision to dismiss that the manner in which the decision was made to dismiss lacked procedural fairness to which the employee was entitled. The employer's response to that was that in the particular case Mr Moran had been singled out from a group of fixed term employees and he alone did not have his contract renewed.

In the decision the Adjudication Officer quoted the case of St Ledger –v- Frontline Distribution Ireland Limited UD56/1984 (1995) ELR160 which stated the statutory definition of redundancy had two important elements namely impersonality and change. The Adjudication Officer pointed out that impersonality of redundancy was clearly emphasised by Charleton J in VC Europe Limited –v- Ponsi 2012 ELR70 where he described it as the economic or technical reorienting of an enterprise whereby the work of employees need to be shed or to be carried out in an entirely different manner.

In relation to the issue of change the Adjudication Officer quoted the case of Kinga Byrne –v- Dublin Institute of Technology RP2260/2009 where the EAT found that

*"It is clear the budgetary constraints involved a cut in staff numbers and would therefore fall within the definition of redundancy. It is also that it was this factor that led to the non-renewal of her fixed term contract"*

This is a very useful decision for setting out the arguments relating to redundancy in a very clear and precise way and it is clear that this case was well argued by both sides.

**Unfair Dismissal – Selection for Redundancy**

This issue arose in case ADJ00021655. In this case the Adjudication Officer pointed out that the employer was entitled to restructure its business in view of mounting losses and to reduce its workforce as necessary. However, no evidence was presented to the Adjudication Officer to show that consideration was given to the selection process for redundancy especially given that roles were remaining open for a period of time after the redundancies were to take place. No evidence was presented as to what engagement with the employer took place regarding alternate roles that the employee could be deployed to even on a short term basis.

The Adjudication Officer stated that while they accept that the employer found itself in a very difficult position it had not shown that the selection for redundancy was fair and had not shown that the selection for redundancy was fair and had to conclude that the dismissal was therefore unfair. In this case the Adjudication Officer was not satisfied that the employee had discharged his duty to mitigate his losses but still a sum of €4,600 was awarded.

This case is a timely reminder for employees that in making somebody redundant it is important to go through a process. It is important that a selection process is clearly set out. It is important that matters are properly communicated to the employee. It is important that the employee knows that the company has looked at the potential for alternative roles and that the employee has been given an opportunity to put forward alternatives to the employee being selected for redundancy. It is of course very important that all of this is in writing and that it shows clearly the selection process in line with a fair procedure.

**Unfair Dismissal & Procedures**

This issue arose in the case *of Murphy Supervalue Rosslare Harbour Alan Murphy –v- Devereux*. While the case is interesting as regards facts, the more relevant issue is in relation to how the Labour Court addressed the issue of procedures.

The Court set out that the procedures which emerge from the evidence and the submissions raised significant issues as regards fairness. They held it was clear that the procedure offered no transparency to the employee as regards the roles of various actors in relation to the investigation of the matter and certainly no transparency as regards to the ultimate decision maker in terms of sanction to be applied. The Court pointed out it was clear as a result that the employee was never provided with the opportunity to address those persons who had ultimately participate in and contribute to the decision to dismiss him.

The Court pointed out that the evidence was such that the employee was never put on notice in the disciplinary phase, that the investigation was focused on a proposition that he was guilty of sexual harassment on the basis that this had been the unannounced conclusion of the investigation phase. Neither was the employee put on notice of the disciplinary phase that the question of whether he sought sexual gratification was significant or that the degree to which he pre planned the interaction with the student would be a key matter. The Court found that it follows that he was never provided in the process with an opportunity to respond to the charge of sexual harassment or to address questions of sexual motivation or pre planning.

The Court reviewed the CCTV footage. The Court held that they could see that a reasonable employer might have concluded that the behaviour of the employee towards the student was inappropriate. The Court noted that in evidence it was acknowledged that inappropriate behaviour is different to sexual harassment. The Court pointed out that it had no role in substituting its own judgement for that of the employer. However the Court noted that no complaint of sexual harassment or behaviour of a sexual nature was submitted to have been made to the employer. The Court stated that it could find no basis for understanding how the events could have been concluded to be sexual in nature nor how the employer could, from the CCTV footage as they said in evidence that the Employee had sought sexual gratification in his interaction with a student. The Court held that this did not fall within the range of conclusion which a reasonable employer might make.

