Welcome to the August 2020 issue of Keeping in Touch.

In this issue we have gone back over significant Redundancy Act cases which have taken place since 2015 in the Workplace Relations Commission and in particular in the Labour Court. We have also, of course, covered a variety of other issues.

Those reading this newsletter may wonder why we have spent so much time looking at the issue of Redundancy. The reason for this is simple. Unfortunately there are going to be a significant number of Redundancy cases. This is a fact of life. Some businesses will close. Some businesses will reduce their headcount. This may either be by necessity so as to be able to continue to operate or due to changed working environments and the way businesses will work an opportunity to reduce the number of employees to make the business sustainable or in some cases more profitable.

We could have very simply retained this information for our own use but we do believe that it is important to share information and we hope those reading this newsletter will find the section which we have devoted to redundancy relevant whether you are a Solicitor, Barrister, HR professional, IR professional or a Union Representative. If you are an employer or an employee equally we hope you find this section relative and informative.

We are already finding that this topic is creating or more properly resurrecting terminology. In 2007 and 2008 those operating in this area of law used to refer to these as redundancies when advising employers. The terminology then changed to downsizing, subsequently to right sizing and at the end to reengineering the work force. That terminology is now remerging. At the end of the day this is still Redundancy work. A spin can be put on it but the reality is individuals will lose their jobs.

This firm started in 2009 in the middle of a recession. We did a considerable volume of redundancy work. One of the issues which we saw arising as a result of Redundancies was a significant rise in Unfair Dismissal and Equality cases. We have every reason to believe that this will occur again. The reasons are quite simple. The first and most obvious is that the employee does not accept that they should have been made Redundant. The second cause of these cases comes

down to employers. It is employers failing to go through a consultation process. Failing to set out the reasons why a particular post is at risk of redundancy, a failure to give the employee a right of representation and make submissions as to why their post should be retained and a failure to give the employee a right of appeal. The potential for claims against employers were they operate fair procedures and are open and transparent with employees was the major reason why claims were taken during the last recession. That will apply again. The idea of disclosing financial information to some employees will be significantly opposed by some employers. Even explaining the reason for selection for some employers is beyond them. Our advice to any employer seeking to make Redundancies is to get advice from an employment law solicitor and get appropriate support form properly qualified HR professionals. Where an employer has HR professionals operating within the firm or company then in those circumstances employers would be wise to follow the advice given. It is the easiest way to avoid claims.

There will be employees who will be actively seeking out redundancy payment. There will be those who will see it as an opportunity to move on. There will be those who will see it as an opportunity to get some monies. There will be those who are in an entity for a long period of time who may believe that this is an opportunity to retire early and possible get a lump sum payment that they would not otherwise obtain. Where employees are on layoff once the 10th August comes and unless that period is extended employers will start seeing claims coming looking for Redundancy and employers need to be up to speed on the issue of the Redundancy Payment Acts and what they need to do if they get a request for redundancy. They have seven days' to respond to a request. That is not seven working days. It is seven days' and unless an employer is up to date with the Redundancy legislation they can suddenly find themselves in a situation of having to pay out redundancy to an individual that they had no intention of making Redundant but had hoped to keep on layoff until sometime later in the year.

Normally in this introduction we look at how matters are going to be moving forward and we make comments on various areas of law but this time we are concentrating on redundancy as we believe that this is going to be a significant issue in the coming months for all involved in employment and particularly professional advisors.

We do hope that you do find the section on redundancy useful and helpful.

INDEX;

- **Getting a Redundancy wrong can result in an Unfair Dismissal case**
- **Unfair Dismissal and Redundancy**
- **Unfair Dismissal – Unfair Selection for Redundancy**
- **Redundancy Payment Acts and Equality claims**
- **A rushed Redundancy may result in an Employment Equality claim**
- **Redundancy - Suitable Alternative Job**
- **Redundancy – Offer of Alternative Employment**
- **Redundancy Payment Acts 1967 – 2014 – Suitable Alternative Employment – 1**
- **Redundancy – Suitable Alternative Employment – 2**
- **Redundancy – Change of Location**
- **Redundancy – Reduced Hours – Reduced Pay**
- **Redundancy – Where a contract is frustrated**
- **Redundancy – Employer ceases trading**
- **Claiming Redundancy from the State**
- **Redundancy – How will the employee enforce a claim?**
- **Entitlement to Redundancy – Social Welfare**
- **Redundancy Cases**
- **Working From Home**
- **Unfair Dismissal**
- **What is Gross Misconduct**
- **Unfair Dismissal – Fair Procedures**
- **Calculation of Annual Leave Due**
- **Annual Leave Year for the Purposes of the Organisation of Working Time Act**
- **European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 S.I. No: 131 of 2003**
- **Transfer of Undertaking Regulations – Who is responsible for a breach**
- **Employment Equality Act 1998, as Amended – Burden of Proof**
- **Victimisation under the Employment Equality Act 1998**
- **What is a Disability under the Employment Equality Act 1998 As amended**
- **Period of Time which can be considered by an Adjudication Officer in an Employment Equality Act case**
- **Reasonable Accomodation for a Person with a Disability**

- **Disability Discrimination**
- **Payment of Wages Claims**
- **Lodging Claims in the WRC**
- **Claims to the Workplace Relations Commission**
- **Format of Decisions**

Out and About in July 2020

On 13 July Richard Grogan was quoted in two articles by Fiona Dillon in both the Irish Independent and the Herald on the importance of both employers and employees obtaining advice on issues relating to redundancy, pay cuts or reduced hours of work. Also on 13 July Richard was interviewed on Lunch Time Live by Ciara Doherty who was standing in for Ciara Kelly answering listener's questions on employment law relating to redundancy, salary cuts, wage cuts and returning to work.

Further, on 13th July we had an article published in Irish Legal News on collective redundancies.

On 14th July Richard was interviewed on Taking Care of Business on Midlands 103 where Richard was interviewed by Ronan Berry. In addition to Ronan Berry being the radio presenter on Taking Care of Business he is also the general manager of Polar Ice Limited.

On 18 July Richard was interview for the Journal.ie in an article "I had to protect my staff – Government Green List could cause workplace disputes".

On 20th July Richard was interviewed by Cork's 96fm on the issue of facemasks in workplaces.

On 21 July Richard was interviewed on Classic Hits on the Niall Boylan Show on the issue of individuals going abroad on holidays and then returning to workplace.

On 27th July Richard was interviewed on Kildare FM on the issues of redundancy and job losses if schools do not reopen fully.

On 29 July Richard was quoted in the Irish Independent on the issue of parents been forced to stay home to mind children.

On 29 July Richard was also quoted in the Irish Sun on the issue of employees being required to stay at home after travelling abroad.

On 31 July Richard was interviewed on the Today with Sarah McInerney show on RFTE answering Employment Law questions.

In IRN 27 in July Richard along with other Employment Law Solicitors was interviews for an article entitled "Employment Law challenges expected to increase in Covid-19 world". Richard was quoted on the issue of the large number of Redundancies which are likely to arise and the issue of bottle necks in the system.

We had in the past written to both Charlie Flanagan and Heather Humphreys prior to the new Government being formed in relation to the provision of Section 678 Companies Act 2014 which in the case of a Company going in to Liquidation or passing a Resolution to go into Liquidation would require an application to the High Court for consent to bring a claim to the Workplace Relations Commission. The legislation in 2014 referred to an exemption for cases going to the Employment Appeals Tribunal. We pointed out that these applications can no longer be made since the Workplace Relations Commission, came into existence, in 2015. We pointed out that if the legislation was not amended there could be a significant number of claims, having to go to the High Court for consent to issue claims in the WRC as otherwise the WRC would not have jurisdiction to hear such cases. When the new Government was formed we wrote to the new Minister being Minister Leo Varadkar. On 15th July we received in a letter dated 10th July confirming that this issue will be addressed in heads of legislation currently being prepared. This will avoid unnecessary applications having to be made to the High Court. We are delighted to note that our concerns have been acknowledged and taken on board. Copy of the letter we sent to the Minister was produced in the July issue of our Newsletter.

Redundancy

The issue of redundancy is an issue which is going to be arising shortly in many workplaces. The issue arose in case ADJ-00024839. In that case the Adjudication Officer set out that there are five alternative definitions of redundancy contained in the Redundancy Payments Acts 1967-2007. It was pointed out that the fact that the requirement of that business for employees to carry out work of a particular kind in the place where the employee was so employed has ceased or diminished or is expected to cease or diminish is a redundancy situation.

This is likely to be one of the grounds which is going to arise in cases. The issue in cases is likely to be the issue as to whether the requirement is likely to diminish as much as it has diminished.

We would anticipate that there are going to be a lot of claims in the WRC over this issue.

Genuine Redundancies

The issue of redundancy is one which can have a devastating impact on any employee. It is however important in all redundancy cases that it is a genuine redundancy. An interesting case on this is a case of JBC Europe Limited and Jerome Penisi [2011] IEHC279 being a decision of Mr. Justice Charleton.

The case determines that to prove that a redundancy was genuine the burden of proof is on the employer in this regard.

The Court also helpfully dealt with the issues of damages and how damages are ascertained.

It is one of those cases that I would recommend to colleagues to read.

Redundancy – Time limit to bring a claim

In the case of Brian Cahill trading as Jerpoint Inn and Helen Green an issue arose as regards the jurisdiction in relation to the issue of a claim under the Redundancy Payment Acts. What is interesting in this case is that the legal representatives were arguing about the fact that

the claim had not been lodged within 6 months of the purported date of termination.

The Labour Court pointed out that there appears to be a misunderstanding in relation to the time limit on claims for Redundancy Payment. The Court pointed out that the limitation period under Section 41 (6) of the Workplace Relations Act 2015 applies and that the appropriate limitation period is 52 weeks from the date of termination of employment.

This is an important reminder of what the law on this issue is. It is one of the cases where the 6 months period does not apply.

The issue arose then whether or not the employee was entitled to Redundancy. The issue was effectively determined on whether there had been a transfer under the Transfer of Undertakings Regulations. The Labour Court helpfully referred to case 24/85 Spijkersv Gebroeders Benedik Abbatoir CV and set out the views of the ECJ in relation to that. It is useful that the Court has set out what the test was, namely:

"In order to establish whether or not a transfer has taken place in a case as such before the National Court. It is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern, as would be indicated inter alia by the fact that its operation was actually continuing or resumed by the new employer, with the same or similar activities."

The Court went on to state that the ECJ had stated:

"To decide whether these conditions are fulfilled it is necessary to take account of all factual circumstances of the transaction in question including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as buildings and stock, the value of intangible assets at the date of transfer, whether the majority of the staff were taken over by the new employer, the transfer or otherwise of the circle of customers and the degree of similarity between the activities before and after the transfer, and the duration of any interruption in those activities. It should remain clear, however, that each of these factors is only part of the overall assessment which is

required and therefore they cannot be examined independently of each other."

In this case the Court found that all stock, furniture and equipment, the 7 days publican's licence and the use of premises all transferred. The Complainant transferred. Supplier accounts transferred. The customer base transferred. There was no period of interruption. The activities, before and after the transfer, mirrored one another. The Court therefore held that there was no entitlement to a Redundancy payment. They however importantly also pointed out that the complainant in this case was entitled to continue in the new employment on terms no less favourable than she had previously had.

This is a very important decision of the Labour Court clarifying the time limits for a claim under the Redundancy Payment Acts and giving further clarity in relation to the Transfer of Undertaking Regulations.

Redundancy Payment Act Claims

In case ADJ-16155 the AO in this case very helpfully calculated the redundancy payment. The decision sets out the start and finishing date. It does not set out the weekly wage.

There are currently difficulties with the Department of Social Protection in respect of certain claims that go in. It is useful if decisions set out the start date, the finishing date and the weekly rate of pay together with any periods of lay off if applicable. Then it is easy for the employee to do the calculation which is required any way to be submitted to the Department and it is equally easy for the Department to check of the information in the decision against their records.

