Introduction

Welcome to the May issue of Keeping in Touch.

April has been a strange time in legal firms and in business generally. We have been putting up a daily post on employment law issues since the Covid-19 lockdown started. These go up in LinkedIn and Twitter.

In preparing this newsletter we thought it was useful to give priority to sections dealing with unfair dismissal and redundancy due to the fact that these are going to become prevalent issues for colleagues, employers, employees, HR and IR practitioners and all those involved and interested in employment law over the coming months. This is an unfortunate fact that these issues are going to arise.

There are changes which will occur. You would never think that a crisis like Covid-19 could have a silver lining but for employment lawyers and clients it may well have. One of the issues will be that the WRC and the Labour Court but particularly the WRC will need to be running cases remotely. This will mean that issues such as submissions and documentation will need to be lodged in advance. This will give the opportunity for cases at hearing to be dealt with quicker. It will mean that there will be the issue that Adjudication Officers will have read submissions in advance there will be an opportunity hopefully for both sides to comment on each other's submissions and hopefully this will result in a situation where hearings themselves will take a lot less time. There will also then be the potential we believe for case management meetings so that issues relating to larger cases which may take a number of days can be scheduled properly to take account of those one day after another rather than the current system of a case being on for a day and then being adjourned to some other day into the future and possibly a subsequent day into the future again.

The issue in relation to remote hearings is an opportunity not just now but into the future to save costs to both employers and employees getting representation. If matters can be dealt with remotely there is every reason that case management meetings can be done remotely even into the future thereby reducing the time that representatives

have to be involved in going down for hearings that these can be done simply from their own office. In relation to technical legal arguments and technical submissions there is every reason why these should be able to be done remotely.

In the Labour Court there is going to be issues as to the right of access. This has been dealt with in the UK where hearings of tribunals in the UK in the employment field are now streamed in YouTube.

Where there is going to be remote hearings clearly there is going to have to be codes of conduct and undertakings given by representatives and those appearing that the hearing themselves will not be recorded.

There are challenges ahead however we have to look at these challenges and embrace them and we have to see going forward and make sure that the changes are for the better and provide a better-quality service to employers, employees and those using the services of the WRC and the Labour Court. The Labour Court is already significantly ahead of the curve having put in place trials before all of this Covid-19 broke looking at how submissions can be done in a more effective way and to limit the costs for the use of technology. We were delighted as a firm to be involved in the first test of same and we're looking forward to the new procedures being rolled out.

Finally, we would wish all those reading our newsletter well and hope that everybody stays safe.

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Out and About in April 2020

On 3 April Richard Grogan was interviewed on the Sean O'Rourke Show relating to Employment Law issues around the covid-19 lockdown.

On 15 April we had an article in Irish Legal News on discrimination in the workplace.

On 17 April we had an article in Irish Legal News relating to the Companies Act 2014 and issues relating to Section 678 of that Act as regards bringing claims to the WRC in the case of companies who are in liquidation.

On 20 April Richard Grogan became a member of the Mediation Institute of Ireland.

During April Richard Grogan has contributed a number of pieces to the Legal ED which are, podcasts being run by the Law Society to provide free CPD to Solicitor colleagues. There is a fee for these payable to Richard which have been donated to the Solicitors Benevolent Association.

Section 678 Companies Act 2014 – A Problem in the Making for Employment Lawyers

You might wonder why Section 678 of the Companies Act 2014 would have any relevance to employment lawyers at all. The answer is very simple. It is our view that post the current lockdown a significant number of companies will not reopen. There will be an issue of companies going into liquidation. The provisions of Section 678 provide that even where there is simply a resolution to wind up a company past then in those circumstances no claim could be brought to the WRC without the consent of the High Court.

The legislation which passed in 2014 had a provision relating to the Employment Appeals Tribunal. An individual was not stopped from bringing a claim to the Employment Appeals Tribunal even where a company was in liquidation.

There is no provision in the Companies Act which changed this to the Workplace Relations Commission. The Workplace Relations Act, 2015 makes no reference to Section 678 Subsection (2) at all.

The effect is that in those circumstances where a company is in liquidation or even a resolution has been passed no claim will be able to be brought to the Workplace Relations Commission.

This will mean that urgent applications will have to be brought to the High Court. There will then be the additional issue of potential claims against the State under the Charter of Fundamental Rights of the European Union for failing to vindicate the rights of citizens to have their cases heard before a Court or Tribunal.

The Workplace Relations Commission will not have the power to simply disregard Section 678.

It is absolutely imperative that the Companies Act 2014 is amended in Section 678 Subsection (2) to delete the words "Employment Appeals Tribunal" and to insert instead the words "Workplace Relations Commission".

This firm has written to the Minister for Justice, the Minister for Employment Affairs and Social Protection and the Minister for Business Enterprise and Innovation along with the Director General of the Workplace Relations Commission requesting that this issue is rectified as soon as possible.

If this is not addressed it would be our concern that there are two issues which will arise. The first will be that unnecessary applications clogging up the High Court as urgent applications will have to made followed on with claims against the State. The second is that unrepresented individuals will go to the WRC and the WRC will be obliged to apply the provisions of Section 678.

It might be argued that this is not something that will be argued. The reality on matters is that a liquidator is obliged to protect the assets of a company. If that means making a Section 678 defence application to the WRC then that will have to be done. If they don't then the liquidator themselves could be negligent. If the WRC decides to reject that kind of an application then the matter could well go on appeal to

the High Court by way of Judicial Review seeking effectively damages against the WRC for exceeding the jurisdiction as setting aside a statutory provision in such circumstances would be questionable as regards their jurisdiction.

Of course an Adjudication Officer applying the Charter can now confirm that a Directive has direct effect against both the State and private employers. However an Adjudication Officer setting aside Section 678 would effectively be ruling not only in respect of a Directive provision but effectively every other non-Directive provision and also would effectively be setting aside the legislation in full in relation to other claims unrelated to employment law which would go to the Courts. We do not see any way that the Courts could accept that an Adjudication Officer as part of the WRC would have such a jurisdiction.

Bringing A Claim Too Early

This issue arose in case ADJ-00023599. The Adjudication Officer referred to a case of An Employee -v- Employer UD1517/2012 where the EAT considered a case where the complaint was lodged before the employment terminated and stated

"The Tribunal is therefore satisfied that the date of termination herein is 12 November 2012 which means that the six-month time period within which there is an entitlement to bring a claim commenced on 13 November 2012 and the claimant's T1A was therefore received too early and in the course of her ongoing employment. The Tribunal therefore has no jurisdiction to proceed with a claim under the Unfair Dismissals Acts, 1977 – 2007 (now 2015)"

In this particular case the employee lodged her claim prior to the date that the resignation was submitted.

Difficulties do arise however in relation to notice periods. There can be a time where an employee for example resigns on a particular date or is dismissed on a particular date and issues the claim quickly even though the notice period in their contract would not have run out or the employers notice to the employee which might in some cases be pay in lieu of notice, but where the notice period will still apply will

not have finished. That arose in a case of Alan Brady applicant, and Employment Appeals Tribunal respondent and Bohemian Football Club being a decision of Mr Justice Barrett delivered on the 30th May 2014 [2014] IEHC302

In that case the court referred to the provisions of Section 8 (2) of the Unfair Dismissal Act 1977.

In that case the court stated

"A number of issues come into play at this point. The first is that prescribed time periods are typically intended to thwart the tardy, not punish the prompt. The second, is the long standing principle of equity, good since at least the time of Smith -v- Clay 1761 3 Bro CC 639 n, that "Equity aids the vigilant, not the indolent", the third is the practical issue of whether a person, here the Employment Appeals Tribunal, can be said not to have received notice within a prescribed period, if it had notice immediately prior to, at the commencement of, and throughout the period. It seems to the court that in the particular circumstances of this case it would be absurd to hold that where the Employment Appeal Tribunal had notice of a claim at the commencement of, and throughout, the six month period, that Mr Brady should be denied an opportunity to bring his claim before the Tribunal"

In that case Mr Brady was employed by the football club. In December 2011 he was dismissed by reason of redundancy. The employee asked when his dismissal was effective and was informed "now". No written notice of dismissal was provided to him and no P45 form has ever been provided despite it being requested. An Unfair Dismissal notice was completed on his behalf and dated the 22nd December 2011 and lodged on the 23rd December. The date of redundancy sighted in the form was the 16th December 2011. The claim came on for hearing before the Employment Tribunal in May 2013 at which stage the football club for the first time raised the issue that the Unfair Dismissal claim was out of time as it had been received before the dismissal took affect when an alleged two week redundancy period was taken into account.

