Welcome to the July Issue of Keeping in Touch

As we head into July we move to a situation where businesses are reopening. We still have the TWSS until the end of August and currently the Covid-19 Pandemic Unemployment Benefit.

When these schemes finish unless there is particularly as regards the TWSS an extension or significant assistance to businesses we are already seeing certain developments. The first is salaries being cut. Some of these are temporary and some are permanent. If the TWSS or other significant supports for businesses, are not put in place we would anticipate that in the short to medium terms there will be salary reductions sought by employers. Of course, these cannot be imposed. However, where those reductions are not accepted the result is that those employees could then be facing redundancy. It will be a matter of employers saying that they are not in a position to pay at that level and that the work will have to be done in a different way which will effectively be by lower paid workers. This will apply to everybody from those working in factories, to those working in offices to those in the professions. This will apply across the board while economic activity is depressed. Of course, there will be a cost to the State to support businesses. Some of those businesses may not actually survive. However, at the same time if the government does not take the step of supporting businesses then those businesses will have a choice downsize, reduce salaries or make individuals redundant. It may well be a combination of all three in some cases. There will be a significant cost to the State if it has to fund redundancies and individuals on social welfare for a considerable period of time. It would be far better, in our view to try and protect those jobs or as many of them as can be protected taking into account that some jobs, that the government seeks to protect may not ultimately be able to be fully protected.

The second issue which is arising is redundancies. Once the TWSS finishes these will increase. At the present time the redundancies we are seeing is companies looking at their staff levels and looking going forward to what they are likely to need. There are some businesses which will already be able to see that the level of staffing which they

require will diminish. This will be over the short and medium term and hopefully not the long term. However, businesses are saying that they cannot afford to keep staff in who are not being fully utilised without government support.

We are going to have a changed workplace. Technology is going to be a lot more important. We are going to see a lot more remote working. That will suit some businesses. It will not suit others. There will be some businesses in a particular sector who will embrace remote working. There will be other businesses who do not do so. There is no obligation on an employer to embrace remote working. Of course, they may have to look at it in respect of individuals who suffer from a disability and to a certain limited extent those who have child minding difficulties if there are problems with crèches or schools reopening in September. Some employers will be able to accommodate remote working. Some will not. Some will not want to have remote working. There will be many employees who will want to have remote working. There will possibly be trade-offs on remote working and one issue which is coming up is the issue of the level of supervision. Some employers will be insisting upon analytics on laptops and computers at home provided by the employer to be able to check that the employee is actually working. At the same time others will need to do so simply to have the records in relation to working time so as to make sure that employees obtain their appropriate rest and break periods and that for example the Organisation of Working Time Act is being complied with.

There are huge advantages of remote working. However, one of the disadvantages of remote working is that remote working in itself may create redundancies. If you take the larger cities their city centers having considerable number of businesses whose services are provided to those working in those centers. This is everything from coffee shops, restaurants, hairdressers and barbers. If fewer individuals are going into city centers then these businesses will have fewer customers. That means they will have lower turnovers. That means that they probably will not need as many staff and certainly will be looking at salary reductions to retain staff. Remote working has been brought forward as a solution to cure all ills but in fact it may create its own problems in itself causing redundancies.

We hopefully will come out of Covid-19 and will not have a second wave. What we can be sure of is that there are going to be turbulent times in employment law and in employment generally. We can expect a significant increase in the number of cases going to the WRC. Many of these will relate to the selection for redundancy. There will be cases over the issue of Payment of Wages Act as regards reductions in salaries or in relation to individuals being on lay off and whether that period is payable or not. The reality is our legislation in this area does not take account of a pandemic situation. To be fair it could not. However, we have to accept that we now have had a pandemic and it does mean that our employment legislation does need to be looked at as to going forward how we deal with a pandemic and how we deal with a situation where a government of the day may have to put a lockdown into place. It is important going forward that if an issue like this arises into the future that we have a plan to deal with it and employment legislation that is clear and precise as to what the rights and obligations of both employers and employees are.

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Out and About in June 2020

On 2 June we were quoted on Breakingnews.ie which is published by The Examiner on three pregnancy dismissal cases one of which we had acted in relating to the issue of the prevalence of pregnancy related dismissals in this country.

On 8 June Richard Grogan appeared on the Sarah McInerney Show in RTE where he answered questions on the difficulties on employees returning to work because of the lack of childcare. That interview also dealt with the difficulties for those suffering from a disability returning to work due to concerns over Covid-19.

On 8 June Richard was quoted in TheJournal.ie on this issue following on from the interview on RTE.

On 9 June a further article issued in TheJournal.ie where Richard Grogan of this firm was quoted extensively relating on the lack of childcare could cause job losses if not dealt with.

On 16 June Richard appeared on Ireland AM answering questions from viewers on employment law relating to issues concerning returning to work.

On 17 June Richard had an article published in Irish Legal News on the issue of disability law.

On Sunday 21 June this firm was quoted in an article in the Business Post where we discussed the difficulties around returning to work. The Business Post had run a large supplement from various professionals and service providers relating to the concerns about returning to work after the Covid-19 lockdown is finishing.

On 30 June Richard was on the Sarah McInerney Show on RTE discussing redundancy law in Ireland.

Letter to Department of Enterprise Trade and Employment on Legislative Defects

Minister Leo Varadkar
Department of Enterprise Trade and Employment
23 Kildare Street
Dublin 2

Dear Minister,

We are simply writing to you to raise some issues which you may wish to consider in your new role.

The first is the provisions of Section 678 of the Companies Act.

We wrote to your colleague, Ms. Heather Humphreys. This Section provides that before any claim can be brought against a company which is in Liquidation, an application must be made to the High Court. There is an exemption in the Section in respect of claims brought to the Employment Appeals Tribunal. This Act issued in 2014. In 2015 the Workplace Relations Act came into effect and since the end of August 2015 no new claims can be brought to the Employment Appeals Tribunal. They must go to the Workplace Relations Commission. Unfortunately in the current environment there are going to be companies that will go into Liquidation. Employees will be bringing claims in respect of non payment of Redundancy, Minimum Notice and possibly Payment of Wages Act claims along with possibly other claims.

It would be an unnecessary expense we would contend for employees to have to bring those claims in respect of claims under Equality Legislation or the Organisation of Working Time Act. Just to give two examples, as they are fundamental rights if an employee was denied access to the WRC before bringing an application to the High Court there could well be claims against the State for failing to vindicate those rights.

The second issue is Section 18A of the Organisation of Working Time Act, 1997 which relates to banded hours contracts. That Legislation in Subsection 1 gives the entitlement where an employee's contract of employment or statement of terms of employment does not reflect the number of hours worked per week by an employee over a reference period. The difficulty with the legislation is the use of the word "worked". Arguments are already arising as to whether holidays are taken into account in calculating the hours worked over a reference period. That is probably the easiest one for an employee to get over as statutory holidays are a particular entitlement under European Law. However, Public Holidays are not a fundamental right. Equally, if an employee suffers from an occupational injury and is off work due to that, there is an argument that that period of time will be part of the reference period but no allowance will be made in respect of that period of time while the employee was off sick even where the sickness is caused by an occupational injury.

Similar arguments are going to arise in relation to issues such as Paternity Leave, and, Parental Leave. The legislation has been badly

drafted. There is an argument to avoid unnecessary fights in the Workplace Relations Commission and possibly in the Labour Court, and ultimately possibly going to the Courts by way of a Point of Law that Section 18A of the Legislation would be amended to set out what absences would be taken into account to be deemed time when the employee was working. This issue has already arisen in the WRC in case ADJ-00024906 where the Adjudication Officer in that case stated;

"The absence of any clear description on a mode or matrix of calculation to accompany the terms of Section 18 A (4) renders this Section on secure and ambiguous".

We would suggest that it is not in the interests of either employers or employees that there would be any ambiguity in relation to a matter such as Banded Hours Contracts. These invariably arise in the case of lower paid workers who will be on an hourly rate of pay.

It would avoid any ambiguity and reduce issues relating to unnecessary litigation in the WRC if there was a clear and definitive statement by way of amending legislation as to what absences are and are not included as deemed periods of time when an employee is in employment for calculating the average hours. If this is not done there will be ongoing litigation. This simply puts costs onto employees and employers. It is important that Employment Legislation is clear and precise to avoid unnecessary disputes and delays. With the current delay in the WRC on average being eight months from the start to the end of a case, by which I mean the date a claim is lodged to the date a decision issues, which is likely to rise taking into account the fact that since the lockdown commenced no cases have been listed and are not likely to be listed until the 20th July at the earliest, that the time will be extended. As the legislation does not allow any backdating employees only receive the right after a decision has issued.