There is no necessity for an AO to do the calculation. It is helpful that they do but provided the relevant information as set out above is there then it makes it easier for checking if an issue arises in relation to the calculation which may be challenged at times by the Department.

In case ADJ-16010 the AO had to deal with an Unfair Dismissal case where it was claimed the employee had been made redundant. The AO

in this case helpfully set out the test of what a valid redundancy was quoting the case of UD206/2011 where the EAT stated:

"When an employer is making an employee redundant, while retaining other employees, the selection criteria being used should be applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria to be adopted will come under close scrutiny if an employee claims that they were unfairly selected for redundancy. The employer must follow the agreed procedures when making the redundancy. Where there are no agreed procedures in relation to selection for redundancy, as in this case, then the employer must act fairly and reasonably."

It is helpful that the AO has set this matter out in this way. Very often employers fail to understand the importance of fair procedures in selection. Redundancy relates to the job and not to an individual. Therefore, while it was not covered in this particular case, selection on the basis of who is the best worker, for example, would not be fair selection.

In case ADJ16380 the AO in this case has set out the decision with absolute clarity. There could be no doubt if any issue arises into the future as to what the relevant calculation would be. The AO has set out the start date, the termination date and the weekly wage. On that basis it is very easy using the Redundancy Calculator to calculate the redundancy payment.

The AO has also set out the requirement for the employee to be in insurable employment. The redundancy legislation is unusual. It is not a requirement that the employer actually paid the employer PRSI. All that is required is that the employee was in employment where their employer should have been liable to pay employer PRSI.

Redundancy, Temporary Wage Subsidy Scheme, Senior Employees, and, those Returning from Maternity Leave

You might wonder why we would lump all of these four together. There is a very good reason and we will try and set it out here.

Under the Temporary Wage Subsidy Scheme ("TWSS") an employer going into the Scheme completes a declaration, to the Revenue saying it is not their intention to make any of those on the TWSS redundant. Now senior employees earning more than €75,000 are not eligible to join the Scheme. Women returning from maternity leave who are not on the payroll on 29 February could not join the Scheme until recently. There may also be some men who would have been on parental leave who may not have been on the payroll on that date equally. However, there is a significant number of women who would be in that position of not being on the payroll on the 29 February.

Take a situation where an employer is intending that they, when opening, will have to reduce the number of employees. The employer now is in a very difficult situation. If the employer complies with the Revenue position the first people to be really considered for redundancy will be those who are earning over €75,000 and those who would not have been on the payroll which in this case would be women returning from maternity leave but now are covered. Let's take a situation where you have a company that has a unit which has ten people doing the same work. One employee is older and has been on a higher salary on the basis of annual increments. There is one employee who came back from maternity leave but could not be put onto the Temporary Wage Subsidy Scheme as they earn over €75,000. The employer works out that they are only going to need eight employees in that unit. Applying the Revenue rules the older employee and the woman returning from Maternity Leave being paid over €75,000 would be the two individuals who should be given redundancy. That covers the Revenue. However, from an employment perspective dismissing either would leave the employer open to an equality claim on the ageism ground and the gender/family status ground from the two individuals.

The Labour Court have constantly held as have the Revenue through the Appeal Commissioners that the Labour Court is not bound by decision of the Revenue or the Appeal Commissioners and that the Revenue/the Appeal Commissioners are not bound by a decision of the Labour Court. There is therefore a standoff. Employment law says one thing. The Revenue law says something else.

If the employer ignores the Revenue rules and applies the normal redundancy rules and equality legislation the employer could well find

themselves in a situation of a reclaim from the Revenue in respect of those who were made redundant who had been on the TWSS. There is even a question that the employer would have a reclaim in respect of all of those workers who are on the TWSS because the employer will effectively have broken their statement of intent to the Revenue by making two people on the TWSS redundant when there was others not on the TWSS who could have been made redundant. From an employment perspective redundancy is the job not the individual and it's hard to argue that issues under the TWSS being Revenue rules would trump the employment legislation.

So there is a Mexican standoff. There is of course a solution and that is that in those circumstances the Revenue rules should be amended so as to provide that the employment law applies being the normal employment law provisions as regards selection and that if on a normal selection basis somebody would have been selected for redundancy who was on the TWSS and a person who was not on the TWSS would be retained then in those circumstances Revenue would neither seek a refund of the TWSS subsidy to the employer nor the interest on it.

The reality is this is going to become a problem. It is a problem which we have highlighted. We highlighted this issue on RTE on the Sarah McInerney Show on 18 May and in an interview with TheJournal.ie.

We doubt that this issue is going to be addressed but we have raised it.

Making an Employee Redundant Who Was on the Temporary Wage Subsidy Scheme

When employers went into the Temporary Wage Subsidy Scheme ("TWSS") the employer would have given a statement, as part of the process, that it was not their intention to be making anybody redundant who was put under the Scheme.

In reality a number of employees who were put under that Scheme are going to be made redundant.

Where an employer proposes to do so they need to be extremely careful. The Revenue Commissioners have indicated that where an

employee is proposed to be made redundant then in those circumstances the employee must be taken off the TWSS.

Take the situation where an employer is considering redundancies. They have say ten employees all under the TWSS. All ten are notified that they are at risk of redundancy. The employer believes that only four of five will actually be made redundant but, because they all work in a similar unit they are all potentially at risk of redundancy.

In those circumstances the employer must take the full ten employees off the TWSS when the consultation process starts. Once the selection has been made then in those circumstances the employees not being made redundant can be put back on the TWSS. This would equally apply if an employer notified an employee that a single individual was at risk of redundancy in which case they equally, in that situation have to be taken off the Scheme.

A number of employers are going to fall foul on this issue and have a reclaim from the Revenue.

There is certain logic in the approach of the Revenue Commissioners. The employer has said that they had not intended to make any employees redundant. There have been issues coming up as regards calculating redundancy notice and holiday pay in a situation where an employee is made redundant and had been put under the TWSS. As the Revenue rules will require the employee to be taken off the TWSS then the law is very clear and their notice and holiday entitlements would be calculated on their old salary or wage not on the TWSS. Equally their redundancy would be calculated on their normal wage of salary subject to a maximum of €600 per week and not on the TWSS rate of pay.

Collective Redundancies

Covid-19 is a unique challenge for employers. The challenges for employers are changing effectively on a weekly basis. Employers are trying to minimise the impact on their workforce, to look after the health and safety of their employees, and to protect the business going forward.

One issue which we see as going to be arising unfortunately is the issue of collective redundancies.

Now the first question is always what is a collective redundancy. A collective redundancy occurs where a particular number of employees in any employment are made redundant within a thirty-day period. The thirty days must be consecutive or put in very simple language one after another. Therefore, for example if employees were made redundant on the 28th February and further employees were made redundant on the 2nd or 3rd of April that would not be a collective redundancy provided the numbers did not exceed the threshold.

The issue then is what are the thresholds. This depends on the number of workers.

Under 21 workers there can be no collective redundancies.

Between 21 and 49 employees then 5 or more must be made redundant.

Between 50 and 99 employees then 10 or more must be made redundant.

Between 100 and 299 employees 10% or more must be made redundant.

300 employees or over then 30 employees or more.

In looking at the number of employees the provisions of the Protection of Employment Act 1997 sets out that you must look at the number of employees averaged over the 12 months before the date on which the first dismissal takes effect. What does this mean? It means in the previous example let us take a company which has 24 workers. Three are made redundant at the end of February. That does not create collective redundancy. One more is made redundant in April therefore there is no collective redundancy as it is not within the 30 consecutive days. The employment is then down to 20 employees. If in June five more employees are to made redundant at that stage you look at the number of employees that were there in the preceding 12 months and in those circumstances in respect of the redundancies in June these

would be a collective redundancy because of the fact that there would have been 24 employees previously in the preceding 12 months.

In the case of a collective redundancy an employer is obliged to provide certain information to the employee's representatives and to consult with them. They must also notify the Minister who also has to be provided with the relevant information.

The representatives will be a trade union, a staff association or a body which has been the practice of the employer to conduct collectively bargaining negotiations with. In the absence of a trade union, staff association or such a body then it is a person or persons chosen by the employees to represent them and negotiate with the employer. It is not a matter of the employer nominating somebody.

The employer can decide on the method of election and the number of representatives but it is the employees who elect the representatives. It may be appropriate if there are different classes of employees who could be affected that representatives would be elected from each class. Take for example a company which is involved in distribution. There will be office staff, there will be those working in the warehouse and there will be those who will be drivers delivering goods. On a very simple basis there would therefore potentially be three different groups of workers who would have possibly different issues but certainly would be defined constituencies.

The employer is obliged to provide certain information and this includes the reasons for the proposed redundancies, the number and description of categories of employees who it is proposed to make redundant, the number of employees and categories normally employed, the number of agency workers to which the Protection of Employees (Temporary Agency Work) Act 2012 applies, to specify those parts of the business in which the agency workers are working and the type of work those agency workers are engaged to do. The employer must also set out the period during which it is proposed to put in place the redundancies, the selection criteria and the method of calculating the redundancy payments. The employer must give all of this information also to the Minister.

The consultation period with the representatives must be at the earliest opportunity but in any event at least 30 days before the first

notice of dismissal is given. The employer must look at the possibility in these negotiations of avoiding the redundancies, reducing the numbers to be made redundant and must look at issues such as redeployment or retraining of employees made redundant.

The company cannot avoid going through this process as failure to do so can be a breach of the requirements, under legislation.

Some employers mistakenly believe that once the collective redundancy negotiations have finished that that is the end of matters. That is not the position. Individual consultations must be carried out with the at-risk employees. An employer who fails to do so can be liable on convictions to a fine not exceeding €5,000. It should also be noted that failure to consult can result in a complaint to the WRC. In some cases, it can result in an injunction.

It is likely that the issue of collective redundancies is going to become a significant issue over the coming months. It is important for employers, employees and representatives to be aware of the relevant collective redundancy legislation.

Collective Redundancy

This issue arose in case C-300/19 being a case opf UQ –V- MacClean Technologies, SLU and joined parties.

The issue concerns Council Directive 98/59/EC of 20TH July 1998 on the law relating to collective redundancies. An opinion of Advocate General Bobek issued on the 11th June the opinion states that the protection of a worker under the Directive will be triggered including the access to the judicial and/or administrative procedure for the enforcements of the rights guaranteed under the Directive pursuant to Article 6 if the worker was dismissed within a consecutive thirty or ninety day period however calculated in which the number of redundancies reached the required threshold. The opinion states that on the facts of each specific case the reference period could lie fully before, fully after or partly before and partly after the dismissal at issue. The only two conditions are those thirty or ninety days are consecutive and the worker evoking his or her rights under the

Directive was dismissed within that period. This is an important opinion in clarifying the law on this point.

Collective Redundancies

With Covid 19 and its effects there are going to be situations where contracts of employment are changed. This may be the way employees work or a reduction in salary.

The termination of an employment contract following a workers refusal to accept a significant unilateral change to essential elements of the contract which operates to his / her detriment constitutes a redundancy for the purposes of Council Directive 95/59/EC of 20 July 1998. This issue arose in a case before the European Court of Justice in case C-422/14 which held that a significant change to essential elements of the employment contract for reasons not related to the individual employee concerned falls within the definition of "redundancy" for the purposes of Article 1(1) (A) of the Directive.

In that case it was held that for the purposes of determining whether there is a collective redundancy under the EU Directive that when calculating the number of redundancies, termination of an employment contract which occurs on the employers initiative for one or more reasons not related to the individual workers concerned are to be equated to redundancies provided that there are at least five redundancies.

In this case the question was one where there was a 25% reduction in the salary. What is interesting is that the CJEU stated that to establish whether there is a collective redundancy within the meaning of the Directive, the condition that there must be at least five redundancies relates not to termination of employment contracts that may be assimilated to redundancies but only to redundancies in the strict sense of the term.