Similar issues would arise for example where there was a notice period in a contract or a minimum notice period under the Minimum Notice and Terms of Employment Act, 1973.

While it is not relevant in the particular circumstances of the case been heard by the Adjudication Officer we felt it appropriate to raise this as this is a trap which employees can fall into at times.

Bringing a Claim Under the Wrong Act

This sort of issue arose in ADJ-00021173. It involved a Labourer and a Construction Company.

A claim issued under the National Minimum Wage Act. The Adjudication Officer in this case held that Statutory Instrument 445 of 2017 being the Sectoral Employment Order (Construction Sector) 2017 applied. The complaint was made under Section 24 of the Minimum Wage Act.

The Adjudication Officer stated that they were guided by the decision of McGovern J in County Louth Vocational Educational Committee -v- The Equality Tribunal and Pearse Brannigan 2009 IHC370 where the Court found it was permissible to amend a claim where the general nature of the complaint remains the same. The Adjudication Officer held that the respondent must be given a reasonable opportunity to deal with these complaints and the fair procedures adopted by the equality officer must be fair and reasonable and in compliance with the principles of natural and constitutional justice.

The Adjudication Officer held that they were satisfied that the employer had been notified of the nature of the complaints of unpaid wages and that the employer was on notice of the nature of the claim and altering the relevant legislation does not fundamentally alter the nature of the claim.

The claim in this case would have been brought under the National Minimum Wage Act. The employer in this case did not attend. The claim under the National Minimum Wage Act would have been a claim where the Adjudication Officer had no jurisdiction probably to hear the case as the appropriate notifications would not have been sent and in any event the employee would have been paid in excess of the National Minimum Wage.

We would have a difficulty in relation to the approach adopted by the Adjudication Officer. The Adjudication Officer held that there were arrears of wages of €1992. And also awarded compensation of two weeks wages being a total of €1395.36. On that basis the employee was paid in excess of the National Minimum Wage.

It would be our view that the Adjudication Officer should not have changed the claim without notifying the employer that the claim was going to now be heard under Section 6 of the Payment of Wages Act 1991.

There is also the issue in these cases where a claim is made under a statutory section as to whether they can actually be amended to a different statutory provision. There is further the issue as to whether those claims can effectively be back dated to the date of the original receipt or only to the date the Adjudication Officer changes matters.

There have been a number of these types of cases in the past but none of them have actually gone on appeal to the Labour Court where these issues would have been argued. It will be interesting to see whether such claims do actually end up before the Labour Court.

Limitation of Claims

This issue arose in ADJ-00023183. The employee brought a claim under the Employment Equality Acts and the Maternity Protection Acts. The employer argued that using dual avenues of redress processing the same complaint not being allowed and referred to the case of Power -v- Jahan Company EDA1326 being a decision of the Labour Court.

The Adjudication Officer in this case looked at this and held that the Labour Court determination in that case acknowledged that the Employment Equality Acts do not contain a statutory prohibition on duplication of claims. In that case the claimant had already been awarded a sum for the complaint heard under the Maternity Protection Acts, based on the same set of facts and now being recycled before the Labour Court to ground a complaint under the Employment Equality Acts. The Labour Court the Adjudication Officer pointed out went on to consider whether in the absence of the said statutory prohibition the issue of res judicata operated to prohibit a party from

litigating the same issue twice. They concluded that in the absence of a statutory prohibition, common law estoppel can apply in proceedings before a quasi - judicial tribunal. The Labour Court considered a number of authorities one of which was the decision in Cunningham -v- Intel Ireland 2013 IHC2007 where Mr Justice Hedigan J stated;

''All matters and issues arising from the same set of facts or circumstances must be litigated in the one set of proceedings''

In the Power case the Labour Court concluded, after the Adjudication Officer set out that the complainant was stopped from ventilating the complaint under the Employment Equality Acts as the complaint had already been judged under the Maternity Protection Act.

In that case the Labour Court stated.

''the present proceedings were merged and extinguished by the decision in her favour under the Maternity Protection Act, 1994 and she is estopped from seeking to litigate that cause of action again''

In this particular case there was no previous hearing, decision or award under the Maternity Protection Act and therefore the issue of Res Judicata as the Adjudication Officer pointed out would not arise nor the argument of transit in Res Judicata. The Adjudication Officer held there was no existing award to be merged with the later award. In this case the complainant asked to have both sets of complaints determined on the same set of facts at one hearing.

The Adjudication Officer held that the Adjudication Officer was not precluded from hearing the complaint.

We would agree with this view of the Adjudication Officer. There will be many situations where an employee may bring claims under different Acts. For example an employee could issue a claim under the Employment Equality legislation and the Organisation of Working Time Act. As a result of this the employee might, for example, be dismissed. In those cases the employee would have a claim of penalisation and victimisation under the two Acts. In our view there would be nothing to stop the employee litigating both claims at the same time but of course could not recover on the double.

In relation to a claim under the Maternity Protection Acts and Equality legislation where an employee is dismissed either during their maternity leave or is not allowed return to work then in those circumstances in our view there would actually be two separate claims. The first would be not being allowed to return. This would be a claim up to 26 weeks wages. The second would be for the dismissal. That would be under the equality legislation and would be up to 2 years wages. The fact that they arise out of the same event is not, in our view the issue. Different rights can arise from a single event.

The decision in Cunningham -v- Intel Ireland Limited referred to previously is a correct statement of the law. However one of the difficulties is that our employment legislation does not allow all matters and issues arising from a set of facts to be litigated in one set of proceedings. There is no one catch all claim.

Let us give a simple example; you have an employee who is made redundant. They do not receive any notice. If for example they have less than five years' service but more than two then they would be entitled to two weeks' notice under the Minimum Notice and Terms of Employment Act. However their contract could provide for three months' notice. In those circumstances the employee would have a claim under the minimum notice legislation for their minimum notice under that Act. They would have a second claim for the balance of the notice under the contract of employment. They could not take the claim for the contractual breach under the minimum notice legislation. In fact they could be bringing their claim for minimum notice under the minimum notice legislation to the WRC and could be bringing a claim to the Courts for breach of contract for the balance of their notice.

The legislation in Ireland is at best complex. The legislation does not take account of the difficulties that are there. The legislation allows separate proceedings to be brought for separate breaches. There are many occasions where a breach will result in various different claims and the procedures that are in place in the WRC do not provide for them all being dealt with under one set of proceedings. Yes the employee can send in multiple claims in the same claim form but they are not one set of proceedings. They are separate proceedings under each piece of legislation.

The facts of this particular case are interesting in itself as is the full decision on those facts but we will deal with that in a separate article. We thought that this particular element was one that it was important to highlight.

Time Limits to Bring A Claim Under the Employment Equality Act, 1998 As Amended

Section 77 (5) (A) sets out the fact that a claim for redress in respect of discrimination or victimisation may not be referred under the section after the end of a period of six months from the date of occurrence of the discriminator or victimisation to which the case relates or as a case may require the most recent occurrence. Section 75 (5) (B) allows for an extension of an additional six months where the complainant shows reasonable cause.

This issue was addressed in the case of Hurley -v- County Cork VEC EDA1124 where the Labour Court held in respect of Section 77 (5) "Subsection (5) of Section 77 these were the situation in which there are a series of separate acts of discrimination which, while not forming part of a regime, rule, practice of principle, or sufficiently connected so as to constitute a continuum".

Let us take a simple example of a situation. In January 2018 the employee is subjected to sexual harassment from a manager. In June 2018 the employee is again subjected to sexual harassment by the same manager. In December 2018 the same issue arises. In February 2019 the employee is subjected to racial harassment but not sexual harassment. A further incident of sexual harassment arises in July 2019.

Again in December 2019 there is a further incident of sexual harassment. In this case I am taking it, for example that all of the incidents of sexual harassment are virtually identical. This may sound an unusual situation but it is for example purposes.

In April 2020 the employee issues an equality claim under the Employment Equality Acts.

In those circumstances it would be our view that all of the incidents of sexual harassment are actually a continuum and therefore all may be referred to as part of the process as the last incident was within six months.