In this case the Court also pointed out that the investigated decision was not communicated to the Employee at the conclusion of the investigation phase or at any time.

The Court awarded a sum of €35,000.

This case highlights the importance of employers ensuring that proper procedures are applied.

In addition it highlights the importance of an employer ensuring that all relevant facts and information are provided to an employee.

**Constructive Dismissal**

In case ADJ-00020799 the issue of Constructive Dismissal on the breach of contract test was considered.

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

*"To advance of a claim for Constructive Dismissal an employee is required to show that he or she had no option in the circumstances of her employment other than to terminate his or her employment"*

The EAT went on to say

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

The case of Western Excavating EEC Limited –v- Sharp was also quoted wherein it was stated

*"If an employer is guilty of conduct that is a significant breach going to the route of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential*

*terms of the contract, then the employee is entitled to treat themselves as discharged from any further performance"*

That case effectively is the contract test. The Adjudication Officer quoted the case of Melcorpo Commercial Properties Unlimited Company –v- Egan TUD191 where the Labour Court considered the matter as follows

*"The question before the Court is whether or not the complainant was retained on no less favourable terms and conditions of employment than those she held while in the employment of the previous owner"*

In this case the employee was successful and an award of €9,000 was made.
It is extremely unusual that an employee will win the Breach of Contract case and this is an unusual case to come before the WRC.

**Sexual Harassment Cases in the WRC**

The annual report for 2018 from the Workplace Relations Commission would appear to indicate that claims of sexual discrimination actually fell. The difficulty with the Report from the Workplace Relations Commission is that their Report deals with case which go for hearing. The claim is lodged and is subsequently settled prior to going to hearing, which is the reality in the vast majority of cases, then in those circumstances their reporting system does not record this for statistical purposes.

In looking at decisions from the Workplace Relations Commission it is important that those reading any report understand that the Report is done on the basis of cases that actually go for hearing. In our opinion, and it is only our opinion, there would appear to be a significant increase in the number of such cases. These cases are not being picked up in Annual Reports due to the fact that they are being settled before a hearing takes place.

**Discrimination Under the Employment Equality Act 1998**

In case ADJ00007390 the employee in this case quoted a number of cases in relation to the test in relation to discrimination. The employee contended that discrimination occurs where there is less favourable treatment when it is linked to a characteristic in of the discriminatory ground quoted cases C-79/99 schorbus. The case of Ntoko –v- Citi Bank 2004 ELR116 regarding the burden of proof and the establishment of a prima facia case was quoted. The need to establish objective facts that infer discrimination in a case of Technology Company and a Worker EDA0714 was quoted. In reference the Dekker –v- Stichting case being case C177/88 regarding claiming that pregnancy comes within the remit of gender discrimination and was direct discrimination. The employee claimed that the decision in Campbell –v- Bank of Ireland Private Banking DEC2013-046 was a seminal case. While the case was ultimately lost on different grounds the Adjudication Officer in this case helpfully set out the argument of the employee.

**Payment of Wages Act 1991 – The Level of Compensation**

In case ADJ00024237 the Adjudication Officer in this case helpfully set out Section 6(2) of the Act and pointed out that the compensation cannot exceed the net amount of wages. In this we agree with the Adjudication Officer. In a case under for example the Organisation of Working Time Act for non-payment of annual leave, for example and Adjudication Officer is entitled to award effectively the economic loss by way of the gross amount. In a payment of wages case it must be the net amount. Equally in a claim under the Unfair Dismissal Legislation it is the net loss of wages.
There is an issue with the legislation in Ireland in that we do not have clear and defined definitions which are consistently applied. In relation to this particular case we believe that the Adjudication Officer got the decision absolutely right as to what the law in this matter is.