The Court found that the fact that an employer unilaterally and to the detriment of the employee made significant changes to essential elements of the employment contract for reasons not related to the individual employee concerned falls within the definition of redundancy for the purposes of the Directive. The Court observed that

redundancies are characterised by the lack of the workers consent. In the case before them the termination of the employment relationship of the worker who agreed to enter into a contract terminating that relationship arises from the changes made unilaterally by the employer, the essential element of the employment contract for reasons not related to the individual worker. That termination therefore constitutes a redundancy. The Court held that one of the objectives of the Directive is to afford greater protection to workers in the event of collective redundancies a narrow definition cannot be given to the concept of redundancies.

This is an important case for collective redundancies going forward in the current environment. The effect of this is that if an employer sought to put in place a reduction in salary which employees did not consent to and effectively said if there was no agreement those who did not agree would be made redundant then if that employer, for example, has over 21 employees and five of them opt for redundancy then in those circumstances this is in effect a collective redundancy and the normal collective redundancy rules will have to apply. That means notifying the Minister but it also means having a full consultation period.

This will probably come as a surprise to many.

Redundancy – How an Employee Can Fall Foul of the Redundancy Payments Acts

In case RPD197 being a case of Anita Olejniczak and Glenbeigh Fire & Flood Limited the issue arose as to whether or not the employee had the requisite service.

The employee contented that she had been employed by the group from March 2009 until her post was made redundant in May 2018. In May 2017 the employee contended she had been promoted within the group of companies.

There are a number of provisions in the Redundancy Payment Acts which can catch an employee out in these situations.

Section 9 (3) (a) of the Act states that a dismissal under the terms of the Act will not be deemed to have taken place if an employee moves from one part of a group to another, a reengagement took place with the agreement of the employee, the previous employer and the new employer. The legislation provides that the employment will not be deemed to be a dismissal if the employee is reengaged by another employer immediately on the termination of the previous employment. What is important however is before the commencement of the period of employment with the new employer the employee must receive a statement in writing on behalf of the previous employer and the new employer which sets out the terms and conditions of the contract of employment with the new employer, specifying that the employees period of service with the previous employer will be regarded by the new employer as service with the new employer and contains particulars of the service mentioned previously. The employee must also notify in writing the new employer that the employee accepts the statement required by that sub-paragraph.

Rarely if ever does this actually happen.

Section 16 refers to a situation where a person is reengaged by an associate company.

In this case the Labour Court looked at the definition of subsidiary which is set out in the Redundancy Payment Acts and Section 7 of the Companies Act 2014. The Labour Court set out that no evidence was offered to support the idea that either company was a subsidiary of the other or that both were subsidiaries of a third company. The Labour Court helpfully set out Section 7 of the Companies Act 2014 in this decision.

The case does turn on the fact that the employer in this case contended that the particular company was not part of a group company. It would now appear effectively that employees in cases are going to have to produce evidence where they are claiming that there is a subsidiary company as part of a group of the relevant shareholdings of compositions and boards. The new reporting requirements relating to companies will make this a lot easier. The beneficial owner's numbers of shares are now going to have to be disclosed in records.

This case indicates one of the difficulties that happens when an employee moves from one group company to another group company. We use this in the widest possible sense. Where an employee believes that they are moving from one group company to another group company it is absolutely imperative that the employee has the appropriate contract put in place which complies with the provisions of Section 9 of the Redundancy Payment Acts and ensures that same is in place before moving. Where the employee fails to do so, as in this case, the employee may lose out on their entitlement to a redundancy payment.

Redundancy – A trap for Employers

In ADJ4328 the Adjudication Officer had to deal with a situation where an employee on lay-off gave a notice of intention to claim redundancy to the employer. The employee did not use the RP9 Form. The Adjudication Officer rightly pointed out that it is preferable that the RP9 Form is used. However, equally the Adjudication officer correctly pointed out there is no requirement under the legislation to do so. The Adjudication Officer pointed out that the employer in such circumstances must give a counter notice within 7 days of receipt of the request for redundancy.

An employee is entitled to claim redundancy where they have been placed on short time or lay off for more than four weeks. The employer, if they give a counter notice must do so within 7 days. That notice must provide that the employee would be provided with 13 weeks continuous employment within four weeks of the counter notice.

In the particular case the employer received a notice but did not respond within the 7 day period of time. The Adjudication officer therefore, in our opinion, correctly held that the employee was entitled to redundancy.

Under the Redundancy Payment Act there is no provision for an extension of time for the employer to give a counter notice. It is therefore important that employers who receive a request for redundancy respond immediately if they intend to give a counter

notice failing which the employee will automatically become entitled to a redundancy.

In another case under ADJ1190 the Adjudication Officer had to deal with a situation where the employer claimed that there had been a transfer under the Transfer of Undertaking Regulations, commonly called TUPE. This is a defence to a claim for redundancy. The Adjudication officer in this case which is one which is interesting went though the history of what happened when the business closed down and found that there had been no transfer under the Transfer of Undertakings. Therefore the Adjudication Officer held that the notification of termination of the employment was simply a notification of termination of the employment which entitled the employee to claim redundancy.

If an employer is going to be relying on the defence that there is a transfer under the Transfer of Undertaking Regulations to a claim for redundancy it is important at the time that the transfer is taking place that the employer ensures that the appropriate notifications are sent advising the employees that a transfer is going to take place under the said Regulations.

Redundancy as a cloak to an Unfair Dismissal

IN ADJ4920 the Adjudication Officer in this case held that the selection of the employee for redundancy was not valid and was effectively an attempt to dismiss the employee because of shortcomings in his performance. The Adjudication Officer held that the use of redundancy in such circumstances is precluded and quoted the case of JVC Europe Limited –v- Panisi 2011 IEHC 279.

The Adjudication Officer awarded compensation of €12,000. This is an important restatement of the law in this area.

Redundancy Payment Acts, 1967 – 2014

In a case of Instore Merchandising and Demonstrating Limited and Colley RPD191 the Court had to deal with a situation where the employee had never been given a contract of employment.

The Court looked at Section 11 (2) of the Act which describes the circumstances of short time within a meaning which could be applied in the particular case as the Claimant's potential remuneration was less than half of existing pay under a new proposed arrangement. However, the Court pointed out that provision was qualified by the time requirement set out in Section 12 of the Act before this could be claimed. The Claimant has not been on short time for four or more consecutive weeks or for six or more weeks within a thirteen-week period and therefore Section 11 (2) was not applicable. The Court pointed out that they were of the view that the contract which the employee has was effectively an "if and when" contract.
The Court held that no redundancy had taken place.

While it was not covered it this case, it is interesting that it was claimed by the employee that she had never resigned but indicated simply that she would not accept one days work every week. There is a provision in the Redundancy Legislation that if there is a breach of contract when an employee can immediately resign and claim redundancy. The Labour Court have recently ruled on such a case.

The other interesting aspect is that the employee would have been better working one day every week for four consecutive weeks and then may well have come within the provisions of Section 11 (2) of the Act. Even if the contract at that stage have been an "if and when" contract, as held by the Labour Court in this case, the employee would still have been able to rely on Section 11 if her remuneration was less than half the existing pay that she would have been receiving.

This case would appear to indicate the importance of employee's getting advice before deciding to bring a redundancy claim. The employer was represented. The employee was not.

Unfortunately, there is no legal aid in this country for such employees. Saying this, the Labour Court, where there is an unrepresented party do take this into account in looking at matters for the purposes of ensuring that the employer or in the employee in this case gets a full and fair hearing and that arguments which could be advanced by the employee would effectively be addressed.

Redundancy after Resigning – It is possible

The case of Drumcondra Childcare Limited and Szumera RPD1814 is an interesting case concerning the application of the Redundancy Payments Act 1967. The facts of this case are interesting and were agreed by the parties. The employee was employed as a part time cleaner. She was placed on temporary lay off on 25 August 2017 until 1 January 2018. After a period of 4 weeks on temporary lay off the employee wrote to the respondent terminating her employment with effect from 1 January 2018. The employee contended that pursuant to Section 12(2) of the Act she was entitled to Statutory Redundancy. The employer contended that it served a counter letter on the complainant offering her a period of continuous employment but this was not done within the time frame of 7 days from the date of receipt of the employees' intention to claim provided for in Section 13(2) of the Act. The Court set out the provisions of Section 12 and 13. The Court helpfully set out the case of Industrial Yarns Limited v. Leo Greene and Another 1984 ILRM15 at page 20 where Costello J (as he then was) stated:

"the S.12 procedure was amended by S.11 of the 1971 Act. After the employer had served the S.11 notice of lay off, the employee could now serve one of two notices;
Either (a) A Notice of Intention to claim redundancy
or
(b) A notice terminating his contract (which is deemed to be a notice to claim a redundancy payment). He cannot serve both".

The Labour Court held that as the claim fell squarely within the meaning of Section 12(2) of the Act. The letter sent by the employee to the employer informing the employer, after she had been on a period of enforced lay off of longer than 4 weeks, is to be deemed in accordance with Section 12(2) of the Act to be a notice of intention to claim a redundancy lump sum payment. The Court held that the claim was not defeated by the Respondent within the meaning of Section 13 of the Act by serving a counter notice within the relevant time period. The employee had commenced employment on the 1st March 2012. The Court held that the relevant termination date for the purposes of redundancy was 1 January 2018 and set out her weekly rate of pay. We would comment that normally an employee in such

circumstances will serve a notice of intention to claim redundancy payment. That form, as produced, provides for the counter notice. By using the alternate method of simply sending a letter terminating the contract some employers may not then be aware that this is in fact, pursuant to Section 12(2) deemed to be a notice to claim a redundancy payment.

Redundancy Selection - 1

The issue of the selection for redundancy is an issue which is going to be arising. This issue did actually arise in case ADJ-00014858. The employee was not successful in that case.

The relevant legislation is Section 6 of the Unfair Dismissals Act 1977. In relation to the issue of selection for redundancy Subsection 3 is the relevant section which provides

"(3) Without prejudice to the generality of subsection (1) of this section, if an employee was dismissed due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be the ground justifying dismissal, or he was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union, or an excepted body under the Trade Union Acts 1941 and 1977, representing him or has been established by the custom and practice of the employment concerned, relating to redundancy and there were no special reasons justifying a departure from that procedure, then the dismissal shall be deemed, for the purposes of this Act, to be an Unfair Dismissal"

In looking at this it is also important to look at the provisions in Section 7 subsection 2 the Redundancy Payments Act 1967 as amended.

In these cases the question is always going to be whether the employee was properly selected for redundancy. In these types of cases it will be imperative for employers to have the appropriate documentation in place showing the selection process and how it was applied to the employee and how the employee was given fair procedures in relation to same.

Fair Selection for Redundancy - 2

This issue was addressed in ADJ-00018415. The Adjudication Officer quoted the case of Williams –v- Comp Air 1982 1 ICR156 where Browne Wilkinson J in considering the issue of fair selection identified the following generally accepted principles governing how reasonable employers will typically act.

The employee will seek to give as much warning as possible of impending redundancies so as to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Unions on criteria to be applied in selecting the employees to be made redundant. Where a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the

opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience, or length of service.

The employer will seek to ensure that the selection is made fairly and in accordance with these criteria and will consider any representation the Union may make as to such selection.

The employer will seek to see whether instead of dismissing the employee he could afford him alternative employment.

In Boucher –v- Irish Productivity Centre 1994 ELR205 this was a case which covered the issue of unfair selection. The selection had been carried out without any consultation or interviews. The Employment Appeals Tribunal emphasised that those in the group likely to be dismissed should be made aware that such assessment is being made and should be given an opportunity to give their views which should be considered.

In Mulligan –v- J2 Global (Ireland) Limited UD-993-2009 in respect of redundancy the Tribunal stated;

"In case of redundancy, best practice is to carry out a genuine consultation process prior to reaching a decision as to redundancy. While in some cases there may be no viable alternative to the making of one or more jobs redundant, whatever consultation process is carried out, the employer who fails to carry out a consultation process risks being found in breach of the Unfair Dismissal Acts as such a lack of procedure may lead to the conclusion that an Unfair selection for redundancy had taken place!".