As regards the issue of racial harassment there is no issue of racial harassment within six months and the previous incident or racial harassment is more than twelve months before the date that the claim was lodged. In those situations we would be of the view that the racial harassment is not part of a continuum of sexual harassment and therefore the claim for racial harassment cannot be heard.

An interesting issue arises if an employee is subjected to sexual harassment say in December 2019. A further incident occurs in February 2020 and proceedings issue in April 2020. The issue there is can the employee issue two separate claims or are they limited to bringing one claim with the two incidents set out therein. In our view if there are two separate incidents of sexual harassment or two separate incidents of discrimination certainly if they occur within the six month period of a claim being lodged then in those circumstances the employee is entitled to bring a claim for each individual breach.

Constructive Dismissal Claims

In reviewing decisions of the Workplace Relations Commission over the last twelve months we have seen a considerable number of constructive dismissal claims that have gone through the WRC.

There appears to be a misunderstanding by a number of employees as to the grounds under which a constructive dismissal claim can be won.

The legal test in relation to constructive dismissal was set out in the case of Western Excavating (ECC) Ltd -v- Sharp where it is set out that it comprises two tests referred to as the "contract" and the "reasonableness" tests. The contract test is:

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

contract, then the employee is entitled to treat himself as discharged from any other performance"

The reasonableness test is the conduct of the employer and whether it

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

In case ADJ-00022313 the Adjudication Officer set out the test. The Adjudication Officer also helpfully set out how the Labour Court in Ireland reviewed this UK decision and referred to the case of Ranchin -v- Allianz Worldwide Cars S.A. where the Labour Court stated:

"In constructive dismissal cases, the court must examine the conduct of both parties. In normal circumstances a complainant who seeks to impose the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must demonstrate that they have pursued their grievance through the procedure laid down in the contract of employment before taking the step to resign – Conway -v- Ulster Bank Limited UDA474/1981"

The Adjudication Officer in this case has helpfully set out the case law at some length.

In many cases which we see employees will say that they saw no benefit in going through the internal grievance procedure as it would not have changed anything. That is a subjective rather than an objective test. If the employee is going to move that form of argument in relation to saying that that is why they did not go through the internal grievance procedure, which would include also going through the appeal procedure, then the burden of proof is very much on the employee to prove that. Mere assertions are not going to be sufficient.

There will be times when an employee was entitled to resign. However the law relating to constructive dismissal is extremely complex. It is not just a matter of walking off the job. There will be situations where an employee will have been entitled to do that and not go through the internal grievance and appeal procedures. However that will be in the minority of cases and in reality a tiny minority of cases.

Any employee considering resigning should get legal advice. It is surprising the number of cases which we see where the employee may well have had a good case of constructive dismissal if they had taken the time to have gone though the internal grievance and appeal procedures. In some cases employees will say that something was raised with a HR department or with a manager. There will of course often be no documents to support that.

If an employee has a difficulty and they do raise a grievance and the employer does not address that grievance either in line with the time limits specified in their contract of employment or in the alternative if there is no internal policy or procedures within a reasonable period of time then in those circumstances the employee will have attempted to use the grievance procedure. For employers if a grievance comes in it is important that that grievance is addressed as failure to do so can result in a claim being brought and being successful on the grounds the grievance was not addressed.

Investigation processes

In disciplinary matters there will often be a preliminary investigation process. It is sometimes argued that that investigation process was not fair. To a certain extent that argument does not carry much weight.

As is set out in case ADJ-00024334 it was held by the High Court in a case of Joyce -v- The Board of Management of Coláiste Iognal 2015 IHC809 that the full panoply of fair procedures does not apply at the investigation stage where no finding was made as a result of that process. In that case the Court stated at paragraph 74

"It is quite clear that the principles of fair procedures and natural justice do not apply to the investigator state provided that, in the words of Clarke J in Minnock 'no finding of any sort were made on behalf of the enquirer other than to determine that there is sufficient evidence or material to warrant a formal disciplinary investigation".

Now the position is entirely different if the investigation stage finds misconduct. In such cases then fair procedures are required. It is often the case that the investigator is there simply to take statements

and to set out facts which are agreed by all the parties and to set out issues where there is disagreement. If the investigator makes a determination of wrongdoing by the person being investigated then of course fair procedures have to be applied. If the investigator only limits themselves to determining whether or not there is an issue which warrants a formal disciplinary investigation and sets out what that issue is and there is no finding of fact other than to the extent that they are agreed by all then in those circumstances the normal rules of fair procedure do not apply.

Unfair Dismissal – Establishing Guilt or Innocence

There is a misunderstanding particularly by employees but also by some employer's that the role of the Workplace Relations Commission or the Labour Court is to establish in the case of an employee that they are innocent or in the case of a employer that the employee is guilty. In the case ADJ-00024334 the Adjudication Officer in this case set out that their job is not to establish the guilt or innocence of the complainant. The Adjudication Officer quoted the case of Looney & Co Ltd -v- Looney UD843/1984 where the Employment Appeals Tribunal stated

'"It is not for the EAT to establish the guilt or innocence of the claimant nor is it for the EAT to indicate or consider whether we in the employer's position would have acted as it did in its investigation or concluded as it did or decided as it did, as to do so would be to substitute our own mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in his position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's actions and decision are to be judged"

Putting this in very simple terms it is a matter for an Adjudication Officer to say what would an ordinary employer in the position of the employer against whom the claim has been brought would have done. If an Adjudication Officer finds that the actions of the employer were within the bounds of what a reasonable employer would have done in those circumstances then the dismissal will be deemed a fair dismissal provided fair procedures were applied. Even if fair procedures are applied if the Adjudication Officer decided that a reasonable employer in the shoes of the employer in the particular

case would not have acted as they did then in those circumstances it will held to be an unfair dismissal.

There is a lot of time wasted in hearings before the WRC, and to an extent, but to a much lesser extent, in the Labour Court where either the employer or the employee seeks, as part of the process to prove either the innocence of themselves or the guilt of the other party. That is not the role.

Unfair Dismissal – Fair Procedures

This issue arose in ADJ-00023533.

In this case the Adjudication Officer confirmed that they were guided by the requirements of SI No. 146-2000 which is the Code of Practice on Grievance and Disciplinary Procedures.

In this case the Adjudication Officer found that the employee understood he could have representatives with him throughout the investigation as he received two letters inviting him to a meeting which each letter referring to his right to bring a work colleague. This was in line with the disciplinary procedures as held by the Adjudication Officer. The Adjudication Officer held that the employee previously had been represented at a union in relation to a grievance matter and he must have been aware that he could have union representation with him if he had so chosen.

We would have a problem with this reasoning. The employee was being brought to a disciplinary meeting. He was advised that he could have representation from a work colleague. He was not advised of his representation rights as a regards a union. Assuming that the employee would have understood something that was not set out in letters inviting him to a disciplinary hearing is in our view moving matters forward quite a lot. On the basis that the employer had a disciplinary process in being which would have limited the right of representation to a work colleague. It is difficult to understand how some assumed right could be implied into the mind of the employee. The issue in Unfair Dismissal cases is always the issue of procedures.

In this case the employee had complained that individuals in the internal HR process had appeared at several times in the process and

it is, by implication, that they were involved at various stages. The Adjudication Officer found that there were a small HR team of two people and that it was inevitable that HR personnel would have roles to play in a disciplinary process. What is important in relation to this is that it is clear that the Adjudication Officer held that the HR personnel did not play a part in the decision-making process and therefore their involvement did not taint the process.

The employee in this case was dismissed for gross misconduct. The Adjudication Officer properly set out that the legal test as regards dismissal is whether it fell within the band of reasonable responses test as set out in the case of the Governor and the Company of Bank of Ireland -v- James Reilly 2015 IEHC241. We would agree with the reasoning there that is namely the question or whether the decision to dismiss was within the range of reasonable responses of a reasonable employer to the conduct concerned.

What is somewhat interesting in this case is that that test only applies once the Adjudication Officer has determined that this was gross misconduct that the employee was dismissed for.

Where an employee is dismissed for gross misconduct and a Tribunal determines that it was not gross misconduct then in those circumstances the dismissal is unfair. The fact that an employee could have been dismissed on the band of reasonable responses on an ordinary dismissal for misconduct is to an extent irrelevant. Once an employer claims that the conduct of an employee is gross misconduct then in any case it is a matter for the employer to show that the conduct complained of comes within the band of gross misconduct. If it does not come within that band then in those circumstances the dismissal is unfair.