Employees who are represented by a Union have the advantage of being able to bring a claim to the WRC without the necessity of getting legal representation. However, not every employee is in that position and it would be beneficial if we could have clear and precise legislation to avoid unnecessary costs.

In relation to claims under the Redundancy Payments Act, 1967 these currently before the WRC are heard in private. If you have multiple claims against the same employer individual hearings will simply delay cases being processed. Before the EAT up to 50 cases against the same employer would be heard on a single afternoon. To enable cases of this kind to be dealt with quickly you might consider amending the Workplace Relations Act, 2015, to have these cases heard in public or at a minimum that cases involving the same employer could be heard at the same time. If this is not done employees may have to wait excessive time to get paid their redundancy.

I would like to wish you well in your new role and I am simply writing to you to raise issues which may be ones that you might consider might warrant appropriate amending legislation to minimise costs to both employers and employees.

Yours sincerely.

A Weird Anomaly in Employment Law

Agency Workers and Fixed Term Workers are all entitled to be advised of employment opportunities either by the hirer in the case of an Agency Worker or by the company or firm engaging them under a Fixed Term Contract. The same right does not apply to part time workers.

The rights for Fixed Term Workers are set out in Section 10 of the Protection of Employees (Fixed-Term Work) Act 2003. In respect of Agency Workers the provision is Section 11 Protection of Employees (Temporary Agency Work) Act 2012.

No similar right applies under the terms of Protection of Employees (Part-Time Work) Act 2001.

This is, to an extent, illogical. It would be a lot fairer if a part-time worker had to be advised of any opportunities to obtain full time work. Of course we do not write the legislation. We just comment on it but it is difficult to understand how an argument could be made that employees in such a situation should not be at least advised and have

a right to be advised of any full time or extended hours contracts which may arise in their employment.

Employment law – Labour Court procedures

There are two issues where we believe the Workplace Relations Act, 2015 could reasonably be amended to make matters more beneficial for both employers and employees in dealing with cases that come before that Labour Court.

The first of these is the issue of mediation. The Mediation Act 2014 does not apply to employment law cases. In cases before the Courts a Judge is entitled to require the parties to attend mediation. Mediation is normally totally confidential. However there is a provision in the Mediation Act, in Ireland, which provides where a party does not take part in mediation in a constructive way, which does not of course mean that agreement has to be reached the mediator can be requested by a Court to advise the Court to whether the parties and in particular one or other of the parties took part in mediation in a constructive fashion. The fact that parties might completely disagree on the law or obligations for the value of a case does not mean that is being not constructive. There are many cases which go, before the Labour Court by way of a management meeting. Where the Court gives a ruling in relation to a preliminary matter which may determine the liability one way or the other it would appear reasonable that the Court in those circumstances could direct the parties to attend mediation. For example if the Labour Court on a preliminary matter determined a particular issue of fact or of law in favour of either party the advantages of mediation to both parties is that mediation can take place but equally the advantage to the Labour Court is that time then hearing the substantive issue which might even be down simply to the issue of the value of the case can be avoided and therefore saving time for the Court. In any event there is the advantage early on that the parties could be asked to attend mediation, if the Court determined it as appropriate even if it is only to see what issues can be resolved between the parties.

The second issue is that the Labour Court does not have the power to provide consent orders. This means that there are cases which have to go for hearing. The issue relating to matters going forward is that an

employee bringing a claim does not get the protection of the social fund in the event of an employer going into liquidation or becoming bankrupt without a decision from an appropriate Court. The practice of the Labour Court, and it is not one with which we disagree, is that if an agreement is reached between the parties then proceedings for the Labour Court are withdrawn particularly if that happens just before or during the hearing. Because of the uncertainty now going forward, unless an employer is in a position to discharge the settlement effectively immediately, some employees will have necessity to protect their claim have to let the matter be resolved by a decision from the Labour Court. It does make some sense, we would contend, that the Labour Court can by agreement give a consent order.

There is of course the issue in relation to a consent order that Section 192A Taxes Consolidation Act, as regards the valuation of such a claim for relief under that Section could be argued, therefore, one where a consent order is given that effectively the relief applies. Because the Court would not have heard the case and it would simply be a consent order it is a relatively simple matter that that legislation would be amended to provide that in the event of a consent order by the Labour Court that the parties would have to give the appropriate certification that this was a reasonable settlement and would likely to have been awarded by the Labour Court and that that would be subject to the normal Revenue rules for audit unlike a situation where there is a decision of the Labour Court where there can be no audit and the decision of the Court brings matter within that Section automatically.

There is of course no reason why these procedures could not also apply before the Workplace Relations Commission.

Mediation Act 2014

The Mediation Act, 2014 does not apply to employment law. Therefore there is no obligation on a Solicitor, representing either an employer or an employee, to advise parties of developments of attending mediation nor to advise them as to the statutory provisions relating to same which is a requirement for all other areas of law.

The reason for exclusion in employment law was outlined by the Minister when the Workplace Relations Act, 2015 was going through the Dail on the basis that there was going to be a mediation service in the Workplace Relations Commission.

The legislation in the Act provides that parties must opt out of mediation before the WRC. However, the claim form from the WRC actually provides that parties must opt in. Normally mediation in the Courts is on the basis that the matters would be sent to an accredited mediator. There is no such provision in the practice of the WRC.

The mediation in the WRC can be successful. It has the advantage of being confidential and any agreement is confidential with the provision that disclosing anything that happens in mediation is of course a criminal offence. The reality while it is called mediation, in the WRC is that in reality it is an enhanced form of negotiation. The practice is more akin to the mediator shuffling between rooms and as often as not the representatives of the parties meeting in a corridor to get into negotiations which are then presented as a mediated agreement. There is nothing wrong with this. However, it is not mediation.

The difficulties which the WRC have with putting in place proper mediation service is effectively the cost. Accredited mediators are unlikely to work at the level of fees paid by the WRC.

As this is not mediation as would normally be understood and is effectively a form of conciliation there must be a reasonable argument to be made that the WRC engage practitioners who are regulars in the WRC at an agreed rate to deal with mediation, as the WRC call it, particularly where there would be technical issues around particular defences and where it may be possible using that mechanism to get an agreed statement between parties and possibly get the matters resolved.

The alternative is that proper mediation as set out in the Mediation Act, 2014 is put in place by the WRC.

The advantage of mediation in the WRC being put in to the Act to cover employment law would mean that anybody representing employers or employees whether it is Solicitors and Barristers, or

those operating for gain or a Union would be obliged to advise parties of the advantage of mediation and to promote it. Equally it would mean that where a party unreasonably took part in mediation that a report to the appropriate Adjudication Officer could be given if a party went to mediation but refused to take part in it in a realistic and real way and just looked at it as a box ticking exercise and in addition to cover situation where either party refused to engage in mediation.

This is unlikely to happen however as the WRC is changing the way it works mediation is something which does need to be looked at again.

Can you have an Unfair Dismissal claim and an Employment Equality Acts claim at the same time?

This issue regularly arises in the WRC where proceedings issue under both and have a tendency to seek to put an employee on election.

This issue did arise in case ADJ/00015339. This is a case where the employee sued on the Unfair Dismissal ground and under the Employment Equality Legislation for failing to provide reasonable accommodation and won both claims.

It would appear to us that an employee could reasonably be excluded from bringing a claim under the Unfair Dismissal Legislation and for a discriminatory dismissal.

There is however a problem with the legislation. The legislation provides that in those circumstances the Equality claim will be the one that will be dismissed by the WRC. We would have a difficulty with this. A claim under the Employment Equality Acts for dismissal on a discriminatory ground is a fundamental right deriving from European Law. An Unfair Dismissal claim is not a fundamental right and derives from local legislation. On that basis it would appear to us that the legislation is incorrectly drafted and that if any claim is to be refused by the WRC that it would be the claim under the Unfair Dismissal Legislation.

We fully understand why this was brought in. It was brought in to stop forum shopping. However it would appear to us that the Legislation is incorrectly drafted and therefore if an employee was to push the point that they may well have a claim against the WRC by

way of Judicial Review or against an employer ultimately in the Courts by way of a Point of Law if the legislation as it is currently drafted was sought to be applied.

Pregnancy Related Dismissal or an Employee Returning from Maternity Leave

In case ADJ-00023019 the Adjudication Officer looked at this issue in some depth.

The Adjudication Officer pointed out that the employee must establish a prima facie case. It would then point out that Section 6 (2A) of the Employment Equality Act, 1998 specifically recognised that discrimination on the gender ground shall be taken to occur on a ground relating to her pregnancy or maternity leave a woman employee is treated contrary to any statutory requirement less favourably than another employee is has or would be treated.

The Adjudication Officer pointed out that the employee's pregnancy meets the prima facia case requirement therefore the burden of proof shifts to the employer to prove the employment terminated was not linked to any discriminatory treatment due to her pregnancy.