**Changing Workplace Policies**

The case of Pierce Dillon and the Board of Management of Catholic University School, being a High Court Judicial Review 2019 IEHC658 is an interesting case in itself and to an extent limited to the

particular facts of the particular case. Saying this, the judgement deals in depth with the law relating to the issue of investigation in disciplinary hearings.

While the relevant facts may not be relevant to most employers' one issue which has emerged is that employers need to be extremely careful when introducing new procedures.

Where employers have existing procedures in place and are introducing a new policy or amending a particular policy it is vitally important for employers to ensure that any new policy or amended existing policy does not conflict with any other policies or procedures.

When introducing any new policy it is important to review all existing policies on any staff handbook or contractual documentation in place to ensure that any new policy is in conformity with the procedures in other policies. If necessary, for example if a new disciplinary policy is being brought into play it may be necessary to review any other policies or procedures which would have a disciplinary element in them to ensure that they conform with the new procedure.

Where a new policy is being brought in it is useful to ensure that that policy will not normally impact on any existing investigation or process under way.

It is of course vitally important that employers have appropriate policies and procedures in place. However, it is equally important to ensure that those policies do not conflict with each other.

**Terms of Employment (Information) Act – Timeframe to bring a claim**

This issue arose in ADJ00020360.

It was argued by the employer that Section 41 of the Act of 2015 being the Workplace Relation Act provides at subsection (6) that an Adjudication Officer shall not entertain a complaint if it has been presented after the expiry of 6 months beginning on the date of contravention. The Adjudication Officer in this case held that there was a continuing breach and therefore the employee had brought the

claim within time. This arguement presented a number of times in the past and it is useful that it has been further clarified in this case.

An issue was raised in relation to the jurisdiction of the Adjudication Officer to hear the case and the employer relied on the Labour Court determination in case HSE-v-O Kelly TED1918. The Adjudication Officer held that the Adjudication Officer may only make a decision on a complaint that is validly before them and within their jurisdiction and stated quoting the Labour Court case TED1918:

*"Rather, the role of the Court in a complaint under the Acts is to determine if the provisions of the Acts have been complied with".*

The employer contended that the motivation of a complainant in bringing a complaint is relevant. The Adjudication Officer held that this was not appropriate.

This is an interesting case in dealing with technical issues. Both sides were legally represented by well known firms of Solicitors and Counsel. Therefore it is a helpful decision because all matters were so well litigated.

**Parent's Leave Top-UP**

IBEC have undertaken a survey in relation to the issue as to what companies are doing on the issue of Parents Leave Top-Up.

The results are;

- 47% - No they will not be topping up Social Welfare benefit for Parents Leave
- 18% - Yes to all eligible employees
- 1% - Yes to some eligible employees
- 34% - Undecided at the time of the survey

The definition of eligible employees that were referred to are those who have completed a service requirement to receive the top-up payment. Some companies have introduced a 6-12 month service requirement to receive any top-up payment.

Of course there is no obligation on any employer to pay a top up in respect of the Leave. It is our view that probably only larger employers are going to pay a top-up.

**The Gig Economy**

In California they have a Bill which has now been approved which could upend the Gig Economy. Business groups, as you can well imagine oppose the Bill.

A partner in a well-known law firm in San Francisco referred to the new Bill as

"A band-aid over an already complex legal analysis"

The Bill proposes a test to determine whether a worker would be designated as an employee or independent contractor under California wage laws and there would be a three – prong test being

- Whether the worker is free from the control and direction on the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact

- The worker performs tasks that are outside of the usual course of the hiring entity's business,

- The worker is customarily engaged in an independent established trade, occupation or business of the same nature as the work performed of the hiring entity.

In such cases the employee will be deemed to be an employee unless the employer can show all of the above following applied.

This may appear a very simple test though in fact it is not.

The Bill would exempt certain occupations such as doctors, investment advisors and some direct sellers. Gig economy workers are not included in the exemption.