Test for Dismissal

This was set out in case ADJ-00022035. The Adjudication Officer set out two important cases. The first is a case of Frizelle-v- Newross Credit Union Limited 1997 IHC137 where two points were raised.

The decision of the deciding authority should be based on the balance of probabilities flowing from the factual evidence and in light of the explanations offered.

The actual decision as to whether a dismissal should follow should be a decision proportionate to the gravity, and to the gravity and effect of dismissal on the employee. The Adjudication Officer also quoted the case of Abdullah -v- Tesco Ireland PLCUD1034/2014 citing Noritake (Ireland) Limited -V- Kenna UD88/1983 where the EAT held:

''What is required of a reasonable employer is to show that he/she had a genuine belief based on reasonable grounds, arising from a fair investigation that the employee was guilty of the alleged misconduct and that the sanction of dismissal was not disproportionate''

In this case the employee did not win.

The issue in these cases is that firstly there must be a fair process and secondly the penalty must be proportionate.

If either of these are not present then in those circumstances, in our view, the dismissal will be deemed to be unfair.

What do we mean by this? The answer in very simple. Even if an employee is one whom an employer believes has committed an offence which warrants dismissal, other than gross misconduct which is a very high bar for an employer to prove, if an employer does not afford the employee a fair process then the dismissal in itself will be unfair.

The next question is what is a fair process. The fair process will be whatever is set out is set out in the employers own policies and procedures or in the code of practice on grievance and disciplinary procedures whichever is most beneficial to the employee.

Where an employer does not set out fair procedures and apply them then the dismissal is going to be unfair. That does not mean that the employee is going to receive maximum compensation up to their full economic loss. The actions of the employee can then be taken into account in setting the level of compensation as to their part on causing themselves to be dismissed.

Even where an employer has a fair process the employer must consider alternatives to dismissal. If the penalty of dismissal is severe, which it always is, compared with the gravity of the offence then in those circumstances equally the dismissal will be deemed to be unfair.

In cases involving disciplinary matters it is vitally important for employers to get advice from an employment law solicitor on fair procedures and the processes they must go through in determining the penalty if the investigation determines that the employee has been guilty of the offence. Of course the solicitor is not there to advise on the penalty but rather on how the penalty will be assessed and the criteria to look at. If an employer is considering dismissing, an employment law solicitor may well be able to advise that the gravity of the offence is not one which any Court or Tribunal could reasonably regard as one which would warrant dismissal.

In addition, employees do need to get legal advice. Of course, employees are not allowed have legal representation in disciplinary hearings except in the most serious of cases. Saying this they are certainly entitled to obtain advice during the process. It is important the employees understand that they are entitled to have representation by a Union Representative or by fellow employee. Even if the employer is not a unionised employment an employer cannot refuse an employee the right to have representation by a Union Official. If the employee cannot get Union representation then assistance from a solicitor by advising them how to deal with the process is of benefit to them.

Unfair dismissal cases do not actually run on right and wrong if we can call it that. They depend on the process. It is the process which is going to be looked at. Many employers forget this. In unfair dismissal cases it can often be that the old adage applies namely ‘act in haste repent at ease’.

It is always our approach that if an issue arises that an employee, before anything is done is placed on suspension first. This is suspension on pay. It may be only for a day or two to let matters calm down.

If the employer regards the breach as serious warranting disciplinary action then an appropriate investigation needs to be put in place and a disciplinary process independent of the persons making the complaint. If the employer is the main witness and moving party in relation to matters then they must avoid a situation where they become judge, jury and executioner. Somebody else needs to be

appointed. Where a very senior individual is involved in moving the complaint it is invariably better than that an independent person, independent of the organisation carries out any investigation to determine matters and if any disciplinary action is warranted. The person hearing the issue should be independent of the organisation and certainly independent of being under the control of the manager or owner who have made the complaint.

In relation to any issue where a penalty is to be imposed it is vital that lesser penalties are considered and that this is not simply a box ticking exercise but rather a real exercise and that the person making the decision to dismiss can set out very clearly why a lesser penalty would not be appropriate.

Should An Employee Appeal A Dismissal Using the Internal Procedures

This issue arose in the case of An Employee -v- An Employer ADJ0000381 on the 12th April 2017.

It was specifically approved in case ADJ-00024334 which issued recently.

In the previous case the Adjudication Officer had stated:

"An appeal is not just an afterthought or a procedure that must be completed as a matter of course. It is a very important part of the disciplinary process and the greater the sanction that has been imposed the greater its importance. An appeal allows a dismissed employee the last chance to make their case, highlight any mitigating factors and seek protection for faulty procedures or disproportionality of sanction"

Where this has happened and an employee is putting in an appeal that does not stop the time running. Therefore the employee should consider issuing an Unfair Dismissal claim to the WRC. When an acknowledgment is received they can advise that the internal appeal procedure is being utilised and ask that the case is put on hold until that has finished. Because the time limit is six months and it is difficult to get an extension the use of an internal appeals procedure will not extend the time limits. Therefore if there is any question of the time limit elapsing it is best practice that the employee will issue the

claim as soon as practicable. It is always better to issue a claim early and find then that the appeal is allowed and withdraw the proceedings than be late issuing the claim and find if the appeal is not allowed that the employee is out of time.

Redundancy

There are some misunderstandings in relation to redundancy.

Where an employee applies for voluntary redundancy in those circumstances the employee is not entitled to notice pay.

Even if the employee has been on layoff for a considerable period of time that does not break continuity of service.

Both these issues arose in case ADJ- 00020619.

In that case the Adjudication Officer referred to the case of Darcy -v- McLoughlin Painting Contractors Limited MN94/2007 where the complainant in the case had been placed on temporary layoff. This was followed by a notification of indefinite layoff. The employees were invited to apply for voluntary redundancy which would not attract notice pay. In that case the complainant employee was unable to secure notice payment as a claim for voluntary redundancy disentitles notice pay.

The Adjudication Officer also pointed out that there is no limitation to layoff. The case of An Post -v- McNeill 1998 ELR19 is one where an absence of 26 weeks due to layoff did not break continuity of service.

On What Sum is an Employee Entitled to Claim Redundancy.

This issue arose in ADJ-00026661.

The Adjudication Officer in this case pointed out in the case of Minister for Labour -v- Nokia Ltd unreported High Court Costello J March 30 1983 and noted at 1984 4 JISLL49. In that case the High Court accepted that the salary of an employee at the date of a declaration of redundancy was the appropriate amount for the calculation of the statutory redundancy sum. This makes absolute sense. An issue is going to arise during the current situation where a

person has been placed on the temporary wage subsidy scheme what will be their rate of pay if they are made redundant after the scheme finishes or just before the scheme finishes.

Now I accept any employer going into scheme is stating that it is not their intention to make anybody redundant but in reality some redundancies will arise the issue then is whether it is their normal rate of pay or whether it is the reduced rate of pay that will determine the sum on which their redundancy payment will be calculated.

There is this High Court decision which determines matters and will be binding on the WRC and the Labour Court. The counter argument is of course going to be that effectively it was the employees' rate of pay prior to this which would be taken into account.

The legislation on this issue is unclear. This was not covered in the Act as to what would happen if somebody was then made redundant.

If ultimately this is an issue which may have to go to the High Court on some cases to determine what the appropriate rate is. It would be our view that an Adjudication Officer or the Labour Court would have a lot of sympathy with an employee where the company has gone into liquidation and the redundancy is going to have to be paid by the Social Fund then it is likely that the Department of Employment Affairs and Social Protection when it comes to paying out may seek to rely on this 1983 decision of Mr Justice Costello.

Time will tell.

Equal Pay Claims – The Three-Year Rule

The relevant legislation is Section 29 of the Employment Equality Acts. The relevant time in Subsection 2 is the period which falls during the three years which precede or the three years which follow the particular time.

In interpreting the redress provisions contained in Section 82 Subsection 1 of the Employment Equality Act 1998 as amended an equality officer in the case of Brady and Others -v- TSB ESOP Trustees Ltd DEC-E2004-007 stated:

"That if a claim for equal pay was made in relation to a disparity which had occurred more than three years previously and which no longer continuing the Director would not be able to award any compensation prior to the date of the disparity for example if a claim was made for equal pay in relation to a disparity which occurred some four or more years previous then the Director could not award redress under the Act".