The Adjudication Officer referred to Section 38A and Section 85A.

The Adjudication Officer set out that pregnancy has been held to be especially protected period in order to limit the adverse effect of discriminatory treatment on women workers and their unborn children. It therefore follows that a particular onus falls on an employer to respect the pregnancy.

It was pointed out that Article 10 of the Pregnancy Directive Council Directive 1992/85/EEC requires an employer to set out duly substantiated grounds in writing where a pregnant worker is dismissed. This is the level at which the bar is set. It is not sufficient for an employer to simply say that a dismissal during pregnancy was for other unrelated matters. Some persuasive evidence of an unrelated justification is required and in the particular case no paper trail or evidence was presented by the respondent.

The Adjudication Officer referred to the case of Assico Assembly Limited -v- Corporate EED 033/2003 in which the Labour Court held:

"Where the employee is dismissed while pregnant or on maternity leave, both legislation and case law states that the employer must show that the dismissal was on exceptional grounds not associated with her pregnancy and such grounds, in the case of dismissal, as a matter of law and in the case of discrimination as a matter of good practice should be set out in writing."

In this case the employee was successful. The case quoted by the Labour Court is one which issued in 2003 and is one of the primary cases often referred to. That case set out that as a matter of good practice the notification should be *"set out in writing"*. However, the Pregnancy Directive Council 92/85/EEC now by virtue of case law from the CJEU has direct effect in Ireland. Therefore as the Directive has now direct effect in Ireland the position on matters is that the dismissal of a pregnant woman or a woman returning from maternity leave must have the grounds set out in writing and those grounds must be completely unrelated to the pregnancy or the fact that the employee had been on Maternity Leave.

Age Discrimination

This issue arose in case ADJ-00024869. The employee was not successful in this case but the case is useful for setting out the law in some depth.

The representatives of the employee argued pointing to the growing body of legal precedent that any retirement age needed to be objectively justified and satisfactory of achieving a legitimate aim. They refered to articles 4 and 6 of the Framework Directive being Directive 2007/78/EC which provides for a two-pronged test for determining whether age discrimination is justifiable firstly is it objectively and reasonable justified by a legitimate aim and secondly are the means of achieving that aim appropriate and necessary. They pointed out the cases Georgiev and Technicheski Universitet Sofia 2010 ECRC-250/09 and Seldon -v- Clarkson Wright & Jakes 2012 IRLR591 of the UK Supreme Court in relation to the need for clarity

and precision in and or means being employed and the Irish case of Donnellan -v- Minister for Justice, Equality and Law Reform 2008 IEHC467. The also referred to the Code of Practice on Longer Working SI600/2017.

The Adjudication Officer looked at the issue of working past a normal retirement age and set out that the decision about whether to extend an individual's contract will depend on a number of factors including but not limited to:

- The nature of the job being done;
- The individual's ability to do the job (a medical may be required);
- The number of hours work that are proposed; and
- The cost associated with remaining in employment which would include insurance.

The representative for the employee had pointed out the approach of the CJEU as to:

- The availability of a pension on retirement;
- The concurrence of a state pension with the retirement age chosen;
- Agreement among the parties;
- Consistency and coherence of application across the workforce; and
- Flexibility and operation.

The Adjudication Officer did refer to the Code of Practice on Longer Working being SI600/2017.

There are a considerable number of these cases now arising. While the employee lost in this particular case there is confusion in relation to the whole issue of where an employee stands, as in this case, where the employee wishes to remain in work until the state pension becomes available. This is becoming a significant issue for many employees.

Traditionally employers had a retirement age of 65 though an early retirement age for some types of particular industries but in normal cases the retirement age would be 65. The state pension is a higher

age. There is a social welfare benefit which can be obtained for employees in those circumstances. The issue of retirement and the requirement for employees to continue working is likely post Covid-19 to become an even more relevant issue for many employees and employers.

Forced Retirement on the Age Ground

This issue arose in a case of a Sales Representative and a Retail Credit Company ADJ-00024927. The case itself as regards the facts and the arguments made are relevant. The Adjudication Officer in this case helpfully went through the law in some detail.

The Adjudication Officer pointed out that the Employment Equality Act transposes Directive 2000/78 which through Article 2 (2) prohibits discrimination on the four grounds including age. As was pointed out the Directive however permits direct discrimination on the age ground where justified. The test is whether matters can be objectively and reasonably justified by a legitimate aim including legitimate employment policy from a labour market and vocational training objectives.

Section 6 (3) (c) of the Act provides that offering a person over the retirement age a fixed term contract shall not constitute age discrimination if it is objectively and reasonably justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

The provisions of Section 8 (1) were also relevant as are Section 34 of the Act which provides for savings and exceptions.

The Adjudication officer in this case referred to the Code of Practice on Longer Working Hours and also the Irish Human Rights and Equality Commission Guidelines on Retirement and Fixed Term Contract which issued in April 2018.

In this case the Adjudication Officer set out that the respondent in this case only cited the complainant's age rather than the particular circumstances and in this case awarded compensation of €22,000.

The reality of matters is that where an employer simply quotes the age ground they are going to have difficulties in justifying matters if a discrimination case is taken. If employers wish to impose a retirement age matters need to be justified on more than just the age ground. Our experience in these type of cases, and we were not in this particular case, is that the justification suddenly appear after the claim has been lodged rather than before. An employer seeking to terminate an employment on the age ground does need to specify the reasons prior to taking the course of action of simply terminating on the basis that they have reached the retirement age.

What Is A Disability for the Purposes of the Employment Equality Act 1998 As Amended

This issue was addressed in some detail in case ADJ-00016629.

The definition of a disability is in Section 2 (1) of the Act being

(A) "The total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
(B) The presence in the body of organisms causing, or likely to cause, chronic disease or illness,
(C) The malfunction, malformation or disfigurement of a part of a person's body,
(D) A condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
(E) A condition, illness or disease which effects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, which may exist in the future or which is imputed to a person"

As pointed out in this case the definition of a disability has been interpreted in a broad manner in the past by the Courts both within this country and the European Court of Justice (CJEU).

The definition of a disability in our employment law is wider than in the Directive being Directive 2000/78/EC as pointed out by the Adjudication Officer.

The Adjudication Officer pointed out the case of HK Danmark -v- Dansk C-335/11 and C-337/11 where it was held that "the concept of a disability" in the Directive must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of a person concerned in professional life on an equal basis with other workers and the limitation is a long term one.

In the particular case it was not in dispute that the employee had issues with her voice which rendered her at a time as mute or without speech. The Adjudication Officer was satisfied that the employee was originally diagnosed with mucosal irregularities or both vocal cords but that they did not require surgery and to allow early recovery her voice should be rested. The Adjudication Officer noted that the employee had not fully recovered. The Adjudication Officer was satisfied that the employee had a disability.

In this case the Adjudication Officer then looked to see had the employer in accordance with Section 16 of the Act had taken the appropriate measures. In this case the Adjudication Officer was of the view that the employer did not fail in its obligations to provide reasonable accommodation.

This case is important for practitioners, employers and employees for two reasons. Firstly, it sets out the law in some detail. Secondly it confirms that even if a person has a disability if the employer provides reasonable accommodation to take account of same an employee will not have a claim which can be won.

Date of Dismissal for Unfair Dismissal Cases

This issue arose in the Labour Court in case UD/19/141 concerning Action Health Enterprises Limited and Michael D'Arcy.

This is an extremely important decision on the issue of the date of dismissal.

Normally to bring an Unfair Dismissal case an individual must have twelve months service. In this case the complainant had been engaged on a contract for service effectively as a contractor from 2014 until the 31st January 2017. At this point the individual changed from being a contractor to an employee. Therefore, the start date of the employment was the 31st January 2017. The contract provided for a 3-month notice period. On 30 November 2017 the complainant was dismissed on a no-fault basis and was presented with a letter informing him that he would receive a payment in lieu of his contractual notice period of 3 months and that his employment would terminate being effective immediately. It was stated he would receive payments within 14 days. The pay in lieu of notice was received on the 17th December. What is relevant about this case is that the payment was prompted by a letter from the complainant's solicitors requesting payment. The relevant termination notice stated:

"…employment may be terminated at any time by either you or the partnership giving the other party at least 3 months prior written notice, or statutory, if greater"

"Where notice of termination of your employment is given, whether by you or the partnership, the partnership will have the right to pay you in lieu of notice the amount of your entitlement to basic salary in respect of all or part of such notice period"

The relevant Section which both parties referred to was Section 1 of the Unfair Dismissals Act which provides:

"Where prior notice of the termination of the contract of employment is given and it complies with the provisions of that contract and of the Minimum Notice and Terms of Employment Act, 1973, the date on which that notice expires"

Section 1(b) of the Act is also important where it states:

"Where either prior notice of such termination is not given or the notice given does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act 1973 ("the 1973 Act") the date on which such notice would have expired, if it had been given on the date of such termination and had been expressed to expire on the later or the following dates

(i) *The earliest date that would be in compliance with the provisions of the contract of employment*
(ii) *The earliest dated that would be in compliance with the provisions of the Minimum Notice and Terms of Employment Act 1973"*

The employer in this case disputed the argument that an employer is prohibited from avoiding the reckonable service accrued by an employee for the purposes of establishing the length of service required pursuant to the legislation by paying in lieu of notice. The employer maintained that both the 1973 Act and the 1977 Act provide the complete opposite. Insofar as the 1973 Act is concerned, it specifically provides that nothing in the Act prevents an employee from agreeing to accept payment in lieu of notice. The 1977 Act was argued is equally clear that the definition of *"date of dismissal"* specifically refers to both legs of the definition to compliance with the contract. Therefore, termination of a contract by payment in lieu of notice was in compliance with the contract. Various case law was quoted as was Dismissal Law in Ireland by Mary Redmond.