In JVC Europe –v- Banasi 2011 IEHC279 Mr. Justice Charleton stated;

"*It is made abundantly clear by the Legislation that redundancy, while it is a dismissal, is not unfair. A dismissal however can be distinguished as redundancy that is not lawful. Upon dismissal an employee can simply say that the employee was not dismissed for a reason specific to that person but that instead his or her services were no longer required, pointing to apparently genuine reasons for*

dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or substantial grounds justifying dismissal, the burden of proof rests of the employer to demonstrate that the termination of the employment came within a lawful reason".

Another case that was quoted is that also of St. Leger –v- Frontline Distributors Ireland Limited 1995 ELR160 where Dermot McCarthy SC stated;

"*Impersonality runs throughout the five definitions of the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose his job. It is worthy to note that the EC Directive on collective redundancies uses a shorter and simpler definition "one or more reasons not related to the individual worker concerned.*

Change also runs through all five definitions. This means change in the workplace. The most dramatic change of all is a complete shutdown. Changes may also mean a reduction in needs for employees, or a reduction in numbers. Definition (d) and (e) involve change in the way of work is done or some other form of change in the nature of the job. Under these two definitions change in the job just means qualitative change. Definition (e) must involve, partly at least work of a different kind and that is the only meaning we can give to the words "other work". More or less work of the same kind does not mean "other work" and is only quantative change*"*.

It is interesting that the case in JVC Europe Mr. Justice Charleton also remarked;

"*It may be prudent, as a mark of a genuine redundancy, that alternatives to letting an employee go, should be examined*".

This is a case where the complaint issued on 4th December 2018. The decision issued on 28th April 2020 with the case having being heard on 7th June 2019.

We simply mention this as this is a case under redundancy which has arisen before we are likely to have the avalanche of redundancies arising. It issued at a time when we had a considerable amount of full employment in this country. Therefore this decision is a useful

decision as it was written at a different time but it is setting out the law as it is now going to be applied in these changed circumstances.

Selection for Redundancy - 3

This issue arose in the case TUS Community Supervisor and a Local Development Company. Ref ADJ-00020033.

In this case the Adjudication Officer helpfully set out the relevant legislation being set out in Section 1, 6(1), 6(3), 6(4)(c), 6(7) of the Unfair Dismissal Acts. The other relevant section is Section 7(2) of the Redundancy Payment Acts, 1967-2014.

The Adjudication Officer set out the legislation in detail. When it came then to the issue of the selection of redundancy where it is accepted that the burden of proof is always on the employer the case of Boucher Irish Productivity Centre R92/1992 is relevant. In that case the EAT stated that the employer had to 'to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessment are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees concerned and that any selection for redundancy of the individual employee in the context of such criteria is fairly made'.

The Adjudication Officer pointed out that generally selection criteria should not be based on subjective assessments of the employee. This is absolutely correct in our view. The employer must be able to establish as the Adjudication Officer set out that an employee was fairly selected for redundancy based on independent, objective and verifiable criteria. In essence what is required of the employer in this respect is to be able to objectively justify why a particular employee was selected for redundancy as opposed to another employee. Specifically the employer must be able to demonstrate that a particular employee had been compared to others who might have been made redundant. Where redundancy arises and no agreed procedure or custom is in place the reasonableness of the selection criteria is usually focused on and tends to be assessed by the objective standards of the way in which a reasonable employer in those circumstances in that line of business at that time would have behaved.

The Adjudication Officer pointed out the case of Bunyan -v- United Dominion Trust (Ireland) Limited 1982 ILRM404 where the EAT endorsed and applied the following view quoted from NC Watling Co Ltd -v- Richardson 1978 IRLR225 where it was stated:

''the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business, would have behaved. The Tribunal therefore does not decide the question whether, on the evidence before it, the employee should be dismissed. The decision to be dismissed has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded ''

In that case the employee won the case because it was able to be shown that the employee had been subjected to certain disciplinary matters. The case highlights the importance of the employer applying fair selection procedures.

Redundancy where payment is not made by the Department of Employment Affairs and Social Protection.

This issue arose in ADJ-00021489. In that case the employee issued the claim but named the employer as the respondent. They did not name the department. The Adjudication Officer therefore dismissed the claim as the department had not been named.

It is vital in such cases where the department do not pay out that firstly they are notified of matters and secondly that after notifying them that they are named in the proceedings.

Selection for Redundancy – 4

This issue was address in case ADJ-00019921 where the Adjudication Officer helpfully set out the case of Williams –v- Comps Air 1982 1 ICR156 where Browne Wilkinson J in considering the issue of fair selection identified the following general accepted principles governing how reasonable employers will typically act namely;

The employer will seek to give as must warning as possible of impending redundancies so as to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions, and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant. Where a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length or service.

The employer will seek to ensure that the selection is made fairly and in accordance with these criteria and will consider the representations the Union may make as to such selection.

The employer will seek to see whether instead of dismissing an employee he could offer alternative employment.

The Adjudication Officer pointed out the case of Boucher –v- Irish Productivity Centre 1994 ELR205 as an illustration of an unfair selection process where no agreement was reached as to the selection and the selection process was carried out without any consultation or interviews.

In Mulligan –v- J2 Global (Ireland) Limited UD/993/2009 in respect of redundancy the EAT stated;

“In cases of Redundancy best practice is to carry out a genuine consultation process prior to reaching a decision as to redundancy.

While in some cases there may be no viable alternative to the making of one or more jobs redundant, whatever consultation processes it carried out, the employer who fails to carry out a consultation process risk being found in breach of the Unfair Dismissal Act as such a lack of procedure may lead to the conclusion that an unfair selection for redundancy has taken place".

The Adjudication Officer also pointed out the case of JBC Europe –v- The Panasi 2011 IEHC279 where Charleton J stated;

"It is made abundantly clear by the legislation that redundancy, while it is a dismissal, is not unfair. A dismissal however can be distinguished as a redundancy that is not lawful. Upon dismissal an employee can simply say that the employer was not dismissed for reasons specific to that person but that, instead, his/her service were no longer required, pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of the employment came within a lawful reason".

The Adjudication Officer also quoted the case of Sty. Ledger –v- Front Line Distribution Ireland Limited 1995 ELR160 where the EAT stated;

"Impersonality runs through the five definitions in the Act. Redundancy impacts on the job as only as a consequence of the redundancy does the person involved loose his job".

It is worthy to note that the EC Directive on Collective Redundancies uses a shorter and simpler definition. "One or more reasons not relating to the individual worker concerned".

The Adjudication Officer also pointed out that Mr. Justice Charleton had remarked;

"It may be prudent, as a mark of a genuine redundancy, that alternative to letting an employee go should be examined".

The case of Williams –v- Coms Air referred to above, is one where there is an issue with the tests as regards the third one namely the issue of matters such as attendance records, efficiency at the job.

These are personal rather than issues relating to the job itself. It is important, in our view, that when determining whether or not there is a redundancy that any issue which is personal to the employee should not be part of the process.

In this case the Unfair Dismissal claim was lost. However it is very useful that the Adjudication Officer has taken the time to set out the Legislation in such depth. It is not clear whether the employer was represented or not. What is interesting is that again in this case the employer raised the issue that the employee had failed to use the internal grievance procedures. While it is not specifically covered in the decision, the issue of raising internal grievance procedures is not necessary. The issue of using internal grievance procedures is an issue which we have covered previously. It is surprising that this issue is continuing to arise with such regularity.

Unfair Selection for Redundancy – 5

This issue arose in ADJ000022899.

The Adjudication Officer referred to provisions of Section 6 (1) and Section 6 (3) which are the relevant provisions relating to a dismissal as a result of redundancy. The Adjudication Officer referred to the case of Student Union Commercial Services Limited –v- Traynor UDD1726 and Tolerance Technologies Limited –v- Foran UDD1638.

The Adjudication Officer held that she was satisfied based on the evidence that a redundancy situation did exist. The Adjudication Officer held that the evidence before her showed that the manner in which the employee was dismissed involved the minimum if any consultation. The employer put a decision rather than a proposal to the complainant, She stated that it seemed that any discussion, and these related to mainly the outstanding payments and severance agreement came after the decision to make the employee redundant. There was no engagement with the employee as regards alternatives which might exist. The employee was not given an opportunity to make suggestions as to why she should be retained or any alternatives that might be considered.

This is a useful case for restating the law on this matter. It is a matter for employers to make sure that even in a redundancy situation that there is no pre-determination. That employees are given their right to put forward effectively a defence as to why they should not be dismissed, That the relevant information is given to them and that they have the opportunity of going through same and having their side of the story listened to. It may not change anything, That to an extent is irrelevant. What it is is the employee gets a fair hearing and a fair opportunity to put forward why they should not be selected for redundancy.

Unfair Selection for redundancy – A Common Mistake – 6

This issue arose in case ADJ00020846.The Adjudication Officer in this case helpfully set out the provisions of Section 6 and 7 of the Unfair Dismissal Legislation finding that the employee had been unfairly dismissed. The Adjudication Officer dealt with the issue of financial loss. The Adjudication Officer pointed out that the salary which the former employer was on was €65,000 per annum and that the employee had commenced employment after being made redundant on a new salary of €50,000 but had no company car. The employee was able to bridge the difference between the two employments by way of overtime but at the date of the hearing a significant difference still existed in the order of 30% including benefits.

The Adjudication Officer held that the financial loss directly attributed to the unfair selection for redundancy would take 7 years to be fully restored. The Adjudication Officer said having regard to the actual financial loss to the date and continuing loss into the future the compensation of €30,000 would be regarded as just and equitable.

This case is a reminder of the importance of fair selection for redundancy where there has been an unfair selection for redundancy an employee may be able to obtain compensation under the Unfair Dismissal Legislation in those circumstances where an employee is being selected for redundancy. There is of course no issue in relation to the employee contributing to the dismissal and therefore provided

the employee can show that they have mitigated their loss there is a very strong argument that the employee should receive their full financial loss up to the maximum which would be two years salary.

Redundancy - Fair Selection

In the Labour Court in the case UDD1629, being a case of Kohinoor Limited and Hussain Ali, has given a very detailed overview in relation to redundancy and the selection processes. The Court in this case referred to a case of Gillian Free –v- Oxigen Environmental UD206-2011 being a decision of the Employment Appeals Tribunal wherein the decision of the Tribunal was quoted with approval. The Court in this case pointed out that it was satisfied that having made the decision to make a number of employees redundant from among a number of chefs carrying out the same or similar duties this was done with the assistance of expert advice and that the company had devised a very detailed selection matrix to decide on the criteria to be used to select those to be made redundant. The Court found that the selection criteria were fair and reasonable. The Court found that redundancy was the reason for dismissal and dismissed the Unfair Dismissal case. This case is a very useful reminder for practitioners as to the best practice which should be engaged in when undertaking a redundancy.

In Case ADJ1461, the Adjudication Officer rightly pointed out that the burden of proof is on an employer to show that the selection process was fair. In this case, the Adjudication Officer found that the employer had not shown that the selection process was fair and an award of €5,000 for Unfair Dismissal was awarded.

Where an employer is considering redundancy, it is vitally important that appropriate advice from an employment law solicitor is obtained.

It is vitally important that employers ensure that there are fair procedures for all redundancies. Failure to do so can result, as in this case, in an award for Unfair Dismissal.

Selection for Redundancy - 8

In the case of Student Union Commercial Services Limited and Alan Traynor UDD1726 the Court dealt with a situation where the Court held that there was a general redundancy situation which existed. One might think that this therefore was the end of the Unfair Dismissal case. Far from it. The Court in this case looked at the case of Mulcahy -v- Kelly 1993 E.L.R. 35 where the EAT held that it was well established that there is an obligation on an employer to look for an alternative to redundancy.

The Labour Court pointed out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Court pointed out in Thomas and Beets Manufacturing Limited -v- Harding 1980 I.R.L.R 225 the English EAT found the complainants dismissal unfair because she could have found work as a packer even though this would have meant dismissing a recently employed packer. The Labour Court pointed out that where there is no agreed procedure in relation to selection for redundancy then the employer must act fairly and reasonably. The Court referred to Section 6 (7) of the Act as amended and set that out in detail.