It is sometimes argued that where the disparity occurred for example six years ago and is continuing then in those circumstances the employee cannot bring a claim. In our view that is absolutely incorrect due to the provisions of Section 29. The employee if they bring a claim is however limited to three years prior to the date of bringing the claim. The fact that the disparity will have been there for an extra period of time does not change the fact. It is effectively a continuing breach which the employee is entitled to litigate.

However it is important that the employee limits their claim to the statutory period set out in the legislation as if the employee attempts to go beyond that then in those circumstances an argument can be made that the claim is statute barred.

When setting a claim it is important that the employee limits their claim to three years. That can be put either in the claim form or as part of their submission.

Pregnancy Related Dismissal.

This issue arose in ADJ-00010478.

In relation to the burden of proof Section 85 of the Act sets this out. The case of Southern Health Board -v- Mitchell is one which is regularly quoted. In that case the Labour Court held that

''The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant must prove, on the balance of probabilities, the primary fact on which they rely in seeking to raise a presumption of unlawful discrimination. It is only if these primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a

presumption of discrimination, that the oneness shifts to the respondent to prove that there is no infringement of the principle of equal treatment''

When it comes to pregnancy related dismissal a book by Bolger, Bruton and Kimber states that:

''*The case law on the burden of proof in cases of alleged pregnancy dismissal have developed in a singular manner due to the particular provisions of the Equal Treatment and Pregnancy Directives. It is now well established that the existence of the pregnancy itself is sufficient to shift the burden of proof to the employer to prove that the dismissal of a pregnant employee was not on the grounds of the pregnancy''*

The above is a quote from Employment Equality law Roundhall Press 2012 Section 2-222 also the Labour Court in the case of Teresa Cross (Shanahan) Croc's Hair and Beauty and Helen Ahern EDA195 is one where the Labour Court set out the protections afforded to a pregnant woman in the following terms:

''Since the decision of Decker the protection afforded to pregnant women in employment has been strengthened considerable in the case law of the CJEU and in the legislative provisions of the European Union. Equally on grounds of gender is now expressly guaranteed by Article 23 A of the Charter of Fundamental Rights of the European Union"..

As the Adjudication Officer pointed out the Charter is now incorporated in the Treaty on the Functioning of the European Union and has the same legal standing as all proceeding and current Treaties. It is as the Adjudication Officer pointed out properly to be regarded as part of the primary legislation of the European Union.

Where there is a breach and a person has been dismissed on the pregnancy ground Case 406/06 Paquay is a case where the CJEU pointed out that in accordance with its case law the prohibition on less favourable treatment on the grounds of pregnancy comes within the ambit of the Equal Treatment Directive and the importance of providing real and affective redress in cases where the rights of pregnant workers are infringed was emphasised.

In that Case at paragraph 49 the Court stated that:

''While recognising that the Member State are not bound, under Article 6 of the Directive 76/2007 or Article 12 of Directive 92/85, to adopted a specific measure, nevertheless the fact remains, as is clear from paragraph 45 of the present judgment that the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive affect with regard to the employer and must be commensurate with the injuries suffered''

The Court set out a summary of matters and set out that it was abundantly clear from the authorities and the legislative provision that the European Union that:

''Women are to be afforded special protection from adverse treatment on account of their condition from the commencement of their pregnancy until the end of their maternity leave. The entitlement of that protection is to be regarded as a fundamental right within the legal order of the European Union and the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction''

The Adjudication Officer in this case also quoted the Labour Court case in Lee Trading as Peking House -v- Fox EED036 where the Labour Court stated that in calculating an award regard must be had to :

''Effects which implode from the discrimination which occurred. This includes not only the financial loss suffered by the complainant arising from the discrimination but also the distress and indignity which she suffers in consequence thereof''

In this case an award of little over €8,000 was made which represented six months of the salary of the employee.

Where an award is made under the Employment Equality Acts this is compensation and is not treated as loss of earnings even though the Adjudication Officer in cases may set out what it is equivalent to. Therefore the payment is tax free.

Discrimination by One Employee Against Another Employee

The issue of the liability of an employer for the actions of an employee towards a fellow employee is covered in Section 15 of the Employment Equality Act 1998 which provides:

"Anything done by a person in the course of his or her employment shall, in any proceedings brought under this Act be treated for the purposes of this Act is done also by that person's employer, whether or not it was done with the employer's knowledge or approval"

Effectively this in vicarious liability.

This makes perfect sense where particularly in relation to discrimination such as sexual harassment or racial harassment and also in relation to very often issues of gender and sexual orientation to name just a few. Invariably, where one employee discriminates against another employee it is done without the authority or consent or approval of the employer. The employer is still liable.

In such circumstances it is imperative that an employer has in place an appropriate policy to deal with harassment and discrimination.

Where an employer receives a complaint then there is a defence in Section 14 of the Act where the employer immediately seeks to investigate matters and puts in place procedures to stop the discrimination then the employer may be able to relyoin that defence.

Just because an employer might then decide that the individual against whom the complaint is made did not intend to cause offence is not sufficient. The employer has to look at it from the point of view of an employee being subjected to that behaviour.

The intention of the person who did or said the act complained of is irrelevant.

In dealing with matters to ensure that there is no repetition this may involve moving the person who caused or said the matter which resulted in the offence created to another site if that's possible or to a different part of the business. It may mean putting that person under the disciplinary process and taking appropriate action up to and

including dismissal. It may include a lesser penalty but that penalty must be appropriate to the level of discrimination. Protections must be put in place to stop a repetition. Disciplinary action or moving the person who caused the offence or a demotion or some other clear penalty will often be sufficient to protect the employer. Where action is being taken it is important that the person who made the complaint is made aware that action has been taken and that appropriate supports are put in place for them to report any further issues and to assure them that they will have the appropriate supports and that the employer is there to support them and to avoid any repetition.

Equality Claims – The Test

In case ADJ-00024277 the Adjudication Officer in this case helpfully set out the case of Arthur Valpeters -v- Melburry Developments Limited 2010 21ELR64 where the Labour Court stated in respect of the provisions of Section 85 A that:

"This requires that the complainant must firstly establish facts from which discrimination may be inferred. What those facts are will vary from case to case and there is no closed category of facts which can be relied upon. All that is required is that they must be of sufficient significance to raise a presumption of discrimination. However, they must be established as facts on credible evidence. Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn. Section 85 A places the burden of establishing the primary facts fairly and squarely on the complainant and the language of this provision admits no exceptions to that evidential rule."

The particular case referred to by the Adjudication Officer is helpful in setting out the law.

There can be a lot of misunderstanding as to what the burden of proof will be.

For example, if a person comes to the WRC saying that they advised their employer on a Monday that they were pregnant and they were then dismissed on Friday that will be sufficient evidence to raise a presumption that they were dismissed because they were pregnant. It

will then be a matter for the employer to rebut matters and the burden of proof will pass to the employer.

Equally if a person has been on maternity leave and returns to work and a year later they are dismissed and they then say that they were dismissed because they have children and/or took maternity leave that is going to need probably something more than just that simple statement.

If a person brings a claim and says that they have been dismissed on any of the nine grounds and they base that on the fact that they were within one of the nine grounds that in itself will not be sufficient. Just because an individual comes within one of the nine protective grounds is not enough to shift the burden of proof to the employer. Other evidence will be required.

It should however be remembered that in discrimination cases discrimination will rarely be open. It is unlikely that an employer is going to tell an employee that they are being dismissed because they come within one of the nine grounds. Therefore in relation to the evidential rule this is taken into account and it is a matter for the employee to put up simply sufficient facts from which discrimination might reasonably be inferred. They do not have to prove that this was the only ground. All they have to prove is that it is reasonable that this could be the ground.

In many equality cases the employee will simply make bland assertions. Rarely will they be sufficient. The issue will often be the nexus or how close an issue is which ultimately results in a dismissal or a discriminatory treatment. For example, a case of a person advising the employer on a Monday that they were pregnant and they are then fired on Friday or possibly even a week later will indicate a close relationship between telling the employer they were pregnant and them being dismissed. If they are dismissed four months later that may not be sufficient. However, if they have been dismissed without being given any reason or for a reason which is illogical or would be patently unfair then that might well be enough to shift the burden to the employer. For example, an employee on the 2nd January tells and employer that she is pregnant and four months later is dismissed on the grounds that she was late for work on two occasions. With her being able to show that other individuals who are not

pregnant had in the past been late for work and had not been dismissed or during that period had been late for work and were not dismissed will then be sufficient to shift the burden back to the employer.