For the complainant the provisions of Section 13 of the 1977 Act was quoted which provides

"A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of the Act) shall be void insofar as it purports to exclude or limit the application of or is in consistent with, any provision of this Act".

The complainant relied on Redmond on Dismissal Law by Desmond Ryan when equally a considerable amount of case law was quoted.

The relevant letter dismissing the employee and the relevant paragraph are as follows:

"The purpose of this letter is to notify you the termination of your employment on a no cause no fault basis in accordance with clause 10 of your contract of employment dated 31 January 2017 ("contract"). You will receive payment in lieu of your contractual notice period of 3 months and your employment will terminate effective immediately (i.e. with effect from to-day)"

The Labour Court asked both parties to identify the subsection of the 1977 Act that they were relying upon and both referred to Section 1(a) as distinct from (b) of the Act.

The Court stated that the case raised a complex issue that had not been definitively settled. The Court stated the Section 4 of the 1973 Act obliges an employer to give a notice of dismissal. The Court pointed out that it is noteworthy that the obligation is not to provide notice of payment in lieu. The Court pointed out that it follows that an employee has a right to receive notice and to work out that notice if he or she so chooses. The Court pointed out that it seems clear that if an employer makes a payment in lieu of notice the employer suffers no loss and cannot obtain redress under the 1973 Act. However, the Court pointed out this does not have any relevance in determining the date of dismissal for the purposes of the 1977 Act.

The Court pointed out that Subsection 5 of Section 4 of the 1973 Act would have the effect that if a contract of employment provided that no notice was being given but payment in lieu will be provided the contact would have to be read as providing for the period of notice. The Court held that the effect of Section 7 of the 1973 Act which provides:

"Nothing in this Act shall operate to prevent an employee or employer from waiving his rights to notice on any occasion or from accepting payment in lieu of notice"

This had the effect that where an employee waives his or her entitlement to notice or accepts payment in lieu of notice the right to notice under Section 4 is extinguished. Section 7(1) provides that nothing in the 1973 Act operates to prevent an employee or an employer from waiving his or her right to notice on any occasion or from accepting payment in lieu of notice. In relation to the issue of payment in lieu of notice the Court held that for a complainant to *"accept payment in lieu"* there must have been an offer and a free acceptance of that offer. The Court pointed out that it follows that where the respondent relies on this provision by simply paying wages in lieu of notice there is no offer in any meaningful sense and there is no acceptance. The Court pointed out that as a result it appears that the contractual provision would be inconsistent with the 1973 Act and cannot be relied upon to assert that an employee agreed to accept

payment in lieu of notice. The Court however went on to say the issue is whether the contract itself would allow the respondent at its sole discretion to determine that the complainant had waived his right to notice within the meaning of the 1973 Act.

The Court pointed out in this case the complainant acting through his solicitor sought payment in lieu of notice and did so in reliance of the relevant provisions of the contract. That payment was subsequently made as a result. Therefore, two issues arise the first at the time of dismissal, the complainant was dismissed without either the contractual or statutory notice. If that is the correct instruction as the Court pointed out at Section 1(b) of the 1977 Act came into play. However, on the other hand by relying on the terms of the contract to seek payment in lieu of notice the complainant through his solicitor approbated the contract and cannot now be seen to reprobate. The Court pointed out the case of Super Wood Holdings PLC -v- Sun Alliance in London Insurance PLC 1995 3IR303 and the case of Manor Park Homebuilders Limited -v- AIG Europe (Ireland) Limited 2019 1ILRN190.

The Court pointed out that in any event an employee is entitled to their statutory notice and that would extend the date of dismissal but in this case as it would only be one week it would not have made a difference. The Court held that because the employee had sought payment on the payment in lieu of notice the employee had effectively consented to the termination being the date the employer purported to terminate same. The decision of the Adjudication Officer rewarding €45,000 was overturned.

This is an extremely important case.

For those involved in employment law the issue is firstly

1. The date of dismissal will always be extended by the statutory notice period to which an employee is entitled.
2. Where an employee has a greater notice period it would appear that an employer cannot bring the date of dismissal back to the date of the actual notice where payment in lieu is made unless the employee consents. If the employee consents then the date of dismissal is the date the dismissal took place without the notice being added.

This has significant issues for those acting for employees in bringing Unfair Dismissal cases.

Firstly, in relation to a case where notice is not paid the date of dismissal will at a minimum be the date that the statutory notice set out in the Minimum Notice and Terms of Employment Act, 1973, will run out.

Secondly, where the contract provides for a longer notice period then an issue will arise as to whether the employee consented to the extinguishment of the notice period or not.

The question then is what is the effect of this for those acting for employees in bringing claims.

1. Where the employee is dismissed the date of dismissal will not be before the date that the statutory notice runs out. Therefore, any claim under the Unfair Dismissal legislation should not issue before that date.
2. Where the contract of employment has a longer notice period and payment is made in lieu of notice and there is any question as to whether or not the employee consented to receiving payment in lieu of notice then in those circumstances those acting for employees should issue on the basis of two dates. The first date will be within six months of the termination date if no notice was added and the second set should issue after the said notice period has expired. The reason for this is particularly if there is a long notice period that an issue could arise firstly as to whether a claim issued within the six-month period and secondly whether a notice issued before the actual dismissal took place. The first situation arises where the employee issues after the notice period expires and works the six-month period on that date. The second would arise where the employee issues immediately after the dismissal and before the notice period expires where an argument could be made that a claim was issued before any dismissal actually took place. In the second situation the Bohemian Football Club case, which is not relevant for this particular case might save an employee on the basis of issuing too soon.

This case is an example of the complexity of employment law. It is a case where a considerable amount of legal argument was made on behalf of both parties. The Labour Court have given a decision which on the facts are very clear. The reality is that this decision in itself will cause uncertainty for some representatives to determine when a dismissal date occurred and may result in more than one Unfair Dismissal claim having to be lodged in the WRC to cover matters. This will create its own difficulties when a case comes on as effectively it may well be that an employee will have to insist upon a decision being issued in both cases. It may then be particularly if there was a long notice period one claim might be held to be out of time and to avoid any difficulty in the event of an appeal an employee in those circumstances who issued in respect within the six months of the original date of dismissal and within six months of the notice period expiring but more than six months from the first date being the date the employee received the letter or was told that they were dismissed may actually have to appeal that to the Labour Court to protect themselves in the event that it was the later date that the dismissal took place and note the earlier date. The opposite would be as regards an employer having to appeal.

It is strange that the legislation in this is not a lot more clear.

This is a case which on appeal dealt with the issue as to what the date of dismissal was. In reality the legislation in Ireland should be very clear. Anybody without the necessity of a solicitor should be able to determine in clear and precise terms what is the date that they were dismissed on for the purposes of determining when they bring a claim. The action of the employee in relation to seeking payment which they will be contractually entitled to by writing to the employer could affect what is the relevant date. A simple amendment to legislation could be made which will provide that regardless as to whether an employee is paid in lieu of notice or not that the date of dismissal for the purposes of determining their right to bring a claim would be the later of the date under the Minimum Notice and Terms of Employment Act, 1973 or the contractual notice in their contract but that neither party could contract out of the notice period but that the parties could agree for payment in lieu of notice and in lieu of the employee working that notice. Equally to avoid difficulties the legislation should provide that a claim issued within six months of the date of notification of the dismissal even if that dismissal takes place at a later date due to

notice periods or six months from when the notice expired would be deemed to be within six months of the dismissal date for the purposes of bringing a claim.

This particular case is one where there was significant legal argument. It is an extremely complex case on the law. The law on an issue such as Unfair Dismissal should never be that complex.