In this case the Court was satisfied that the respondent employer did follow a consultation process with the complainant. The Court noted that the complainant has almost 12 years' service. The Court noted that the company had a number of business units which had fluctuating numbers of staff employed. The Court pointed out that it was presented with no information to demonstrate that the respondent carried out an exercise to consider alternative options/suggestions. The Court went on to say that the Court accept that had such an exercise been carried out it may not have identified any alternative positions suitable to the complainant. However, the Court pointed out importantly that it seemed still that no such exercise was engaged and on that basis the Court found that the approach adopted by the respondent was somewhat arbitrary and therefore the dismissal of the employee pursuant to Section 6 (7) was unfair.

The Court awarded the sum of €12,000 on top of the existing redundancy payment which had been made. This is an extremely important decision of the Labour Court. It highlights the importance of employers having a procedure in place for selection for redundancy.

The case highlights the importance of considering alternative employment within the organisation. The decision highlights the importance of considering any alternative options or suggestions that are put forward.

The fact that an employer might believe that such process may not change the ultimate decision does not impact on the obligation to do so and failure to do so may well result in an Unfair Dismissal claim being upheld against an employer.

It is very useful that the Labour Court have taken the time to set out in some detail the approach which an employer should adopt.

Redundancy Payment Act 1967 – Transfer

The issue of a transfer from one entity to another often arises in the area of redundancy. This issue was dealt with in case ADJ18637. This involved an employee who worked as a legal secretary in a legal partnership. There were three partners. One partner dissolved the company. The Managing Partner informed the employee in 2015 that she was being made redundant. She was then advised that this individual was starting her own company and invited the employee to work with the new company. The employee joined the firm. In this case the employee had no written contract. No notifications occurred under SI131 in the Transfer of Undertaking Regulations. The firm of solicitors contended that there was no redundancy as the employee was not dismissed. The employer relied on the case of Symantec Limited –v- Lyons and Leddy 2009 IEHC256 where the High Court had held that a transfer on the same terms and conditions meant that a person had not been made redundant by virtue of Regulation 4(1) of the TUPE Regulations. There is also the UK decision of Robert Graham Hynd –v- David Armstrong and 24 Others 2007 CHIH 16XA158/04 which is authority for the contention that a partnership comes within the reach of the European Communities (Protection of Employees on Transfer of Undertaking) Regulations 2003. In that case the solicitor successfully challenged his dismissal due to redundancy on the dissolution of a partnership in which he was employed and argued he was entitled to the protection of Regulation 4 when the partners established a new firm. The Court in the UK accepted that the employee was employed by a partnership and could draw on the

Regulations to contest his dismissal due to redundancy and assert his right to a transfer into the new company.

The AO in this case also quoted the case of Spijkers –v- Geber Benedik Abbatoir TV case C-24/85 as authority for determining if a transfer of undertaking occurs. The AO pointed out that the business was the same before and after the transfer, the intellectual property, in good will, much of the customer base transferred and the staff transferred. The AO in this case held that there was no redundancy.

The AO in this case did not quote a case from the Labour Court being RPD1713 being the case of Ardcolum Motor Factors Limited and Gildea where the Labour Court had held that an employee who refused to transfer does not become entitled to redundancy under the 1967 Act. A similar approach was taken by the Labour Court in case RPD1710.

Redundancy – Lay-Off and Right to Claim Redundancy

Case ADJ12935 is an extremely interesting case when it comes to the issue of a lay-off and the rights of an employee to claim redundancy and also the issue of wages.

In this case the company got into trading difficulties. However, it continued to operate and made plans to move to a new location but which required planning permission. It was expected that this would occur but it did not happen. The employee had been placed on temporary lay-off on August 25th. The employee in this case sent a letter stating that she had been on lay-off since the 28th August 2017 and that she was given notice to terminate her employment and stated her last day of employment was the 1st January 2018.

The AO in this case pointed out that the relevant provisions of Sections 11 and 12 of the Redundancy Payment Act as amended in Section 12 specifically provides that the employee must give the notice of intention to claim redundancy in respect of the lay-off or short time. Part B of the RP9 Notice Form, as the AO correctly pointed out, provides one means to do this. The employee in this case did not indicate a notice of intention to claim the redundancy payment. The AO had pointed out that this is clear and a simple statement of intention to resign does not comply and indeed indicates a voluntary

resignation. The AO in this case held against the employee under the claim for redundancy. The employee in this case may well have been able to bring a claim under Section 9 of the Redundancy Payment Acts if she had resigned without giving notice. It is an unusual provision. In the alternative, if the employee had given the employer the required notice in the RP9 Form, the employer would have had an option to give a counter notice within 7 days. If that counter notice had not been given then the employee would have been automatically entitled to the redundancy. If a counter notice had been given then after a period of 4 weeks the employer would have been obliged to give the employee 13-week continuous employment. If that was not done, the employee would have been able to lodge a further claim for redundancy and claim 13 weeks wages. This case is a prime example of why employees should use the relevant statutory forms. The redundancy legislation is complex. It is one where individuals do need assistance from somebody who is trained in Employment Law.

There is another aspect of this case which is interesting, and that is in relation to the issue of pay. The AO in this case quoted the case of Law -v- Irish County Meath (Pig Meats) Limited 1988 ELR266 which held that unless there is an expressed or implied term permitting the lay-off without pay then it is a breach of the employee's contract of employment to do so. An implied term would include Custom and Practice as was set out in the case of Petkevicius -v- Goode Concrete Limited, 2014 IEHC66. The AO set out that case related to the construction industry where there would be ups and downs rather than this type of industry. The AO held that there was no expressed term in the contract of employment allowing lay-off without pay. The AO set out the provisions of Section 5(1) and as there was no express term the AO held the employee was entitled to payment. The AO then turned to the issue in relation to the position of the employee during the notice period. The AO held that the deciding question was that the employee was still under a contract of employment so she was entitled to payment during this period also.

This part of the case raises a significant issue for employers. Contracts of Employment do need to cover the provision of lay-off without pay. If a contract has a provision that an employer is entitled to lay-off an employee without pay, then in those circumstances the employer is entitled not to pay. If the employer does not do so, the employer is obliged to pay. The case law referred to previously would,

however, cover situation where an exceptional circumstance arose. This would be for example where premises flooded or was destroyed by fire or some other reason that was highly unusual then in those circumstances there would be a right to lay-off while repairs were put in place. Let us take a situation where a premises is damaged by flood. The employer is advised that it is going to take 4 weeks to dry out the premises and make them fit for business against. Of course, the employer in that case, even if there is no provision to lay-off without wages, is entitled to lay-off the staff and not to pay them because that would be an exceptional situation. If however, the employer decides that instead of just drying out the premises and getting them back operational to put in place improvements that would take a further 6 weeks then that further 6 weeks would not be exceptional circumstances and the employees would be entailed to be paid.

Redundancy Payment Acts

In case ADJ16132 the AO in this case helpfully quoted the Second Eddition of Employment Law at 19.123 where it was stated:

"*The question of suitability may be determined objectively, whereas the reasonableness of the employee's refusal is subjective and must be considered from the employee's perspective. Thus the employee's perception of the alternative job must be taken into account."*

In Executors of Everest V. Cox it was found that,

"*The employee's behaviour must be judged from her point of view on the basis of the facts as they appeared or reasonably have appeared to her, at the time the decision had to be made".*

The English EAT case of Hudson v. George Harrison Limited shows that the arbiter of fact, before making a decision on the reasonableness of the employee's decision to refuse to take up an alternative position can look at the employees personal circumstances. Before quoting the above mentioned quotation from the Executors of Everest, the EAT stated that,

"*The S141(2) question involves taking into account the personal circumstances of the employee. The test is wholly subjective but it includes taking into account those personal circumstances".*

The relevant Irish sections are Section 7(2)(a) and Section 15(2).

Redundancy – After Lay-Off

In the case of G4S Secure Solutions (Ireland) Ltd and Stanek RPD186 being a Redundancy Payment Act claim the case involved an employee who had been placed on lay off. The employee was placed on lay off on 3 November 2016. This continued for a period of more than 4 weeks. On 14 December 2016 he served notice in writing upon the employer under Section 12 (1) (b) of his intention to claim statutory redundancy. The employee submitted that on 21 December he wrote to the Respondent to advise that no counter notice had been received in accordance with Section 13 (1) (b).

The employer contended that efforts have been made from 15 November onwards to contact the employee by phone to offer him work but such efforts were unsuccessful because he was uncontactable. The employer accepted that a notice of intention to claim had been received on the 14 December 2016. They also accepted that no counter notice in writing had been issued to the employee as specified in Section 13 (2) or at all.

The Labour Court in this case set out that the Act is very clear in respect of matters before the Court. The Court stated that it was common case that the employee had complied with the requirements of Section 12 (1) (b). The Court also held that it was common case that the employer did not comply with the requirement of the Act in Section 13 (2).

In those circumstances the Labour Court overturned the decision of the AO and decided that the employee was entitled to redundancy.

This case is a timely reminder of the importance of the employer serving the counter notice. It is not sufficient to phone the employee.

The counter notice must be served on the employee.

Redundancy – Layoff – Payment of Wages

In ADJ12693 the AO in this case held that where an employee who is on layoff gives notice of resignation under the terms of their contract (or effectively under the redundancy legislation) that in that period of notice the employees contract continues and in those circumstances the employee is entitled to be paid.

This is an interesting decision.

Dismissal by Reason of Redundancy

A dismissal of an employee by reason of redundancy will normally take a case under the Unfair Dismissal Legislation. Redundancy is a defence to an Unfair Dismissal case.

However employers need to be careful. Case ADJ13371 is a very good example of this. In this case the AO found that there was a valid redundancy. However, and this is the one employers need to be careful of, the AO also found that the procedure in relation to the redundancy was procedurally unfair. The AO in this case therefore held that this converted the process into an Unfair Dismissal and compensation on top of the redundancy payment already paid was ordered.

In Unfair Dismissal cases it is always procedures, procedures and still more procedures. Even where a redundancy is being dealt with it is absolutely imperative that employers put in place appropriate procedures.

Unfair Dismissal and Redundancy

This issue arose in the case of a Senior HR Manager and a Global Management Company. ADJ-20023549.

The Adjudication Officer pointed out the case of JVC Europe Limited –v- Panisi 2011, IEHC 279 where Charleton J stated;

"In all cases of dismissal whether by reason of Redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of employment came within a lawful reason. In cases of misconduct, a fair procedure must be followed whereby an employee is given an entitlement to explain what otherwise might amount to a finding of real seriousness against his or her character".

In an Unfair Dismissal claim, where the answer is asserted to be redundancy, the employer bears the burden of establishing redundancy and of showing which kind of redundancy is apposite. Without that requirement vagueness would replace the precision necessary to ensure that upholding of employee rights. Redundancy is not personal. Instead, it must result from, as Section 7(2) of the Redundancy Payment Acts 1967, as amended, provides;

"Reason not related to the employee concerned."

"Redundancy cannot therefore be used as a cloak for the weeding out of those employees who are regarded as less competent than others or who appear to have health or age related issues. If that is the reason for letting the employee goes, then it is not a redundancy, but a dismissal".

The Adjudication Officer pointed out that Mr. Justice Charleton recited two specific legal requirements in effecting a legitimate redundancy both of which are directly relevant in the particular cases. The first is Section 7(2) of the Act of 1967 where Section 5 (2) requires that "(2) for the purposes of subsection (1), an employee who is dismissed shall be taken to be dismissed by reason of redundancy if for one or more reasons not related to the employee concerned the dismissal is attributable wholly or mainly… five listed grounds. The Adjudication Officer pointed out that this highlights the essential requirement of impersonality in affecting a fair dismissal on grounds of redundancy noting the cases of St. Ledger –v- Front Line Distributors Ireland Limited 1995 E.L.R.160 at pages 161-162 where the EAT stated;

"Impersonality runs throughout the five definitions of the Act".

In this case Mr. Justice Charleton remarked that;

"It may be prudent and a mark of genuine redundancy that alternatives to letting an employee go should be examined" and that a fair selection procedure may indicate an honest approach to redundancy by an employer".