The Equality Legislation is one of the most complex areas of law in Ireland. It is always advisable that employees get advice from an employment law specialist before issuing proceedings. Equally employers who may have a claim against them should also get proper appropriate legal advice from a solicitor with the appropriate qualifications.

Compensation in Equality claims

This issue was dealt with in ADJ-00010478 where the Adjudication Officer helpfully pointed out that in setting compensation under Section 82 of the Acts compensation can be awarded to a maximum of 104 weeks remuneration for an act of discrimination. The Adjudication Officer pointed out that in the case of Lee Trading as Peeking House -v- Fox EED036 the Labour Court stated that in calculation such an award regard must be had to:

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

That decision of the Labour Court runs very much in line with what is referred to as the Von Colson and Kamann principles.

Compensation in an equality case is not just for economic loss. It is there to compensate the individual for the distress caused. It is also to set compensation at a level which will be persuasive of an employer going forward being compliant.

Discrimination Under Employment Equality Act, 1998 - The Test.

In the area of discrimination cases there is a lot of confusion. The case law is very specific but the understanding of matters outside the legal area is somewhat unclear and a case of ADJ-00020828 is helpful in setting out the legislation.

The Adjudication Officer in this case set out the provisions under Section 85A of the Employment Equality Acts, 1998 – 2015. The effect of this section is to place the burden of proof in the first instance on a complainant to establish facts which on an initial examination leads to a presumption that discrimination has occurred. This is referred to as prima facia evidence. The Adjudication Officer pointed out that as set out by the Labour Court in Graham Anthony & Company Limited against the decision of an equality officer in respect of a complaint of Mary Margetts EDA038 the Labour Court stated:

'' The mere fact that the complainant falls within one of the discriminatory grounds laid down under the Act is not sufficient in itself to establish a claim of discrimination. The complainant must use other facts from which it may be inferred on the balance of probabilities that an act of discrimination has occurred''

As set out in the case of Mitchell -v- Southern Health Board 2001 ELR201 that case held;

'' It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the burden of proof shifts to the respondent to prove that there is no infringement of the principle of equal treatment"

This is a useful decision in restating the law.

Discrimination in Providing a Job

This issue arose in ADJ-00016575.

The individual bringing the complaint brought the complaint against a firm of solicitors, 29 people applied, 2 were male and 27 were female. 6 female candidates were short listed, 5 of these attended for interview. No male candidate was shortlisted. The Adjudication Officer considered the respondents explanation for not short listing the claimant as well as the CV's of the candidates shortlisted. One candidate being candidate no 4 had no experience either in law or administration and her work experience was confined to being a waitress. The job advertisement included "previous receptionist

experience in a busy working environment". The Adjudication Officer held that having considered the claimant's CV and the fact that he had extensive experience in administration in a law office he was satisfied that he was as well if not better qualified than candidate no 4 and accordingly an awarded of €2,000 was made.

This case highlights the importance of employers putting in place proper procedures for job advertisements. In this case the parties were named.

So what should an employer do:

1. The first issue is to work out what qualifications if any will be required. If this is a very junior position or somebody is going to be trained in then it is a simple matter of simply saying that no previous experience is required.

2. If previous experience is required then it is a matter of setting out what that experience should be. This needs to be realistic.

3. If previous experience is needed for the job then that should be set out. In some cases you may look for somebody that has a minimal level of experience in the job but that will often be looked at in light of the salary that is going to be provided.

4. Consider having an application form. That can be easily set out to be non gender specific and to avoid any issue arising which could raise an issue of discrimination under any of the nine grounds under the Employment Equality Acts.

5. If you receive in a CV some person in the firm or company who is not going to be involved in the selection process should make a copy of each CV. In respect of the copy the name of the individual should be deleted this will avoid any issue in relation to race or gender.

6. Any information contained therein which might indicate the gender or race or any of the other nine grounds should be deleted for example if somebody sets out their activities or interest and one person puts in rugby and another person puts in hockey and while those sports are played by both men

and women there may be a view that it is more likely that a particular sport would be played by a particular gender. Anything like that should be deleted. If using an application form it is very easy to delete such matters.

7. Unless part of the job involves sales or something like that where membership of clubs or organisation might be important, which should have been then set out in the job advertisement any such issues would normally be deleted. It is probably better that the person reviewing would simply take a note of how many organisations or clubs the person is a member of and delete any specifics.

8. The individual reviewing the CV's must make sure that they delete anything which could indicate gender. Therefore a school that a person may have gone to may need to be deleted unless the person reviewing same knows that it is a school that is not limited to one gender.

9. The person then that sees the CV's should see CV's that have nothing on them which are specific that would have any of the nine grounds that could be identified. In selecting individuals for interview again there should be some form of selection process used. On the initial selection it may simply be, does the person indicate that they have the required experience. It is important however that the person initially reviewing delete anything which would show that somebody had more than the experience requested so as to avoid an age ground issue.

10. The individual then selecting for interview should be selecting on documentation, all of which must be maintained, which would show that there could have been no discrimination on any of the nine grounds as the information before them was redacted from the CV and that the CV's were neutral.

11. Not every selection process has to be absolutely neutral. If you take a firm or company offering a job there is nothing to stop them as part of the selection process deciding that they will firstly interview people who would live very close to where they operate. If the job involved secretarial work, for example,

they might look at whether there were any typographical errors. However whatever criteria is going to be used it is important that it is documented before the process starts. It is also useful to decide how many people will be interviewed. You might have a situation in the future where you might receive a hundred CV's who would all be potentially suitable. You might have decided before you received in any CV's that you would not be interviewing more than ten people. The selection process there then may very well be some random system. It could be everything from the first ten that were date stamped received to having somebody different simply pick out ten of whatever the selection process is again it should be documented.

12. The main issue to remember when looking at selection for interview is always that you must be aware of the potential of a claim and therefore put in some structure or facility which is independent of the person making the selection which if it is challenged into the future can be shown that there was no discrimination on any of the nine grounds.

13. When it comes to an interview process again there should be a marking sheet. The person with the top marks should be offered the job first.

Conclusion

If you have such systems in place it is unlikely that you can be caught with a claim of discrimination.

Once Covid-19 is over there is likely to be significant job losses. It does mean that there will be in the future a lot of job applications for many jobs. There is always the potential that an unsuccessful candidate would bring an equality claim. Therefore having a system in place before you start the process and which is followed fully throughout the process will give employers the best opportunity of avoiding a claim being successful against them.

Equally if an individual challenges why they did not receive an interview or the job by being able immediately to set out why a

person was not called to interview or why a person who was called for interview did not get the job reduces the potential of a claim.

Parental Leave

In case ADJ-00025209 this issue was addressed.

The submission by the employer in relation to what the law was, was not actually challenged by the Adjudication Officer and held that the law had been properly set out even though finding against the employer. The employer had argued that the issue of what constitutes urgent family reasons has been extensively litigated. It was argued that the urgency of a family situation cannot be judged in hindsight nor can the question as to whether the employee's presence was indispensable. The matter needs to be looked at from the employee's point of view at the time the decision was made not to go to work. The cases of Carey -v- Penn Racquet Sports Limited 2001 ELR27. The fact that an illness subsequently transpires to be non-serious is not relevant. Whether or not the employee's presence in indispensable is a question of fact and not a question of law as held in the case of McGaley -v- Liebherr Container Cranes Limited 2001 ELR350 and also the case of Quinn -v- Higgins Engineering Galway Limited 2000 ELR102.

It must be pointed out that Force Majeure leave under the Parental Leave Act is limited to three days in twelve month period and five days in any twenty four month period.

Force Majeure Leave – Claiming Same

This issue arose in ADJ-00023633. The Adjudication Officer in this case set out Section 13 of the Act.

Force Majeure leave applies where for urgent family reasons owing to an injury to or the illness of a person specified in Subsection 2 the immediate presence of an employee at the place where the person is, whether at his or her home or elsewhere, is indispensable.

The facts of this case are interesting but what was more interesting is that the Adjudication Officer in this case was satisfied that the employee raised the issue about her entitlement to Force Majeure

leave with the employer by way of email within a few days of her return to work. The Adjudication Officer however pointed out that the Act places a clear and unambiguous requirement on an employee to notify the employer in a manner set out in Section 13 Subsection 3 of the Act. The relevant Statutory Instrument is SI No. 454 of 1998. It must be set out in that prescribed form or in a form to like effect.