This case shows the complexity of issues which must be dealt with by the Labour Court. Equally Adjudication Officers have complex legislation to deal with. There are very few votes in getting employment legislation drafted properly, clearly and in clear and definitive terms which can be easily relied upon. The difficulty we have is that we do not have codified legislation. There are differences between, in this case, the 1973 and 1977 Act. It is often thought by both employers and employees that it is simply a matter of going to the WRC to bring a case. This case indicates just how complex employment law in Ireland is.

Breach of Trust and Confidence – Unfair Dismissal Claims

This issue arose in a case of a Hospital Porter and a Hospital. It involved the loss of €647.99 which the employee was unable to provide a reasonable excuse for this sum being missing.

The employer in this case relied on a case of Audrey Burtchaell –v- Premier Recruitment International Limited Trading as Premier Group UD1290/2002 where the Employment Appeals Tribunal reaffirmed that the trust and confidence as a test has long been established to be a fundamental issue relating to proper working conditions and in a situation where this trust and confidence is destroyed it would be reasonable under such circumstances for an employee to be dismissed.

In this case the Adjudication Officer held that the dismissal was not unfair.

Financial Loss in Unfair Dismissal Cases

In case ADJ-00015339 the Adjudication Officer in this case pointed out Section 7 (3) of the Unfair Dismissal legislation which provides the future loss may be taken into account to include any actual loss and any actual estimated prospective loss of income attributable to the dismissal and the value of any loss of diminution attributable to the dismissal of the rights of the employee under the Redundancy Payment Act 1967 – 1973 or in relation to superannuation. The Adjudication Officer referred to the case of Allen -v- Independent Newspapers 2002 ELR84 where the EAT held that it was satisfied that the claimant's illness was attributable wholly to the factors which led her to resign her employment and claim constructive dismissal. They held that her illness had led to her financial loss and having regarded the series of findings made by the Tribunal it follows that it must hold that the financial loss is attributable to the conduct of the respondent. The Adjudication Officer in this case took a similar view in awarded compensation.

An interesting case on this very point then arose in ADJ-00025595. This is a case where the Adjudication Officer held that the employee commenced working for an employer 26 years previously. The employee had never worked anywhere before that. The argument from the respondent was that the employee failed to mitigate her loss as she was currently doing an IT course which is 2 years in duration and it was unfair to expect the respondent to be responsible for the complainant's loss for that period as it was open for her to get a job in some other area.

The Adjudication Officer in this case helpfully looked at the issue of remedying Section 7 and determined that compensation was the appropriate remedy rather than re-engagement or reinstatement. The Adjudication Officer held that the employee had been subjected to a prolonged campaign of verbal abuse, bullying, intimidation and emotional manipulation all of which were at the very serious end of the spectrum. The Adjudication Officer found that the Adjudication Officer was full satisfied that it would be some considerable time before the complainant will recover from the treatment and accepted that having never worked anywhere else and never having done any courses when she worked for the respondent that the employee would need to upskill and work on her interview skills with a view to

handling the inevitable questions in relation to how her employment ended. The Adjudication Officer pointed out that the complainant was totally blameless in relation to her dismissal and there was no action or omission on her part that contributed to her financial loss. The Adjudication Officer pointed out that the employee had sought professional advice in relation to how she could move forward with her life and secure future employment and was following that advice. In this case the Adjudication Officer awarded a figure of €104,000 being 104 weeks salary.

These cases are helpful. The first looks at an issue relating to an illness caused in the workplace. The second looks at the issue of an employee having to take certain actions to enable themselves to become employable into the future. Both of these decisions are worth reading.

Unfair Dismissal – Fair Procedures

This issue was looked at in some depth in the case of ADJ-00012146.

The constitutional right to fair procedures and natural justice as was pointed out by the Adjudication Officer was recognised in the case of Re Haughey 1971 IR217 where O'Dalaigh C J stated that,

"Article 40s3 of the constitution is a guarantee to the citizen of basic fairness of procedures"

The Adjudication Officer pointed out that the principles enshrined in that case were implied into contracts of employment by the Supreme Court in the case of Glover –v- BLN Limited 1973 IR388 and have been cited in Labour Court decisions including UDD1815, A Commercial State Body –v- A Worked UDD 1611 Kilsaran Concrete Kilsaran International Limited and VED UD1294/2008.

It was also pointed out that the case of Frank Shortt –v- Royal Liver Assurance Limited set out that the disciplinary process may not be perfect but it should come within what could reasonably be considered a fair response by the employer to the circumstances. In Mooney –v- An Post 1994 ELR103 is a case which set out that what is required by an employer to satisfy the requirements of natural justice may differ from case to case.

In that case Keane CJ stated that two principles of natural justice namely "Audi Alterem Partem" and "Nemo Iudex In Causa Sua" cannot be applied in a uniform fashion to every set of facts".

Therefore, while employers are required to afford natural justice and fair procedures to employees when carrying out disciplinary procedures regard must be had to the particular circumstances to the case to ascertain what the requirements of natural justice and fair procedures demand in the particular circumstances.

In this particular case the Adjudication Officer set out that if the process is followed by the employer while not entirely faultless or within the scope of what could be considered a reasonable response in the particular circumstances then the employer's action will be deemed to be acceptable.

However, as pointed out by the Adjudication Officer there are certain fundamental requirements and fair procedures as outlined in Glover -v- BLN Limited 1973 IR388 which cannot be dispensed with regardless of the particular circumstances which arise in an individual matter. These include but are not limited to:

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

The Adjudication Officer pointed out that the requirements are there so that an employee has a meaningful opportunity to prepare and present a defence. Where an investigation is carried out there may be occasions where as detailed in Kelly –v- Minister for Agriculture 2012 IEHC558 the full range of fair procedures might not apply at the investigation stage. However, that would just be at the investigation

stage and the respondent was the Judge and jury in relation to the decision to terminate the employment.

The Adjudication Officer pointed out that it was noted in Meath Co Council –v- Creighton UD11/1977 and Carr –v- Alexander Russell Limited 1976 IRLR220 that an employer may be able to justify a procedural omission if it meets the onus of proving that despite the omission it acted reasonably in the circumstances in deciding to dismiss an employee.

In this case the Adjudication Officer found that the decision to dismiss was not fair.

What is helpful in relation to this case is that the law has been set out in some detail.

This case is clearly one where it is important for employers to understand that fair procedures must apply throughout the process. There may be times when some latitude may be given but in particular employers need to be certain that if they have policies in place that these are fully followed and that at all times to be looking at the issue as to whether or not there are fair procedures in place. Where an employer does not follow fair procedures then the employer is at risk, as in this case of losing the case.

Unfair Dismissals – Right to an Appeal and the Importance of an Employee Making an Appeal

This issue was addressed by the Adjudication Officer in case ADJ-00020835.

The Adjudication Officer referred to the Labour Court case in 1933 Sloanecczko Limited and Kopacz where the Labour Court stated: *"There are certain fundamental requirements and fair procedures that cannot be dispensed with regardless of the particular circumstances that arise in an individual disciplinary matter. They include*

(i) The requirement to make the employee who is the subject of the investigation is aware of all the allegations against him or her at the outset of the process;

(ii) The requirement that the employer has published a disciplinary procedure for its employees follows those procedures scrupulously when conducting a disciplinary process."

The Adjudication Officer found that the absence of an appeal mechanism outside of what is available under the Unfair Dismissals Act 1977 – 2015 was counted that the general principles set out in SI146/2000 which provides as follows:

"The essential elements of any procedure for dealing with grievance and disciplinary issues are that they must be rational and fair, that the basis for disciplinary action is clear, that the range of penalties that can be imposed is well to find and that an internal appeal mechanism is available"

The Adjudication Officer held that the absence of an appeal against the decision to dismiss was one factor rendering the dismissal unfair. The Adjudication Officer referred to case UD/954/2013. The Adjudication Officer went on to state that the importance of an appeal mechanism prior to invoking a statutory entitlement has been acknowledged in many decisions. In An Employee –v- An Employer ADJ0000381 the Adjudication Officer 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 the importance. An appeal allows a dismissed employee the last chance to make their case, highlight any mitigating factors and seek protection for faulty procedure or disproportionality of sanction"

The Adjudication Officer held there were procedural defects and found that the employers decision to engage just one person and not prescribed two persons provided for in the disciplinary procedures together with the absence of an appeal mechanism short effects the statutory rights under the Unfair Dismissal Act 1977-2015 rendered the dismissal to be unfair on procedural grounds.

This decision is important for employers. While the issue of employees is not covered in this decision it is equally important than an

employee uses an appeals process which is in place where they have been advised of same.

Unfair Dismissal – Constructive dismissal

This issue arose in the Case of Corhaio and Curran UDD2020 .