This case is useful in setting out the tests in relation to redundancy.

Selection for Redundancy

This issue arose in the case TUS Community Supervisor and a Local Development Company. Ref ADJ-00020033.

In this case the Adjudication Officer helpfully set out the relevant legislation being set out in Section 1, 6(1), 6(3), 6(4)(c), 6(7) of the Unfair Dismissal Acts. The other relevant section is Section 7(2) of the Redundancy Payment Acts, 1967-2014.

The Adjudication Officer set out the legislation in detail. When it came then to the issue of the selection of redundancy where it is accepted that the burden of proof is always on the employer the case of Boucher Irish Productivity Centre R92/1992 is relevant. In that case the EAT stated that the employer had to 'to establish that he acted fairly in the selection of each individual employee for redundancy and that where assessment are clearly involved and used as a means for selection that reasonable criteria are applied to all the employees concerned and that any selection for redundancy of the individual employee in the context of such criteria is fairly made'.

The Adjudication Officer pointed out that generally selection criteria should not be based on subjective assessments of the employee. This is absolutely correct in our view. The employer must be able to establish as the Adjudication Officer set out that an employee was fairly selected for redundancy based on independent, objective and

verifiable criteria. In essence what is required of the employer in this respect is to be able to objectively justified why a particular employee was selected for redundancy as opposed to another employee. Specifically the employer must be able to demonstrate that a particular employee had been compared to others who might have been made redundant. Where redundancy arises and no agreed procedure or custom is in place the reasonableness of the selection criteria is usually focused on and tends to be assessed by the objective standards of the way in which a reasonable employer in those circumstances in that line of business at that time would have behaved.

The Adjudication Officer pointed out the case of Bunyan -v- United Dominion Trust (Ireland) Limited 1982 ILRM404 where the EAT endorsed and applied the following view quoted from NC Watling Co Ltd -v- Richardson 1978 IRLR225 where it was stated:

''the fairness or unfairness of dismissal is to be judged by the objective standard of the way in which a reasonable employer in those circumstances in that line of business, would have behaved. The Tribunal therefore does not decide the question whether, on the evidence before it, the employee should be dismissed. The decision to be dismissed has been taken, and our function is to test such decision against what we consider the reasonable employer would have done and/or concluded ''

In that case the employee won the case because it was able to be shown that the employee had been subjected to certain disciplinary matters. The case highlights the importance of the employer applying fair selection procedures.

Getting a Redundancy Wrong Can Result in an Unfair Dismissal Case

This arose in case ADJ-00018737 involving a branch manager and a vehicle servicing organisation.

The Adjudication Officer in this case looked at Section 6 and 7 of the Unfair Dismissal legislation.

The Adjudication Officer set out in circumstances where redundancy is unavoidable there is an onus on the employer to establish reasonable and objective criteria for selection and must apply this criteria fairly. The case of Mulcahy –v –Kelly 1993 ELR35 being a case where the EAT held:

"It is well established that there is an obligation on an employer to look for an alternative to redundancy."

In that case it was held:

"Having heard the evidence presented the Tribunal is satisfied that a redundancy situation existed…when the decision was made to terminate the claimant's employment."

It is our opinion that the claimants dismissal resulted wholly or mainly from reasons of redundancy. Notwithstanding that the claimant's selection for redundancy was not in contravention of a procedure or an established custom and practice of the employment relating to redundancy, there is an obligation on an employer to look at all employees as possible candidates for redundancy.

The Adjudication Officer set out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Adjudication Officer set out that the two locations were within reasonably close proximity to each other and there had been a regular occurrence to move employees from one side to the other. The Adjudication Officer set out that in Thomas and Beets Manufacturing Limited –v- Harding 1980 IRLR255 the English EAT found that the dismissal was unfair because she could have found work as a packer even though this would have meant dismissing a recently employed packer. In the case of Gillian Free –v- Oxygen Environmental UD2006/2011 the Employment Appeals Tribunal noted that:

"When an employer is making an employee redundant while retaining other employees, the selection criteria being used should be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy… Where there is no

agreed procedure in relation to selection for redundancy… Then the employer must act fairly and reasonably".

The relevant legislation is Section 6 and 7 of the Unfair Dismissal legislation.

This is a useful decision for reminding employers about the importance of the selection procedure. The fact that an employer may determine that the role of a particular employee is going to be made redundant it does not mean that the employer must just finish there. The employer then has to look at the entire organisation to see is it possible for that employee to be retained within the organisation sometimes in a different role even to the extent that an employee with lesser service would be dismissed.

By this we mean that if you had a business that had two shops in a country town. They are at different ends of the town. It is a relatively short distance apart. There are two people who work on checkouts one in each location. The employee working in rotation A has five years' service. The employee working in location B has three years' service. The employer decides to close location A. In those circumstances the employer has to look at whether the employee in location A should actually transfer to location B and that the employee working there who has lesser service should be made redundant.

Of course this is going to create, in any organisation, huge upset. You will have an employee who sees their job been taken by an employee from a different shop. That is unfortunately an issue which employers will need to address in the current environment.

The example that we are giving is a very simple example. There is of course going to be more complex issues where you will have an issue of an employee performing one job but who is capable of performing a different job.

It is vitally important that employers in putting in place the selection process are aware of their obligation to look at retaining an employee and finding them a different position if that is possible even to the extent that an employee with lesser service performing a particular function might be let go to accommodate that individual. These cases

will invariably result in an unfair dismissal case one way or the other and therefore legal advice is always required.

Unfair Dismissal and Redundancy

A redundancy is a defence to a claim for Unfair Dismissal. Of course the redundancy must be a legitimate redundancy but it is a full defence to an Unfair Dismissal claim. This issue was determined in a previous case ADJ-00001579.

Unfair Dismissal – Unfair selection for Redundancy

Where an employee is unfairly selected for Redundancy this can result in an Unfair Dismissal case. This occurred in a case ADJ2619 where an Adjudication Officer awarded €12,000 to the employee holding that the dismissal in such circumstances was an unfair dismissal. The employee had an economic loss in 2016 of €6162 between what he would have earned in his previous employment and after the dismissal. Compensation of €12,700 was awarded. This effectively is 2 years loss of earnings. Such decisions are important to have a significant impact on employers and it is important that employers apply fair procedures.

In this case the employee relied on cases of Mackey –v- Resource Support and Services Limited UD56/2009 and Fennell –v- Resort Facility Support Limited UD57/2009 where the employee maintained that the EAT had held that in both cases there were genuine redundancies but the employer did not adopt fair procedures in affecting the redundancies.

The employee in this case also relied on the cases of Gillian Free –v- Oxigen Environmental UD206/2011 where the EAT upheld that an employer must act fairly and reasonably when selecting one employee over another for redundancy.

The Adjudication Officer held that the employer;

1. Failed to consult or engage with the claimants before announcing the decision to restructure
2. Failed to properly consult with the claimants on the procedures that it adopted
3. No selection matrix was discussed with the claimants
4. Did not afford the claimants a reasonable opportunity to consider these procedures
5. Did not afford the claimants an opportunity to make proposals that might avoid redundancy

On that basis the Adjudication Officer held that the complainant was unfairly dismissed. This case is an important reminder for employers that it is vitally important that employers adopt fair procedures in the selection process. The procedures should be open. It should be transparent. There should be discussions with the employees involved. The employees should have an opportunity to put forward alternatives to redundancy or the selection process.

The fact that these things are done may not change who may ultimately be chosen for redundancy but the issue is whether the individuals were fairly selected. Where an employer fails to apply fair procedures then they run the risk of potentially having not simply a redundancy claim but in fact an unfair dismissal claim which can be far more expensive.

Unfortunately in many cases employers fail to obtain legal advice from specialist employment Solicitors before embarking upon redundancy processes.

The cost of doing so is far less than the level of award which can be awarded which was awarded in this case. This case is one of those cases which should be read by employment law Solicitors, HR/IR Professional and by employers. It is one of those useful decisions which issue from the WRC.

Redundancy Payment Acts and Equality Claims

In case ADJ11958 the AO had to look at the provisions of Section 7(2)(e) of the Act which provides for redundancy where,

"*The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is capable of doing other work for which the employee is not sufficiently qualified or trained".*

The AO in this case referred to the Employment Law Second Edition by Murphy and Regan at pages 784/785 where the authors cited the decision in St. Ledger v. Frontline Distribution Limited 1995 ELR160 where the EAT stated,

"*Definition (e) must involve partly at least work of a different nature, and, that is the only meaning we can put on "other work" more or less work of the same kind does not mean "other work" and is only a quantitive change".*

This case was an equality case. The decision covers in some depth the law relating to discrimination where an employer would have sought to get rid of an employee on the basis of redundancy. In this case an award of €25,000 was made. The AO in this case in setting an award of €25,000 took into account that a redundancy payment of a little over €9000 had already been made.

This case is interesting both in the area of Equality and Redundancy Legislation.

A rushed Redundancy may result in an Employment Equality claim

IN ADJ-0001888318883 the Adjudication Officer in this case awarded a total of €56,000.

In reviewing the case it is clear that the Adjudication Officer did not say that this was not a genuine redundancy situation where a job was moving to another country. The Adjudication Officer did however point out the decision of Mr. Justice Charleton in JBC Europe Limited –v- Panisi 2001 IEHC279 where he stated:

"*It may be prudent and a mark of a genuine redundancy that alternatives to letting an employee go should be examined*".

In this case the employee was given an alternative. She was given time to consider a new position in a new country before her employment was terminated. However she was only given 9 days. This was to consider moving with her job to France. The Adjudication Officer pointed out that the employee was still actively interested in the role but was not given sufficient time to get a French Lawyer to advise her on the new contract.

Where making an employee redundant it is important that alternatives are put forward and considered. At the same time if a new role is being offered the employee must be given sufficient time to consider same. If there is a change in contract arising then of course time will have to be given. Of course it will depend on what the changes are. If it involves a change in country and therefore the law governing there employment clearly a lengthy period will have to be given. If it is a minor change then only a short period of time will need to be given.

The case however importantly points out that the issue of redundancies cannot be looked at in a vacuum. Employers must be conscious of the fact that not only may an unfair dismissal claim arise on the basis of unfair selection but equally an Employment Equality claim can arise.

Redundancy – Suitable Alternative Job

This arose in the case of ADJ-00020231. The Adjudication Officer pointed out that Section 15 of the Act provides that an employee shall not be entitled to a redundancy payment if the employer has offered to renew the employees contract of employment or to reengage the employee under a new contract of employment and that the provisions of the contract is renewed or of the new contract as to the capacity in place in which the employee would be employed and as to other terms and conditions would not differ from the corresponding provisions of the contract in force immediately before the termination of the contract and the renewal or reengagement would take effect on or before the date of termination of the contract and that the employee had unreasonably refused the offer.

The Adjudication Officer pointed out that under Section 15 the employer must make this in writing and it must be a suitable employment in relation to the employee and the renewal or reengagement must be notified to take effect not later than four weeks from the date of termination of the contract where the employee has served the relevant notice.

The Adjudication Officer pointed out the case of Cinders Limited -v- Byrne RPD 1811 the Labour Court held that the issues to be considered where the suitability of the offers of alternative employment made on behalf of the respondent to the complainant and whether the complainants decision to refuse each of those offers was reasonable in all the circumstances. The Labour Court in that case relied on the case of Cambridge & District Co-Operative Society Limited -v- Ruse 1993 IRLR156 where the Labour Court referred to the suitability of the employment is an objective matter whereas the reasonableness of the employees refusal depends on factors personal to him and is a subjective matter to be considered from the employees point of view. In the Cinders case the Labour Court held that it was reasonable for the employee to refuse to move to a concession within a department store but unreasonable to refuse to move to a stand-alone store in the city centre a distance of about six kilometres. The Labour Court in that case held there was no significant difference between the working environment she would have enjoyed in the alternative store and that she had experienced in the previous twenty or so years of her working relationship with the respondent.