The difficulty with Force Majeure leave is that the entitlement may arise but unless the employee notifies the employer in accordance with the relevant Statutory Instrument then the employee does not receive the entitlement. In this case the Adjudication Officer found that the claim was not well founded as the employee had not used the correct form.

This is an issue which arises. Unfortunately, the Act does not have the relevant Statutory Instrument referred to in it nor is it set out in a Schedule to the Act which would have made matters far easier for somebody looking to make a claim.

Entitlement to annual leave where an employee is out sick.

This issue arose in ADJ-00025283 involving an Accounts and Office Manager and a Facilities Engineering Company. The Adjudication Officer in this case helpfully set out Section 20 of the Act along with Section 23. The employee in this case had been out sick in the leave year 2017/2018. No leave was taken and 20 days were due for the leave year 2018/2019 and up to her termination on the 13th February the employee had an entitlement of 17 days. This amounts to 37 days which the Adjudication Officer found was due at a rate of €5,483.40. The Adjudication Officer awarded this amount but importantly also ordered a further sum of €5,000 as compensation for the employer refusing to pay the employee their entitlement under the Act when she requested this on the termination of her employment.

An employee is out sick continues to accrue their entitlements. Now it must be noted that is not forever Section 23 of the Organisation of Working Time Act provides that the relevant period means in relation to a situation where a position finishes that it is the current leave year and the leave year immediately preceding the current leave year. Now in looking at leave years it must be remembered that the leave year for

the Organisation of Working Time Act commences on 1 April and finishes on the following 31st March.

Minimum Notice & Terms of Employment Act, 1973 – Right to Notice

This case arose in ADJ-00021593 where the Adjudication Officer went through the legislation in some depth. The Adjudication officer pointed out that an employee is entitled to waive notice under the Act. However unless the employee has waived their notice then in those circumstances, as found in this case the employee was entitled to be paid their notice period where they had sought to work out their notice.

Even if the employee had not sought to work out their notice there is a strong argument that in those circumstances unless the employee has specifically waived their right to the notice payment they are entitled to it.

There is an exception, though it was not relevant in this particular case, that where an employee is dismissed for gross misconduct the employee is not entitled to their minimum notice.

Frivolous and Vexatious

As we have set out in previous issues the argument that claims are frivolous and vexatious are often raised. In case ADJ-00021674 the Adjudication Officer in this case helpfully set out the law relating to what this means.

In Farley -v- Ireland and Others 1997 IESC60 Mr Justice Barron stated

"So far as the legality of the matter is concerned frivolous and vexatious are legal terms, they are not pejorative in any 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 if 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 McCracken J set out in the Supreme Court:

"*While the words "frivolous and vexatious" are frequently used in relation to application such as this, the real purpose of the jurisdiction is to ensure that there will not be an abuse of the process of the courts. Such a produce cannot be permitted for two reasons. Firstly, the courts are entitled to ensure that the privilege of access to the courts, which is of considerable constitutional importance in relation to genuine disputes between parties, will only be used for the resolution of genuine disputes and not as a forum for lost causes which, no matter how strongly the party concerned may feel about them, nevertheless have no basis for a complainant in law. The second and equally important purpose of the jurisdiction is to ensure that litigants will not be subjected to the time consuming, expensive and worrying process of being asked to defend a claim which cannot succeed."*

In this particular case while the Adjudication Officer found against the complainant the Adjudication Officer at the same time set out the claims were not frivolous and vexatious.

Settlement Agreements – Waiving of Employment Rights.

This issue arose in ADJ-00019764. In this case this issue was raised and the case of Hurley -v- Royal Yacht Club 1997 ELR225 was raised. In that case the complainant had signed an agreement accepting certain payments in full discharge of all claims against the respondent. Mr Justice Buckley in the Circuit Court held that the claim for Unfair Dismissal could proceed as once an employee is dismissed the employee was entitled to the benefit of the Act Section 13 of the Unfair Dismissal legislation sets out that a provision in any agreement shall be void in so far as it purports to exclude or limit the application of or is inconsistent with the provisions of this Act. However it was held that effectively it did not prevent agreements under the Act however the employee must be given full and informed consent and is entitled to be advised of his or her entitlements under Employment Protection legislation and these must be set out.

A further case on this is the case of Sunday Newspapers Limited -v- Kinsella and Bradley 2008 19 ELR53 where the High Court held that

an employee can contract out of statutory rights in that case Mr Justice Smyth held:

''An employee being offered a severance package was entitled to be advised of his entitlements under the Employment Protection legislation and any agreement or compromise should list the various applicable statutes or at least make it clear the same had been considered by the employee. In addition, the employee should have been advised in writing to seek appropriate advice of his rights. In the absence of such advice, a severance agreement waiving the statutory rights of the employee would be void Hurley applied''

The other case which was quoted is the case of Board of Management Malahide Community School and Dunne Conaty 2019 IHC486 where Mr Justice Simmons referring to Section 13 of the Unfair Dismissals Act in the case of a fixed term legislation case stated:

''On its literal meaning, Section 13 precludes an employee from ever contracting out of their rights. However, there is case law which suggests that – at least in the context of settlement agreements – an employee may be entitled to waive their right based on informed consent. The school cannot avail of this in its appeal. This is because it is common case that the teacher had not been informed that the contract of October 2015 would entail the loss of her acquired rights. Indeed, it appears that both the school and the teacher were laboring under the mistaken belief that the teacher did not have any acquired rights''

Another issue which arose and does arise is whether an Adjudication Officer or the Labour Court can go behind a waivered agreement. This issue arose in the case of Starrus Echo Holdings Limited and Gerald O'Reilly UDD1868 where the Labour Court declined jurisdiction to go behind a waiver. Where an employer is putting a waiver in place that waiver agreement will have been drafted by the employer. It must therefore be construed, in our opinion, strictly against the employer. If there are any mistakes or errors then the document cannot be amended to rectify same. Where there is a wavier the wavier will have to be specific.

Section 10: Instruction, Training and Supervision of Employees

A lack of training, instruction and supervision of employees are big contributing factors to successful personal injury* claims* for workplace injuries* against employers and their insurers. Section 10 of the Safety, Health & Welfare at Work Act, 2005 sets out an employer's statutory obligation to provide training, instruction and supervision of employees. The section is broken down in detail below: –

- Section 10 (1) (a): The training must be provided in a form, manner and language that is likely to be understood by the employee. This is very important if, for example, an employee does not speak English very well.

- Section 10 (1) (b): Employees must receive time off work, with no loss of pay, for adequate task specific training and training in relation to emergency measures.

- Section 10 (1) (c): The employer must take into account the capabilities of an employee in relation to safety, health and welfare for any specific task assigned to him/her.

- Section 10 (1) (d): The employer must protect against the dangers that specifically affect a certain class of particularly sensitive employees and / or any group of employee(s) exposed to risks expressly provided for under statute.

- Section 10 (2): The employer shall adapt training to take account of any new risks or changes to health, safety and welfare and training will be repeated periodically, as appropriate.

- Section 10 (3) (a), (b), (c) and (d): The employer shall provide training to the employee on recruitment, where an employee has been transferred or the employee's tasks have been changed, on the introduction of new equipment, a new system of work or new technology.

- Section 10 (4): The employer must ensure that persons in the workplace who are employees of another employer receive

instructions in relation to safety, health and welfare as necessary or where appropriate.

- Section 10 (5): The employer must give training to fixed term employees or temporary employees, having regard to their qualifications and experience, who will be working in the workplace.

Back injuries* and/or repetitive strain injuries* usually arise among employees who have not been properly trained. If an employee has not been properly trained or has not received proper instruction or is not properly supervised, then it is reasonably foreseeable that the employee could become injured. In those circumstances, these injured employees usually have quite strong personal injury* claims*. Compliance with the Safety, Health and Welfare Act 2005 and the regulations applicable thereunder will make for a better, more productive and lucrative work environment.

Why is PPE so Important from a Legal Point of View?

We have heard a lot about PPE, or personal protective equipment, in the news headlines over the last number of weeks in light of the current COVID19 pandemic. We all know that it is a measure which is used to keep workers safe while carrying out their work in accordance with their employment. In the current circumstances with COVID19, using PPE will save lives. While there are lots of employers who will regard the provision of PPE as an absolute priority, there are also employers who have an extremely relaxed attitude to the provision of PPE and, as we move through the economic aftermath of COVID19, there will be employers who will view PPE as an expensive outlay and cut the cost of providing same. This will end up being the most expensive cost saving measure ever implemented by those businesses.