What is interesting about this case is that the employer referred the employee for a second consultation with Medwise with a view to getting an up to date assessment on the medical situation and prognosis of the employee. The Court determined that the employee without any basis for doing so, in the Court's view, concluded that the employer's decision to seek a second review was an aggressive step designed to build a case to engineer his dismissal. The Court pointed out that the employee therefore decided to pre-empt any such move by resigning.

The Labour Court held that in light of the rational that they had set out in the decision that the employee had not established that the employer breached the contractual obligations to him or acted in such an unreasonable manner that justified the resignation.

This had been an appeal for the Workplace Relations Commission where the employee had lost. The Labour Court affirmed the decision of the WRC.

This case is a further reminder and one that we have been stressing in a number of cases of the importance of employees taking significant care before resigning.

Constructive Dismissal

An issue sometimes arises in relation to constructive dismissal cases where the employee contends that the instructions for some complaint against the employee was the grounds justifying the resignation.

This issue was addressed in the case of Ruffley –v- The Board of Management of St Anne's School 2017 IESC33 where Mr Justice Charleton stated;

"Correction and instruction are necessary in the functioning of any workplace and these are required to avoid accidents and to ensure that productive work is engaged in. It may be necessary to point out faults. It may be necessary to bring home a point by engaging in an unusual task or longer or unsocial hours. It is a kindness to attempt to instil a work ethic or to save a job or a career by early intervention. Bullying is not about being tough on employees. Appropriate interventions may not be pleasant and must be taken in the right spirit."

Banded Hours

Case ADJ-00024906 is an example of just how bad the drafting of this legislation is. At the same time the approach by the Adjudication Officer is one of practicality. Saying this it may well be that this is a case which will ultimately go by way of a point of law to the High Court or alternatively if not this case some other case. It is therefore worth looking at. This case involved a member of ground staff and an airline.

The background of the case is important in this particular matter. The employee was employed as a check-in staff and had a contract for 20 hours exclusive of all breaks. The employee applied to be placed on a new contract to match her hours worked under Section 16 of the Employment (Miscellaneous Provisions) Act 2018 which deals with banded hours. The employee was first notified of being placed on a Band H being 37.5 hours per week. Subsequently the employer confirmed that an error has occurred through the double counting of overtime and noticed the employee would be placed on a Band G which is a period between 31 and 36 hours exclusive of all breaks.

The union argued that Section 19 of the Act confirms the calculation of how annual leave is to be applied and that Section 20 sets down that annual leave should be paid at the normal weekly rate which provisions are in the Organisation of Working Time Act 1997.

The Respondent argued that Section 18 of the Act does not provide any specific method of calculation to be applied when calculating the entitlement under the Act. It was argued by the Respondent employer that absences from work were not earmarked by a measurement tool

and in this vacuum 130 employees were offered banded hours in accordance with this policy.

In relation to the relevant case the employer referred to Section 18A (13) which was submitted was that the employer was not obliged to offer hours of work in a week where there was no expectation of work or where they job was not being carried out and it was argued that only hours worked in accordance with the Act should be considered for banding calculation. It was further argued that there was no requirement to treat annual leave in a manner analogous to payment during annual leave which is calculated in accordance with the 1997 regulations.

The Adjudication Officer set out the legislation in full and the various banded hours.

The Adjudication Officer pointed out that there is no provision in the Act which deems time spent on annual leave or other absences as time worked for purposes of Section 18A. The Adjudication Officer referred to the book Organisation of Working Time Act 1997 by Anthony Kerr BL which referred to the Labour Court case of Skanska -v- Carroll 38/2003 where it was stated:

"The obligation to provide annual leave is imposed for health and safety reason.

The Adjudication Officer also referred to the case of Royal Liver Insurance Limited -v- SIPTU DWT41/2001 where he stated although the term paid annual leave is not defined by the Act the Labour Court has ruled that it is a term of common usage in industrial relations and is well understood as meaning a period of rest and relaxation during which a worker is paid her normal wages without any obligation to work or provide any service to the employer. The Adjudication Officer referred to Article 7 of EC Directive 2003/88/EC which directs Members States to take the necessary measures to ensure that every worker is entitled to paid annual leave"

The Adjudication Officer pointed out that Section 18(A) (4) suggests that what is to be determined is the average number of hours worked by that employee per week during the reference period. The Adjudication Officer stated that the Adjudication Officer had

difficulties with the argument that the employer was not obliged to factor in absences through statutory/sick leave. The Adjudication Officer pointed out that the absence of any clear description of a mode or matrix of calculation to accompany the terms of Section 18 (4) renders the section obscure and ambiguous. The Adjudication Officer in this case referred to a number of cases of the European Court of Justice being case C-350/06 as relevant in determining matters.

The Adjudication Officer pointed out that if the mode of calculation canvassed by the Respondent employer were to prevail as a matter of mathematical and fact in every case where an employee avails of annual leave their annual weekly working hours over a 12 month reference period will be artificially reduced below their actual average or normal working hours and such a result will be inconsistent with other provisions of the Act and could not reflect the plain intention of the Oireachtas. The Adjudication Officer stated it seems clear that an employees average working hours in a referenced period should be ascertained by taking the total number of hours worked by that worker over the reference period and dividing that number by the number of weeks actually worked in the same period and in this case also adding in annual leave days.

Certainly, we would agree with the view that there is a strong argument that an Adjudication Officer would certainly add in holidays as these are periods of time where an employer has an obligation to ensure that the employee takes their appropriate annual leave. There is however of course the issue that the legislation is so badly drafted that a counter argument can clearly be made.

What is of significantly more concern is that while it is possible to construct an argument that annual leave days would be included it would appear that periods of leave for absences such as sick leave would not be included. It is certainly clear that issues such as matters including compassionate leave or other authorised absences from work may not be included in calculating matters. Therefore while the number of hours will be divided by 52 weeks to work out the average if the employee has not been working for say 3 weeks in the year because they were sick they may well be excluded from getting a contract based on what their normal week was because of that absence.

The provisions of Section 18A (1) specifically refers to the number of hours worked per week and Subsection (7) provides that an employee should be placed on a band of weekly working hours on the average which shall fall within the band for a period of not less than 12 months following that placement.

The difficulty with this legislation is because of the use of the word *"work"*. We were always of the view that this was badly drafted legislation. It is now coming to the forefront and it is likely there is going to be a number of cases on this issue. The issue is going to come down to the interpretation of the legislation in accordance with the Interpretation Act. At some stage this legislation is going to go to the High Court.

That is neither fair to employees nor employers. It is we believe important that this legislation is amended to provide a degree of certainty as to how the calculation is done. For example, if an employee was absent due to an injury suffered in the workplace is that period to be discounted in calculating the average. As the legislation is currently drafted that would appear to be the position.

Safety Health & Welfare at Work Act 2005 – 2014 – Penalisation

This issue arose in a case of MSR -FSR Ireland Limited and Jason Quinn.

The Court in this case went through Section 27 and Section 28 of the Act.

The Court pointed out that the requirement to establish penalisation under Section 27 of the Act has occurred was set out in the case of Paul O'Neill -v- Toni and Guy Blackrock Limited 2010 21ELR1. The Court pointed out that firstly it is necessary to establish that there has been a protected act. The Court pointed out that the whole purpose of the Act is to improve the safety of workplaces. The Court stated the purpose of Section 27 is to ensure that workers are not inhibited by apprehension regarding possible detriment having raised safety issues of concern and that should such a detriment be imposed for this reason then it means redress. The Court was of the view that the concerns raised were safety concerns which are protected.

The Court pointed out as in the Paul O'Neill and Toni and Guy Blackrock Limited case that the Court in that case set out the requirement in this regard that:

"…the claimant must establish, on the balance of probabilities, that he made complaints concerning health and safety".

The Court then pointed out that the second requirement is that the worker must have suffered a detriment for having raised a concern protected by the Act. The Court pointed out that this requires that an employee must show that there was a detriment.

The Court pointed out in the case of Paul O'Neill v- Toni and Guy Blackrock Limited that the Court had held that where there was a protected act and where there was a subsequent detriment imposed the burden of proof shifts to the respondent. The Court pointed out to satisfy the Court that the detriment had nothing to do with those complaints is a matter for the employer. In this case the Court determined that there had been a health and safety complaint and there had been a detriment. What is interesting on this case is that the Court concluded that the detriment was not as a result of having made a protected complaint.

The Court stated:

"In summary, the Court accepts that there was a protected act and there was a detriment suffered by the complainant. However, on the evidence presented the Court finds there was no causal connection between the protected act and the detriment suffered by the complainant"

On that basis the complaint fell. This case is important in stating the law. It gives clarity on this area of law. The fact that there has been a protected act and a detriment will not automatically mean that the employee wins their case. However, it is clear that the burden of proof is clearly on the employer to show that the detriment had nothing to do with the complaints that had been raised.