In Europe Deliveroo is the entity which is most involved in litigation. In Spain this summer no less than three cases were taken in relation to the issue of delivery riders with each one ruling in favour of the delivery riders. In June 2019 the Special Court of Barcelona ruled that the status that Deliveroo placed on its delivery riders was "bogus" and while the company championing of autonomy for riders was organisationally sound the extent to which the company controlled its riders led the Court to the view that these delivery riders are employees and not self-employed contractors.

In another case it was held that the platform is an information platform that drives and directs the riders and that Deliveroo had sole control over this digital platform and while riders provided services Deliveroo had absolute control over the assignment of deliveries given to riders. As such it was held that that enabled Deliveroo to meet customer demands with supply but was not the rider's bikes which the riders owned themselves but the digital platform that controls whom the riders deliver to and consequently it was held that they were not self-employed.

It is likely that the recent Spanish law may well be subject to appeal.

Going forward

The EU Commission issued Directive 2019/1152 on Transparent and Predictable Working Conditions. The Directive intends to impose new minimum standards to ensure that all workers including those on atypical contracts benefit from more predictability and clarity as regards their working conditions. The difficulty is that the definition of a worker is not explicitly defined in EU law. However the European Commission's recent Access to Social Protection shows movement in a direction but that is non-binding on Member States.

In Ireland a persuasive assumption is that the initial determination of employment status in this area may well be done under the existing legal structures. The difficulty with this however is that the existing legal structures are ones which were designed for an entirely different type of economy. The Revenue's Code of Practice for Determining Employment or Self Employment Status of Individuals is really not fit for purpose in the current economy.

Solutions

Various road blocks have been put up particularly by the Department of Employment Affairs and Social Protection to attempt to stop any efforts to bring individuals into the category of employee by way of legal means. The Department has been very forthright, recently, in stating that they are undertaking investigations. The reality on the matter is that the Department recognises, as does the Department of Finance, that the Department of Social Protection is losing a considerable amount of USC, and the State is losing to the Revenue a considerable amount of Income Tax.

Of course the issue is complex but there are some very simple steps that could be taken immediately to resolve matters.

- By certifying that anybody who is paid less than twice the national minimum wage hourly rate of pay or twice the a Sectorial Employment Order rate will automatically be deemed to be an employee would effectively stop those in the construction industry and those engaging delivery drivers from classifying such individuals as "self-employed"
- Such a solution will probably resolve 85% of the issues
- By providing that where an entity misclassifies an individual as self-employed that in those circumstances the entity so misclassifying the individual will be responsible for paying tax on a grossed up salary on the basis that the individual has been paid "net" not gross and would be responsible for any outstanding ESC with no limit as to how far that matter can go back then where the employee is currently in employment and if they have left for a period of five to ten years would create an environment which makes it very clear that only legitimate self-employed contractors would be engaged.

In Ireland we have an endemic problem of individuals being classified as self-employed when they are no more self-employed than the man in the moon is a reality. The construction industry is rife with individuals being classified as self-employed. The industry which is involved in deliveries whether of food or other services is equally one where there are significant difficulties with individuals being classified as self-employed. The beauty industry is equally one where this is a constant problem whether individuals are working in nail bars which

seem for some reason to be a favourite for being classified as self-employed or those involved in modelling where they are engaged through an agency.

Flexibility in work practices is of course important. The reality however is that by classifying individuals as self-employed when in reality they are not is creating an underclass of individuals who are devoid of employment rights. Invariably these are individuals who are on low pay and are not in a position to fund challenges to their status. The gig economy is storing up problems for this country. Individuals in the gig economy find it extremely difficult to get mortgages. They find it difficult to get credit. Those who are misclassified are open to exploitation by those engaging them. There are entities which have set up on the basis of working on a particular basis. Many of these larger entities never set up on the basis that they were going to exploit individuals and have never sought to exploit individuals. However we now live in a different environment where certainty is an issue we as a country must address and the issue is whether we want flexibility or whether we want to protect workers. At the present time it would appear that the Department of Employment Affairs and Social Protection while making all the noises that it intends to act against rogue employers in reality appears to take a view that they wish to talk about the issue rather than address it. The underlying reason would appear to be that the Department of Employment Affairs is scared silly of doing anything which would in any way be seen as anti-multinational. Unfortunately the reality is that many large multinationals in this country are using the self-employed schemes to avoid the employment legislation in this country and this is particularly so in the IT industry. The Department of Employment Affairs is so terrified of upsetting the IT industry that effectively they are incapable of acting to address this issue.