The reason why the provision of PPE is so important from a legal point of view is because employers have a duty of care to employees. While an employer is not an insurer for its employees, it is well settled law that an employer must take reasonable care for the safety of its employees. In addition to this common law duty of care, an employer also has a statutory duty of care under the Safety, Health and Welfare at Work Act 2005 to ensure the safety, health and welfare of its

workers so far as is reasonably practicable. Section 2 (6) of the Safety, Health and Welfare at Work Act 2005 sets out the definition of "reasonably practicable". This is an important definition as this is the standard of care to which an employer will be held:

"For the purposes of the relevant statutory provisions, "reasonably practicable", in relation to the duties of an employer, means that an employer has exercised all due care by putting in place the necessary protective and preventative measures, having identified the hazards and assessed the risks to safety and health likely to result in accidents or injury to health at the place of work concerned and where the putting in place of any further measures is grossly disproportionate having regard to the unusual, unforeseeable and exceptional nature of any circumstance or occurrence that may result in an accident at work or injury to health at that place of work."

So how does an employer take reasonable care for its employees and ensure their safety, health and welfare so far as is reasonably practicable? It can provide a safe place of work, a safe system of work, competent staff and proper equipment. Providing PPE can help achieve a safe place of work and a safe system of work. However, the provision of PPE and simply leaving it in the workplace will not be sufficient. All employees must be instructed to use the PPE and employers must ensure so far as is reasonably practicable that all employees are following these instructions.

An employer also has a statutory duty under Section 19 of the Safety, Health and Welfare at Work Act 2005 in relation to hazard identification and risk assessment. A risk assessment will identify the risks of COVID19 in the workplace, the protective and preventative measures taken and the resources provided for protecting the safety, health and welfare of workers at the place of the work. All of this information should then be recorded in a safety statement pursuant to Section 20 of the Safety, Health and Welfare at Work Act 2005. Again, this is where the provision of PPE and instruction in relation to the usage of same will arise.

While reading the above, an employer may think that this is just lawyers being overzealous about health and safety law. However, if an employee becomes sick or injured at work and subsequently brings a personal injury claim or the employee's family bring a claim for fatal

injuries, a court will analyse whether proper equipment, a safe place of work and a safe system of work were implemented. In addition, a court will also examine whether the employer complied with its statutory obligations under the Safety, Health and Welfare at Work Act 2005. If an employer has not been compliant, it will have a difficult time successfully defending such an action. There may even be issues with insurers providing indemnity in extreme cases as a result. Accordingly, it is in an employer's best interests to be compliant in an effort to keep injury and illness among employees at a minimum at work. This will also result in happier employees which contributes to good productivity and revenue for business, which will be needed as our economy navigates its way out of the aftermath of COVID19.

Section 19: Hazzard Identification in the Workplace

It is well settled law that an employer owes a duty of care to an employee. An employer must take reasonable and prudent steps to take care for the safety of it's employees. One of the ways that an employer can do so is by complying with it's statutory obligations under S19 of the Safety, Health & Welfare at Work Act, 2005. This section relates to hazard identification and risk assessment. The section is broken down in detail below: –

- S19 (1) requires an employer to identify the hazards in the place of work under it's control, assess the risks presented by those hazards and to be in possession of a risk assessment. The aim of a risk assessment should be to reduce the risk of injury and/or illness associated with work.

- S19 (2) requires an employer when carrying out such a risk assessment to take into account the work being carried on at the place of work and to have regard to it's statutory duties.

- S19 (3) requires an employer to review it's risk assessment where there has been a significant change in the matters to which it relates or there is a reason to believe that the risk assessment is no longer valid. In either of those circumstances, the employer is required to amend the risk assessment appropriately following review.

- S19 (4) requires an employer to take steps to implement any improvement identified as necessary in the most recent risk assessment which relates to the safety, health and welfare at work of employees. This section also requires an employer to ensure that any such improvements are implemented in respect of all activities and levels of the place of work.

- S19 (5) requires that every persons to which Sections 12 or 15 of the Safety, Health & Welfare at Work Act applies shall carry out a risk assessment in accordance with S19 even though it's duties under those sections may apply to persons other than it's employees.

It is in an employer's best interests to be in compliance with S19 in an effort to keep injury and illness among employees at a minimum at work. This will lead to a reduction in any sick leave absences, minimum exposure to personal injury* claims* and happier employees which contributes to good productivity and revenue for any business owner.

Section 20: Safety Statement

Pursuant to Section 20 (1) of the Safety, Health and Welfare at Work Act 2005, employers must have a safety statement. This statement will be based on the identification of hazards and the risk assessment carried out pursuant to Section 19 of the 2005 Act. It is a protective and preventative measure specifying the manner in which the safety, health and welfare at work of employees shall be secured and managed.

Section 20 (2) sets out what the safety statement must specify. The specifications are as follows: –

- the hazards and risks assessed;
- the protective and preventative measures taken and the resources provided for protecting safety, health and welfare at the place of work to which the safety statement relates;
- the plans and procedures to be followed and the measures to be taken in the event of an emergency or serious and imminent danger, in compliance with Sections 8 and 11 of the 2005 Act;

- the duties of employees regarding safety, health and welfare at work, including co-operation with the employer and any persons who have responsibility under the relevant statutory provisions in matters relating to safety, health and welfare at work;
- the names and, where applicable, the job title or position held of each person responsible for performing tasks assigned to him or her pursuant to the safety statement;
- the arrangements made regarding the appointment of safety representatives, and consultation with and participation by employees and safety representatives, in compliance with Sections 25 and 26 of the 2005 Act, including the names of the safety representative and the members of the safety committee, if appointed.

In relation to the usage of the safety statement, Section 3 specifies that the employer must bring the safety statement to the attention of it's employees, at least annually and, at any other time, following it's amendment in accordance with this section. It must also be brought to the attention of newly-recruited employees upon commencement of employment as well as to the attention of any other persons at the place of work who may be exposed to any specific risk to which the safety statement applies. Section 3 also specifies that the safety statement must be in a form, manner and language that is reasonably likely to be understood. This is very important if employees are non English speaking or if employees have difficulty with reading, etc. There is no obligation to record the communication of the safety statement to employees and those affected. However, it is preferable that an employer do so in the event of a personal injuries* action arising.

Section 20 (4) deals with specific tasks being performed at the place of work that pose a serious risk to safety, health or welfare. In these circumstances, the employer shall bring to the attention of those affected extracts of the safety statement setting out the risk identified, the risk assessment and the protective and preventative measures taken in accordance with relevant statutory provisions in relation to that risk.

Section 20 (5) imposes an obligation on the employer to review the safety statement, taking into account the risk assessment carried out in accordance with Section 19 of the 2005 Act, where there have been

significant changes in relation to what the safety statement refers, there is another reason to believe that the safety statement is no longer valid or an inspector, during the course of an inspection, investigation, examination or inquiry directs that the safety statement be amended within 30 days of the giving of that direction and following review, the employer must amend the safety statement, as appropriate.

Section 20 (6) deals with a scenario where an employer contracts another employer for services. In those circumstances, the employer shall require that the contracted employer be in possession of an up to date safety statement, as required under this section.

Section 20 (7) requires a copy of the safety statement to be kept available for inspection at or near every place of work to which it relates while work is being carried out there.

Section 20 (8) specifies that it shall be sufficient for an employer employing 3 or less employees to observe the terms of the code of practice, if any, relating to safety statements which applies to the class of employment covering the type of work activity carried on by the employer.

Section 20 (9) sets out that every person to whom Sections 12 or 15 of the 2005 Act applies shall prepare a safety statement in accordance with this section to the extent that his or her duties under those sections may apply to persons other than his or her employees. This relates to the general duties of an employer to persons other than it's employees and the general duties of a person in control of a place of work.

It is imperative than an employer with more than 3 employees have a written safety statement containing all of the requirements specified under Section 20 (2) of the 2005 Act, as set out above. It must be communicated to employees and it must be communicated in a manner and form that is likely to be understood by employees. It should be kept under review and updated when appropriate. As set out above, there is no requirement to record the communication of the safety statement to employees. However, it is advisable to do so as, in the event of a personal injury* claim* arising, it will assist your insurers with your Defence.

***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.**