Rights of Part-Time Workers

This issue arose in case ADJ-00024996. The employee in this case brought a claim under Section 16 of the Protection of Employees (Part-Time Work) Act, 2001. The effect of the claim was that the employee had not been advised of the opportunity of full time work. The Adjudication Officer in this case pointed out that the employee in this case may have considered in error the application of Section 10 of the Protection of Employees (Fixed-Term Work) Act 2003 which provides that an employer shall inform a fixed-term employee in relation to vacancies to ensure that he or she shall have the same opportunities to secure a permanent position as other employees. The Adjudication Officer pointed out that the Protection of Employees (Part-Time Work) Act 2001 contains no such provision.

The part time legislation in Ireland provides no obligation on an employer to inform an employee of full time work opportunities.

Payment of Wages Claims – Awards of Compensation

In PWD 2019 being a case of Student Housing Operations Limited and Denise O'Brien the Labour Court in this case set out that neither the Labour Court nor Adjudication Officer has jurisdiction under the Payment of Wages Act to award either interest or compensation for a breach under the Payment of Wages Act. The Court effectively held that an Adjudication Officer can only award the actual monetary loss. While it is not set out in the decision there is a provision where if the amount of the under payment in any particular week fails to meet a minimum level that must be paid to the employee then in those circumstances compensation can be awarded but that is extremely limited and there is no argument in this case that that provision would have applied.

The Court also pointed out that expenses are expressly excluded from the definition of wages for the purposes of the Act.

The Adjudication Officer had awarded a reduced sum of €4,500 gross financial loss together with €1,730.76 compensation for breach of the Act.

The Labour Court had set out the definition of wages as set out in Section 1 of the Act.

An interesting aspect which was brought up by the employee and rejected by the Court was that the salary from the date of dismissal to the date of conclusion of an appeal of the dismissal should have been paid. The Court pointed out that they were furnished with a copy of the employee's contract of employment and the employee handbook. The Court pointed out that there was nothing in either document that displaced the established presumption that an employee's contractual entitlements including the entitlement to payment stands extinguished as and from the date that an employee has been dismissed and paid in lieu of notice where appropriate.

The employee in this case was also sought to have included a claim for holidays based on overtime/time in lieu and salary post dismissal. The Court held that there was no basis in law for this aspect of the claim.

As regards the bonus the Court pointed out that the contract provides that any payment under the scheme was discretionary and importantly that no bonus was payable to an employee if their employment was terminated before the payment date.

Bonus Schemes

This issue arose in case ADJ-00021741. The case is useful for restating the law. The Adjudication Officer looked at the issue of whether a bonus payment was properly payable. The Adjudication Officer pointed out that in Cleary -v- B&Q Ireland Limited 2016 IEHC119 the High Court held that an employer was required to exercise discretion reasonably and if the discretion is exercised unreasonably the employer will be in breach of contract if no reasonable employer would have exercised the discretion in that way. The Adjudication Officer pointed out that the High Court held that the discretion to withdraw a bonus scheme could not be exercised when the employee had accrued the entitlement and crystallised once it was earned in accordance with the terms of the scheme as operated.

In this case the employer had contended that the bonus was not payable because of the fact that a disciplinary process had commenced. The Adjudication Officer did not uphold that defence.

We are simply mentioning this case as the issue of bonus payments are going to be significant in the coming period.

Where there is a contractual bonus provision then in those circumstances the employee, once they are earned is entitled to same. In respect of discretionary bonus schemes many employers are simply, at this stage, advising employees that same are being revoked or substantially reduced.

The problem is cases will arise where the employers are less than clear in advising employees as to what is happening with any bonus scheme.

Right to Disconnect

In 2018 legislation was introduced in France to set out that an employee was entitled to disconnect after work hours and not to answer emails or a work phone.

There has been a lot of debate, in Ireland, about the right to disconnect.

While it would be useful to have a very clear and precise statement of this the current position in Ireland is there is an effective right to disconnect. We thought it might be useful to set out some of the relevant legislation.

Section 11 of the Organisation of Working Time Act provides that an employee shall receive an eleven hour break between finishing work and starting the next day. So an employee who starts work at 9 o'clock in the morning cannot receive emails or be required to deal with an email after 10 o'clock on the night before. This might seem not to be that strong as getting emails at 9.30pm or 9.45pm in the evening is an intrusion.

The next Section of the Organisation of Working Time Act is Section 15 of the Organisation of Working Time Act. This sets out that an

employee is not required and can not be required to work in excess of 48 hours' averaged over a four month period. If an employee leaves the office and is working from home and is required to answer emails then they are at their employers workplace, even if they are at home because it becomes their workplace, they are working on behalf of the employer and are there to deal with matters at the request of the employer. If they are expected to answer the emails then there is limited opportunity to disconnect and there is a stronger argument that they are in fact working.

The next Section is Section 17. This requires that an employer will give the employee 24 hours' notice of the requirement to work over the hours set in their Contract of Employment. A Contract of Employment which sets out that the employee will work from say 9am to 5.30pm and then sets out that the employee would do such sufficient overtime as necessary for them to perform their duties does not take matters outside the realm of Section 17. The contract has a start and finishing time then the employee in the absence of getting notification at least 24 hours' in advance of the time or times that they must be available is not required to do any work unless that notification is sent and is entitled to disconnect.

Where an employer seeks to penalise or put the employee through a disciplinary procedure or take any detrimental act against the employee where the employee has, for example relied on Sections 11, 15 or 17 of the Organisation of Working Time Act then in those circumstance the employer will have penalised the employee and this is a further claim against the employer.

The reality of matters is that the legislation in the Organisation of Working Time Act effectively provides a right to disconnect.

If new legislation is to be introduced then really it is simply a matter of applying Section 17.

There will be times when employers will require overtime to be undertaken. There is no doubt about that. Having a blanket ban on overtime would be detrimental to businesses equally provided that the requirement is a reasonable requirement and does not result in excessive hours then in those circumstances it is reasonable, we would contend, that the right to disconnect should not be such that it

is so ridged that if an issue arises in the workplace, where work needs to be done and provided 24 hours' notice is given that the employer cannot require the employee to do that overtime.

The reality of matters is that many employers have a situation where employees themselves are accessing work emails now that they are on mobile phones or on laptops which they have at home outside of normal office hours.

It is good business for an employer to seek to limit the amount of additional hours that are worked. Where an employee works additional hours particularly where they are not getting the eleven hour break or are working over 48 hours' an average then in those circumstances where the employee suffers a health issue which can be either physical or physiological the employer leaves themselves open for a personal injury claim. In the case of Senior Executives, in particular these claims can be extremely expensive for employers mainly because these individuals are on high salaries and potential loss of earnings where they have a physical or psychiatric illness caused by excessive work can significantly impact on their ability to continue working therefore creating a significant claim against the employer.

Of course employers will have issues such as having to service clients. Particularly in service companies they will have clients in other Jurisdictions whether it is in the United States of America or in the Far East. Our service industries intended to work on the basis of the Irish operation having to react and work at times that the foreign client or associated business is working at. This has been incorporated into many Irish entities being the normal nine to five together with then such additional hours thereafter that are necessary to deal with non-Irish based clients or associated companies. If dealing with overseas companies who work on a different time zone than here in Ireland then there is a strong argument that the employer needs to reorganise the workplace in a way that allows that to be addressed.

Long hours is a feature of service companies. That is changing. It is likely as a result of Covid-19 that many companies will reduce the number of their employees and therefore there will be pressure on individuals going forward to work additional hours. However it is just

simply good business for employers to make sure employees do disconnect from work at the appropriate time.

The Workplace Relations Commission already has a role to play in doing inspections but probably it is necessary for the provisions of Section 17 to be tightened up but at the same time giving flexibility for an employer in cases where reasonable overtime is required.

Bringing Claims Under the Wrong Legislation

This issue arose in case ADJ-000251576. The claim was brought under Section 39 of the Redundancy Payment Acts. The employee received her redundancy but did not receive her full minimum notice payment. The claim issued. The Adjudication Officer held that the entitlement to payment based on service being statutory minimum notice or payment in lieu governed by a contract is a matter governed by other statutes rather than the Redundancy Payment Act.

If this was a case of minimum notice then the claim should have been brought under the Minimum Notice and Terms of Employment Act. If it is one for a longer period of notice than set out in the statute then the claim would be under the Payment of Wages Act.

It is one of the difficulties with the claim form to the Workplace Relations Commission that employees have to specify the Act under which they are bringing the claim.

While this related to a relatively small sum of money it is a further indicator of the fact that non represented individuals will often bring claims under the wrong piece of legislation.

Getting the name wrong in proceedings to the WRC.

This arose in case ADJ-00025915.