The Adjudication Officer in this case also held, which will be important, that the relevant termination date in a case arising from lay off or short time is the date the notice of intention to claim relief is served and referred to the case of Leinster Cleaning Services -v- Muningus RPD199. It might be thought by some that it is the date that the notice would run out or the notice period in the contract. It is not. It is the date that the notice is served.

Redundancy – Offer of Alternative Employment

This issue arose in ADJ-00026299. The issue in relation to being offered suitable alternative employment is set out in Section 15 (2) of the Redundancy Payments Acts 1967 -2015.

The issue is whether the offer constitutes an offer of suitable employment in relation to the employee and where it has been refused whether it was unreasonable to refuse the offer.

The Adjudication Officer pointed out that this issue is that firstly the offer made must be looked at objectively and secondly the decision of the employee must then be looked at from a subjective stand point. The Adjudication Officer set out that this position had been clearly set out in Employment Law Second Edition at 19.123 where it states

"The question of suitability may be determined objectively whereas the reasonableness of the employee's refusal is subjective and must be considered from the employee's perspective. Thus the employee's perception of the alternative job must be taken into account"

The Adjudication Officer reviewed the law in relation to this.

In this particular case the Adjudication Officer found that the employee was 65 years of age, was not in good health and had afterschool commitments with her granddaughter. The new job would have been one where she would have had to take two buses to get to the Barrow Street premises leaving her with a substantially longer commute time both to and from the workplace. Even though the employer was willing to amend the working hours that would not have reduced the actual amount of time and effort involved in getting to and from work. The Adjudication Officer found that the employee was entitled to redundancy.

While it is not set out in this particular case the reality of matters is that a short additional commute would be reasonable. A longer commute would not.

Redundancy Payment Acts 1967 - 2014 – Suitable Alternative Employment

This issue arose in a case of Browne and Di Simo RPD1914. In this case the Labour Court looked at the law on this. The Court stated that in determining the within appeal the Court was required to consider firstly the suitability of the offer of alternative employment and

secondly whether or not the complainants decision to refuse that offer was reasonable in all the circumstances. The Labour Court quoted the case of Cambridge & District Co –Operative Society Limited –v- Ruse 1993 IRLR156 where the English EAT, when considering a similarly worded provision of the British Legislation, said that the question of:

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

In this case the employee had been in one location and was offered a position in Nutgrove Shopping Centre. The Labour Court correctly pointed out, in our view, that while the employee was naturally concerned about the potential loss of clients as her earnings were dependent on the amount of business she conducted. At no point did the employee endeavoured to test out that concern. The Labour Court pointed out that in accordance with Section 15 of the Act there is a facility for her to carry out her work in the new premises on a trial basis while retaining her right of possible redundancy payment. The Court was satisfied that the offer to continue the employment on the same terms and conditions amounted to suitable alternative employment within the meaning of Section 15 of the Act and that the refusal to accept the option of working in Nutgrove Shopping Centre Salon was unreasonable.

It is sometimes forgotten by employees that the Redundancy Payment Legislation specifically provides that an employee is entitled to effectively take an alternate position for a trial period and if that does not work out then to seek redundancy.

Redundancy – Suitable Alternative Employment - 2

This was considered in ADJ-00026761. The Adjudication Officer set out that in considering whether the decision of an employee to refuse to move to a new location was reasonable in all the circumstances the Adjudication Officer followed the Labour Court in the case of Gareth Browne -v- Isabella Di Simo RPD1014 which applied the English EAT case of Cambridge and District Co-operative Society Limited -v- Ruse 1993 IRLR156 where the Labour Court stated:

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

The case of Executors of JP Everest -v- Cox 1980 ICR1415 was also quoted where it was stated that:

"The reasonableness of an employee's refusal of suitable alternative employment depends on factors personal to him and is a subjective matter to be considered from the employees' point of view. The employee's behaviour and conduct must be judged looking at it from his point of view, on the basis of the facts as they appeared, or reasonably to have appeared, to him at the time the decision had to be made".

The Adjudication Officer set out that taking this into account the employee's personal circumstances are factors for consideration. In this case the complainant had said that the reason she rejected the offer was because commuting 62 kilometres each way by car on the congested N11 and M50 motorway was a lot more argues and stressful journey and would take a considerably longer time than travelling by train a journey which took 45 minutes. In addition, she said the extra expense of commuting by car because she would have to upgrade her car and this would cause an additional financial burden on her as well as the additional expense of maintaining the car. In this case the Adjudication Officer upheld the case and awarded redundancy.

Redundancy - Change of Location

In case ADJ5444 an unusual situation arose. The employee's contract provided that the employee would work on a particular motorway and at sites around Ireland. Subsequently, he was asked to move to Poland. The issue of Section 9 of the Redundancy Payment Acts was raised, this states:

"*For the purposes of this part an employee shall, subject to this part, be taken to be dismissed by his employer if but only the employee terminates the contract under which he is employed by the employer*

without notice in circumstances such that he is entitled so to terminate it by reason of the employer's conduct".

This is a very specific provision. The employee cannot give notice. The employee must resign effectively immediately. In this case the employer had worked for the employee in Northern Ireland. The contract did refer to the word "Ireland". The Adjudication Officer has pointed out that having considered the matter at some length and having taken legal advice on the issue the term "Ireland" in legal terms is defined as a 26 Counties of the Republic of Ireland and does not include the North of Ireland. Therefore, under Section 9 (c) of the Claimant was entitled to terminate his contract due to redundancy as no work was available to him in the jurisdiction of his Contract of Employment.

The Adjudication Officer pointed out that normally an employee is expected to lodge a formal grievance to his location of work or continue to work under protest until the matter where he was assigned could be adjudicated on.

However, as the employment opportunities had ceased in the relevant jurisdiction these factors had no merit in the case. The employee's representatives argued that the principle of *contra proferentem* should apply in that the employer should have been more specific as regards to its intention in the contract.

The Adjudication Officer held that the claim for Redundancy was a valid claim. This matter is dealt with under ADJ5444.

Redundancy – Reduced Hours – Reduced Pay

There is an old case ADJ-00003524 where an Adjudication Officer had to look at the issue of an employee who had been placed on reduced and short time work. This case is a useful reminder that if a person is made redundant within a year of being put on reduced hours of work then the redundancy payment is based on the earnings of a full week prior to being placed on the reduced or short time work. If an employee is made redundant after working the reduced hours for more than a year then it is calculated on the reduced earning.

This case highlights that if an employee has been placed on reduced working hours and are considering bringing a redundancy case that they should certainly do so within 12 months or at least seek to be put back onto their full hours because if they wait they could end up being paid their redundancy on the reduced amount.

While the issue was not determined by the Adjudication Officer it appears that if an employee does seek to be put back onto full time work then the redundancy, if it subsequently arises, will be on the full hours prior to the reduction.

It will not be a matter for the employee to simply say that they requested it. They will need documentary evidence to prove it. This could be an email or a letter together with evidence of posting but probably an email with a delivery receipt and a read receipt or at least a delivery receipt would be sufficient and probably the best evidence of seeking it.

Redundancy – Where a contract is Frustrated

The right of an employee to claim a payment for a contract which is frustrated.

This issue arose in ADJ-00025512 involving a Chef and a Community Service Provider.

The Adjudication Officer set out Section 7 of the Redundancy Payment Acts in detail. The Adjudication Officer also set out the Provisions of Section 9. The relevant Section here is Section 9 (1) (c) where the employee terminates the contract under which he is employed by the employer in circumstances … such that he is entitled so to terminate it by reason of the employer's conduct.

In this case the Adjudication Officer held that Subsection (c) allows for dismissal to take place where the employee is allowed to terminate their own contract because of the conduct of the employer. The employee considered her new role and location to be unsuitable. The Respondent listened to those concerns and made a commitment that it would be considered. The employee it appears had not taken the opportunity for that consideration to take place. The Adjudication

Officer stated they could not predict the outcome of that consideration but had no reason to doubt the Respondent employer would ensure it takes place when the Complainant returns from sick leave. The Adjudication Officer held that the employee had not been dismissed.

This case is useful for highlighting an issue relating to redundancy which is going to arise. There will times where an employee will rather claim redundancy rather than claim Constrictive Dismissal.

The provision of Section 9, in a particular Section 9 (1) (c) is an issue which employees will look to in the coming months.

The interesting aspect which was not addressed is whether the employee by their actions effectively resigned and whether the employer can now rely upon same.

Redundancy – Employer ceases trading

In case ADJ8826 the Adjudication Officer had to deal with a situation where a company had ceased trading. The Adjudication Officer in this case held that the employee had not resigned. The Adjudication Officer held that the employee had not been dismissed. The Adjudication Officer then went on to find in a claim that the employer should engage with the employee on the basis of paying the employee redundancy.

We find this decision hard to countenance. The claim was brought under the Redundancy Payment Acts. Either it is a redundancy or it is not a redundancy. Where a company goes into Liquidation and ceases trading then the employee's employment has effectively been terminated and it is a redundancy.

It is not clear what notices were served on the employer. If a notice had been served under the Redundancy Payments Acts, being the RP9 then clearly the notice has been served and the employee would be entitled to a ruling one way or another as to whether it was a redundancy. Alternatively, if it was a lay off situation that was only contemplated and the employee had served the appropriate notice without a counter notice the employee would have been entitled to claim redundancy.

In this case the Adjudication Officer has issued a decision which is difficult to fathom. If the employee or the employer appealed there is no decision to appeal. Now it is probably arguable that the employee can contend that the decision which issued was such that it was sufficient for the employee to bring an appeal to the Labour Court. This should not be necessary, in our view. If a redundancy situation arises then in those circumstances the employee should receive the redundancy by way of an appropriate decision.

That is just our view.

Claiming Redundancy from the State

In ADJ5427 the Adjudication Officer in setting out the decision at the end has set out a very useful note as to what the employee should do for the purposes of claiming redundancy.

The Adjudication Officer has set out the procedures for claiming the Redundancy from the Department of Social Protection. This includes the employee completing a Form RP50. This document can be completed online.

It is always advisable that the form is printed of and sent in hard copy along with the decision. In addition the Department, although it is not set out in the decision, do seek to have the person claiming Redundancy complete a redundancy calculation in accordance with the redundancy calculator produced by the Department. This should be completed and printed of and included with the RP50. A copy of any decision of an Adjudication Officer should of course also be sent along with any supporting documentation to prove insurable employment.

However, the requirement to show supporting documentation is not of itself a requirement to claim redundancy. The decision is also useful in that it confirms that the Department is entitled to pursue an employer who has not paid redundancy in respect to any monies paid to an employee pursuing a redundancy claim.

Redundancy – How will the employee enforce a claim?

In ADJ7254 the Adjudication Officer found that there was a redundancy. We reviewed the decision. It does not give a start date in the decision. It does not give a finishing date. It does not give a rate of pay. It does not give the employees date of birth. Now all of those are needed for the employee to go to the Department of Employment Rights and Social Protection to put a claim into the fund. At a very minimum the decision has to set out start date, finishing date, and the rate of pay. The decision that has issued is effectively unenforceable if the employee has to go to the Social Fund. This is the type of case where an employee may have to appeal to the Labour Court which is an unnecessary additional cost. Alternatively, may have to bring a claim back to the Workplace Relations if the Department refuses to pay up. Decisions relating to redundancy should set out the basic information which is required by the Department.

Entitlement to Redundancy – Social Welfare

In case ADJ-00007291 the Adjudication Officer in this case helpfully set out the test for determining the entitlement to redundancy payments. The Adjudication Officer pointed out the relevant test is whether the individual was:

"An employed contributor in employment which was insurable for all benefits under the Social Welfare Acts 1952 – 1963 immediately before the date of the termination of his employment"

In such circumstances the employee is entitled to statutory redundancy.

It does not matter whether the employer paid the actual contributions. The issue is whether the employee was in "*insurable employment*" at the time.

In this particular case the Adjudication Officer pointed out that all parties believed that the contributions had been paid. In our view this is helpful but it is actually not the relevant test to determine whether

an individual is entitled to redundancy. The test is simply being in insurable employment.