**Private & Confidential**
The Minister for Justice and Equality
flexibleworkingconsultation@justice.ie

19 December 2019

**Re: Right to Disconnect Outside Work Hours**
---

Dear Minister,

I am proposing to make a submission in relation solely to the issue of the right to
disconnect outside work hours.

Our Organisation of Working Time Act, 1997 is based on the EU Directive. The
CJEU has recently held that an employer is obliged to maintain such records, as
is necessary to show the hours that the employee worked of any particular day.

When the Directive was adopted Ireland sought limited derogations.

There are some basic entitlements:

A right to an 11 hour uninterrupted rest period.
A right to rest periods during the day after 4.5 hours work and 6 hours work, of 15 minutes and 30 minutes respectively.
A requirement to have a 35 hour uninterrupted rest period every week which will normally be a weekend.
A requirement that Employees do not work in excess of 48 hours.

In respect of the Provisions of Section 12 of the Organisation of Working Time Act, it states that an employer shall not require employee to work for more than 4.5 hours, or 6 hours is relevant without providing the employee with a break. The issue of "required" is contrary to the Provisions of the Directive which have no such limitation.

There is effectively an obligation on an employer to ensure that the employee gets the appropriate rest and breaks periods.

Contracts of Employment will normally provide that an employee will work a set number of hours for week which could be up to 40 in many cases or sometimes longer and up to 48 maximum. In other contracts it will provide a start and finishing time on a daily basis. Many of those contracts will provide that the employee shall provide and do such additional hours as are necessary for them to perform their duties.

There will of course always be emergency situations which can arise. However, where an employee has a contract that sets particular number of hours per week or a daily start and finishing time, then if additional hours are required there is requirement under Section 17 of the Organisation of Working Time Act, 1997 to provide the employee with 24 hours notice. Because of the use of smartphones, employees can now obtain e-mails at any stage. They can obtain them at all times of the day and night. They can be receiving them on holidays.

Our legislation as regard holidays provides holidays following the CJEU determination are that holidays are a complete break from work.

Where employees do not have the appropriate rest and break periods this can result in stress, burnout, heart disease, impact on their time with their families and impact on their ability to undertake sport or other leisure activities.

As matters currently stand it would appear that employee have a certain protections but those protections are being eroded by some employers requiring employees to answer work e-mails or phone calls after hours. In other cases, it is more underhand in that if the

employee does not do so, effectively their opportunity for advancement can be limited.

I do believe that for the purposes of providing work life balance there does need to be a requirement that an employee outside of their contracted hours and particularly to ensure that they get the rest periods and proper holidays and do not work excessive hours should be automatically entitled not to answer a work phone or to answer e-mails outside of their contractual hours, except in an emergency situations.

We are currently creating situation where we have 24/7/365 availability. Without a clear and definitive statement that individual employees are entitled to disconnect from work, I believe that this will have a detrimental impact on employees. Where individuals suffer stress or other medical conditions as a result of excessive working this can only result in claims against employers for personal injury being the physical or mental injury sustained due to lack of rest. In addition, where an employees work excessive hours and do not get appropriate rest periods, there is a greater potential of those employees being involved in an accident where they hurt themselves or hurt others. This can be either in the workplace or on the road if they are driving home while excessively tired.

Flexible working has many benefits but at the same time, there needs to be boundaries so that Employee gets appropriate rest and break periods.

Kind regards,

Yours sincerely,

_____

**Richard Grogan**
**Richard Grogan & Associates**
**Solicitors**
**9 Herbert Place**
**Dublin 2**

***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.**