The Adjudication Officer looked at the Statutory Provisions which are in Section 39 of the Organisation of Working Time Act.

The Adjudication Officer looked at the issue of the degree of formality which is required and referred to the Judgement of the High Court in the case of Co. Louth VEC –v- The Equality Tribunal 2009 IEHC370 where Mr. Justice McGovern stated;

"If it is permissible in Court proceedings to amend pleadings where the justice of the case requires it, then, a fortiori, it should also be permissible to amend a claim as set out in a form such as an originating document before a Statutory Tribunal, so long as the general nature of the complaint remains the same."

In the Travel Lodge case being the case of Sylvia Wach –v- Travel Lodge Management Limited EDA1511 the Labour Court referred to the decision of the Supreme Court in the case of Halal Meat Packers (Ballyhanus) –v- The Employment Appeals Tribunal 1990 IRLM293 where it stated;

"That is in line with the generally accepted principle that Statutory Tribunals, such as this Court, should operate with the minimum degree of procedural formality consistent with the requirements of natural justice. On that point the decision of the Supreme Court in Halal Meat Packers (Ballyhanus) –v- Employment Appeals Tribunal 1990 ILRM293 is relevant. Here Walsh J stated, albeit obiter as follows;

"This present case indicated a degree of formality, and even rigidity, which is somewhere surprising. It is a rather ironic turn in history that this Tribunal which was intended to save people from the ordinary Courts would themselves fall into rigidity comparable to that of the common law before it was modified by equity".

The Adjudication Officer held that the Adjudication Officer should not be overly stringent and certainly not more stringent than the standard that would apply in the ordinary Courts.

The Adjudication Officer then looked at the question as to whether the correct respondent on notice of the proceedings was afforded an opportunity to be heard. The employee indicated that his employer was A-B. The WRC sent a copy of the form to A-B in Dublin. The Adjudication Officer pointed out that it was apparent this was sent to A-C in the UK because on the 19th December 2019 on behalf of A-C

the HR Business Partner wrote to the WRC stating that they were confirming that the respondents details were A-C rather than A-B.

The Adjudication Officer pointed out in the Labour Court Case of Ballarat Clothing Limited –v- An Aziz EDA151.

The Court followed the reasoning of Mr. Justice Hogan in O Higgins – v- University College Dublin 2013 21 MCA where it was stated;

"*In light of this acknowledgement the Court adopts the reasoning set out by Hogan J cited above and allows the appeal. Not to allow the appeal for such a technical reason where the correct respondent was aware from the commencement of the case that an error had been made and acknowledges it would suffer no prejudice by being named as the correct respondent would amount to a grossly disproportionate response and deprive the appellant of the substance of her rights to have the complaint heard and decided on its merits".*

The Adjudication Officer was of the view that if the proceedings were amended no prejudice would arise.

The Adjudication Officer then looked at the question of whether the incorrect respondent named was as a result of a technical, clerical or administrative error.

The Adjudication Officer pointed out in the Judgement of Sandy Lane Hotel Limited –v- Times Newspapers 2011 3IR334 Mr. Justice Hardiman gave short shift to the plaintiff's case that the omission of the word "Co" from the company's name was a clerical error. His view was bolstered by the fact that the complainants were a consortium of business men in the course of a complicated series of arrangements made for tax planning purposes in which they obviously had the benefit of the best legal and taxation advice. The findings include reference to the case of Re Maere's application 1962 RPC182 where the term clerical error was described as "*…a mistake in the course of some mechanical process such a writing or copying as distinct from an error arising e.g. from a lack of knowledge or wrong information, in the intellectual process of drafting language to express intention".*

It appears that the complainant Solicitor made a mistake by inserting A-B instead of A-C on the complaint form. The Adjudication Officer

pointed out to their mind that a technical clerical or administrative error is one made a person not qualified to know the correct term or use or one that results from a misprint or misspelling. The Adjudication Officer pointed out that it was apparent that the year previously when he represented the complainant regarding his personal injury claim the Solicitor was uncertain regarding the identity of the complainant's employer. To ensure that one of the parties would be held liable the Solicitor had sent letters to A-B and A-C which was a contract cleaning company. The Adjudication Officer pointed out if this uncertainty still exists, it is their view that some effort should have been made to establish the name of the complainant's employer before submitting the complaint to the WRC. The Adjudication Officer held that this led the Adjudication Officer to a conclusion that the mistake in the name of the respondent was not a simple clerical or administrative error.

In this case the Adjudication Officer did not agree to extend the time.

Where there is any issue relating to a company it would be our view that it is useful to attach a copy of a print out from the Companies Office.

As the claim form to the WRC is a non-statutory form. If the print out is included then the correct name of the company as per the Companies Office will appear. When acting for employees it is important to get instructions from them as to who they say their employer was. Again employees can check this by going to Revenue online. If there is any question as to the name of the name of the correct employer then it would be our view that proceedings are issued against each of these entities and there is a request that matters are consolidated together. Because the time limit runs and depending on the case there could be an issue where trying to find out could delay matters that proceedings issue sooner rather than later. For colleagues representing employees the provisions of Section 150 of the Legal Services Regulation Act does assist. As colleagues have to issue such a notice it is very useful to include in that the entity against whom the proceedings will be issued and setting out clearly in that document that this is the entity that the employee had engaged you to issue proceedings against and whom the employee says is their employer. The employee will be signing that form.

If an issue arises it is important to be aware that not every name change will be allowed.

Incorrectly reading a decision of the WRC due to a typographical error is not a ground for extending time to appeal.

This arose in the case RPD202 in a case of Drumcondra Childcare Limited Natalia Jaryszjarysz.

In this case it appears that the Adjudication Officer omitted the word '*Not*' when drafting the decision. However, the Court held that a virtually identical sentence had proceeded this and did not accept that an experienced practitioner familiar with the facts having read the previous paragraph could have concluded anything other than that the case under the relevant legislation had not succeeded.

The Court held that the words '*Exceptional circumstances'* meant effectively out of the ordinary.

In this case the right to appeal was refused as regards an extension of time. The interesting aspect of this is that this related to an experienced practitioner. It would be interesting to see if a similar view would apply in the case of an inexperienced practitioner. What is interesting is that effectively exceptional circumstances might, and this is not set out by the Court or addressed by the Court differ depending on whom the representative was. If the representative is experienced one approach but if not represented possibly a different approach.

Time Limit to Bring a Claim Under the National Minimum Wage Act

This issue arose in case MWD202 being the case of Anita Byrne and Gloria Rubio-Piment.

The Court in this case set out Section 23 of the Act in some detail.

The employer in this case contended that the complainant was statute barred having regard to the fact that the complaint was not made within six months of the last date on which a breach of the Act could have occurred. The Court set out that the relevant time limit for the

making of a complaint is set out in Section 41(7) of the Workplace Relations Act, 2015. The provision the Court held was consistent with the Act at Section 24. In this case the employee did make a request of the employer for a statement of her average hourly earnings by registered post on the 2nd November 2018. The employment had been terminated on the 8th May 2018. The complaint was made on the 17th December 2018. The 17th December would have been outside the six-month period but the request under Section 23 was within the six-month period. The Court pointed out that the employer made no response to that request. The Court pointed out that while reasons were given they were not relevant to the matter raised as a preliminary matter. The Court held that by operation of law the time limit applicable for making a complaint was either within six months of the date of receipt by the complainant of the statement requested of where no statement was provided within six months of the expiry of the time limit provided by the Act for the supply of that statement to the complainant.

The Court held that the complaint had therefore been lodged within time.

In this case the employee contended that she works 25 hours a week.

The Court pointed out that the law places no obligation on the employee to record her hours of work. The Act as the Court pointed out at Section 22(1) does place such an obligation upon the respondent and the Court concluded that the respondent had failed to maintain the records and to discharge the burden of proof placed upon the employer by virtue of Section 22 (3). An amount of €4,794.30 as claimed on the basis of a 25-hour working week was awarded.

Time Limits To Bring a Claim

The golden rule would appear to be always to issue as soon as possible. This issue arose in case ADJ-00024335.

The Adjudication Officer in this case quoted along with other cases the case of Kepak Group –v- Valsomiro Augusto Arantes UDD1625 where the Court stated in relation to an application for an extension of time;

"In that case, and in subsequent cases in which this question arose the Court adopted an approach analogous to that taken by the Superior Courts in considering whether time should be enlarged for "good reason" in Judicial Review proceedings pursuant to Order 84 Rule 21 of the rules of the Superior Courts 1986. That approach was held to be correct by the High Court in Minister of Finance –v- CPSU and Others 2007 18ELR36".

The Labour Court went on to say;

"It is for the complainant to establish that there is a reasonable cause for the delay. It is well settled that an application for an extension of time must both explain the delay and provide it justifiable excuse for the delay".

***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.**