Redundancy cases

The reality of matters is when you look at the volume of cases between 2008-2011 under the Redundancy of Payment Acts the Employment Appeals Tribunal ('EAT') had a significant number of such cases. As an open forum they were able to schedule 5 or 6 cases on an afternoon or where there was a large number of employees from one company or employer all of them at the same time. That is going to be a difficulty in the WRC. However it is likely that there is going to be a significant volume of these cases. There will be calls for these to be dealt with promptly. It would appear that legislation would be amended to allow all cases to be heard on a written submission. In redundancy cases particularly there may be an issue as to whether the claim is being defended or simply it is a delay by the employer to pay redundancy or an inability to pay which would require a decision. It might be an issue that the WRC would look at in relation to having preliminary hearings in relation to redundancy cases and to have a provision whereby claims can be dealt with on written submissions only.

Working From Home

There is a significant increase in the number of individuals who are conducting work in their homes. There is an issue with making sure that laptops or internet connections remain secure. This creates a risk for employers. There is a risk of contamination. There is a risk of data breaches.

There is certainly a risk of an employee unintentionally sharing confidential or work related information. This can be due to the level of activity in circulation outside the workplace and the fact that at home others may have access or see what is happening.

When individuals are in their normal workplace there are restrictions on personal devices. There is privacy of phone conversations in offices. Yes of course other employees might hear what is being said but those

outside the workplace would not. With individuals working from home those protections are not there this can mean that there can be an unintentional relaxation of the usual rules and sometimes complacency.

To avoid problems going forward employers need to look at:

Policy reviews and retraining. Businesses need to review their policies covering confidentiality and the use of company devices. Using company laptops for non-business use is something employers need to make sure employees understand it should not happen and will not be tolerated.

When working at home there really does need to be a clean desk policy. Files of confidential information should be placed in a secure place. For example mobile work phones or laptops should be locked or turned off when not at their desk and certainly all papers should be put away outside of working hours. This reduces the risk of sensitive information being disclosed.

There are of course some other non-data issues which are equally as important.

It is vitally important the employers make sure that managers or the employers themselves check in with those who are working remotely. In workplaces before Covid-19 there was a sense of community and team work. It is more difficult to maintain that where people are working from home. There is less interaction.

It is important to ensure that all employees feel involved in the business.

There is also the challenge of developing the business and developing individuals within the business. The water fountain discussions or the brain storming over a cup of coffee or just simply discussing business opportunities over a cup of coffee or developments in the business which happened organically when individuals where in the workplace now very much has to be organised. The exchange of information, ideas and ways of working along with the sharing of new developments is something that is needed for a business to move forward.

One of the big challenges would be maintaining relationships within the organisation.

For employers one of the big issues is going to be the area of data protection. The protections that were automatically in the workplace may not apply if somebody is working at the kitchen table.

We mentioned the issue of working at the kitchen table and we would say that that is the one thing that nobody should be doing. If a company is having individuals working from home then a work station has to be set up. It is important to check with employees that they have the proper table and chair. Where they are working has suitable light and heat. A work station at home is no different than a work station in the office. If the employee is working for home then they have to have the appropriate equipment and particularly a safe working environment and it is important that empoyers check with employees that they do have that in the business.

Unfair Dismissal

An interesting case relating to Unfair Dismissal was set out in case ADJ-00022471.

The Adjudication Officer on this case firstly accepted that their function in relation to alleged misconduct does not determine the innocence or guilt of the employee or whether the Adjudication Officer would have dismissed the complainant. The issue is to be determined as to what a reasonable employer would have done in the circumstances that faced the employer set out in Looney – v- Looney UD843/1984 and that the test is whether it was within the band of reasonableness as considered by a reasonable employer which test was set out in Noiritake Ireland Limited –v- Kenna UD/88/1983.

The Adjudication Officer also looked at the issue as to whether as a result of the action of the employee the client relationship was damaged between the employer and the entity whom they provided the services to. The Adjudication Officer referred to the case of Merrigan – v- Home Counties Cleaning Company Limited UF/904/1984 where a hospital was threatened with losing a cleaning contract following the

publication of a damming newspaper article. The Adjudication Officer pointed out that this was followed in another EAT case of Employee –v- Employer UD1181/2010 where the complainant had been rejected by a third party, county council regarding the quality of his work on judging the road worthiness of commercial vehicles. In the absence of an investigation the EAT determined:

"Dismissal of an employee brought about through pressure of third parties where the customers, clients, fellow employees or others must be justified provided the employer acts fairly and handles the procedure and investigation properly"

The Adjudication Officer pointed out that this places a high level of responsibility on an employer in a third party complaints scenario to explore a valid reason for any pressure exerted against the employee. The Adjudication Officer pointed out that this places the investigation process into sharp focus.

The Adjudication Officer in this case pointed out that there was no terms of reference governing the enquiry and set out:

"Frankly, I have difficulty with the methodology relied on by the investigator."

The Adjudication Officer also looked at the issue where it was argued that there was an evaporation of trust. The Adjudication Officer referred to the decision of Keane J in a case seeking an injunction against dismissal for suspected fraudulent transaction in O'Leary –v- An Post 2016 IEHC277 where the Court ordered that a statement should issue where specific misconduct was found. This followed a lack of definition at how trust and confidence had been lost.

The Adjudication Officer also helpfully mentioned the case of Morales –v- Carton Bros UD835/2011 where the EAT found that an employee who suffers an assault and who undoubtedly fends off the blows and in the process makes physical contact with the aggressor is deemed equally guilty and should be dismissed is harsh and unreasonable and manifestly unfair. That is a case where there was a zero tolerance of violence and fighting. The Tribunal held that the decision taken to dismiss in that case veered outside the band of reasonableness as the action taken was not supported by the fact. The Adjudication Officer

in this case helpfully quoted a number of important cases in setting out the law in the area of Unfair Dismissals.

What is Gross Misconduct

This issue arose in ADJ-00022455.

The issue of gross misconduct if often raised in unfair dismissal cases without actually looking at what gross misconduct is intended to cover.

As set out in this case the Adjudication Officer said the Unfair Dismissal Acts does not define gross misconduct. The Adjudication Officer referred to the EAT case of Lennon –v- Bredin M160/1978 where serious misconduct was referred to as:

"We have always held that this exemption applies only to cases of very bad behaviour of any kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer, we believe that the legislature had in mind such things as violent assault or larceny or behaviour in the same serious categories''

The issue here related to an employee refusing to take out of hour's work which was categorised as gross misconduct the Adjudication Officer pointed out that the complainant's core working hours were unblemished. The issue arose in extra curricular work.

The Adjudication Officer stated that the Adjudication Officer fully appreciated that a person may be considered to have repudiated his contract if he wilfully disobeys the lawful and reasonable orders of his master and refer to the case of Brewster –v- Burke and Minister for Labour 1985 4JISLL98.

The Adjudication Officer found that act complained of did not amount to gross misconduct and was capable of being addressed by lesser sanction than dismissal. The Adjudication Officer noted that the respondent did not have regard for the option of suspension which was detailed side by side with investigation in their policy. The Adjudication Officer placed a high level of importance on the unblemished part of the complainants six years' working history and

that the respondent did not consider this positive element in the decision taken to dismiss. The Adjudication Officer however placed a high level of impotence on the unreasonable behaviour of the employee on the face of a legitimate request to staff along standing emergency service where he possessed a key skill. In this case a sum of two weeks' salary in the sum of €2,500 was made.

This case does indicate that there are times where an employee will win a case but that the level of compensation will be quite minimal.

Unfair Dismissal – Fair Procedures

In case ADJ-00024768 the issue of fair procedures was dealt with by the Adjudication Officer.

The Adjudication Officer pointed out that it is well established that the standard required in disciplinary investigation is fairness, an absence of bias and a focus on the behaviour being investigated and not on any unrelated matter.

The Adjudication Officer pointed out the High Court case of O Mahony –v- Arklow UDC 1965 IR710 where the High Court held that an Adjudicator should not;

"...parse and construe the rules of procedure in a narrow and unreal way, looking for some flaw in procedure to invalidate a transaction where the requirement of justice and the substance of procedures have been observed".

The Adjudication Officer also referred to the Code of Practice on Grievance and Disciplinary Procedures SI146/2000. The Adjudication Officer pointed out that it was apparent that the employee was informed of the charges against the employee and had an opportunity to respond but was not offered an opportunity to be represented at the investigation meeting. However, the Adjudication Officer pointed out that this was remedied at two follow up meetings. In addition, the Adjudication Officer found that the employee had been given an

opportunity to appeal. The Adjudication Officer held that the requirement for fairness had not been compromised.

Calculation of Annual Leave Due

This issue often arises particularly where there is an issue concerning the carry over of days. It can also arise where an employee has an entitlement for more than 20 days. This issue arose in the case ADJ/00019188 in relation to carry over of days but would also apply we believe in relation to a situation where an employee has more than 20 days holidays.

The Adjudication Officer quoted the case C-609/178 and C-610/17 which was referred to as the TSN case where the European Court of Justice held that Annual Leave entitlements in excess of that required by the Directive is not within the scope of the Directive.

The Adjudication Officer reviewed a significant amount of European Case Law on this but also looked at the case in the Northern Ireland Court of Appeal of PSNI –v- Agnew. Here the Court agreed with the approach of treating each day of leave taken as an amalgamation of each of the three sources of leave. As cited by the Court, no Police Officer ever said I have two more working Time Directive days left before I move on to Working Time Regulation days.

In this case in Northern Ireland the Police Officer had 30 days of Leave made up of 20 Directive Days, eight Regulation days and two days as per their contract. One days leave was 20/30's Directive, 8/30 Regulation and 2/30 contract.

The Adjudication Officer felt that this is the appropriate way to address these issues where there is a carry over of days where the employee would be claiming more than 320 days holidays. It also makes absolute sense where an employer and employee have agreed holidays in excess of the statutory days.

Take a situation of an employee who is given 30 days holidays. In the leave year starting on 1 April 2019 and finishing on 30th March 2020 they took 20 days. They are now leaving the employment. They are looking for their holiday pay on leaving. Now if the rationale of the

Adjudication Officer was not applied the employee could say that the first ten days was my extra days holidays so I only got 10 days under the Directive. The employer could say the exact opposite namely that the first 20 days of those were under the Directive. The approach of the Adjudication Officer gets away from that type of argument and brings a practical solution to allocating days between Directive days and additional days. In the example given each of the days taken would be 2/3 Directive and 1/3 contractual. The same would apply as regards the additional days. So in the example we are giving 6.66 days would be allocated to the Directive and due.

As the Adjudication Officer in the relevant case pointed out the Adjudication Officer can only award days in accordance with the Directive provisions. The Irish Legislation simply provides the 20 days minimum.

This is a very well thought out decision. It is also practical, fair and approaching the issue in a way which would be fair to all parties and is a sustainable argument.

Annual Leave Year for the Purposes of the Organisation of Working Time Act

This issue regularly comes up and again arose in case ADJ-00021550. The Adjudication Officer in this case stated that it appeared to the Adjudication Officer that the parties were under a misapprehension that the leave year should be construed as it was set out in the complainant's contract of employment which was the calendar year. The Adjudication Officer set out that this however is not in line with Section 2 of the Organisation of Working Time Act as interpreted by the Labour Court in Waterford City Council -v- O'Donoghue DWT0963 where the Labour Court stated:

"The only leave year which is cognisable for the purpose of determining if an employee received his or her statutory entitlement is that prescribed by the Act itself. This is to say a year starting on 1 April and ending in 31 March in the following year. While different arrangements may be put in place for administrative purposes, in determining if a contravention of the act occurred that Court can only have regard to the leave allocated to an employee in the statutory period".

This issue of contracts and the leave year set out in a contract regularly arises and it is helpful that the Adjudication Officer in this case has set out again the Labour Court ruling as to what the appropriate annual leave year is for calculating annual leave entitlements.

European Communities (Protection of Employees on Transfer of Undertakings) Regulations 2003 S.I. No: 131 of 2003

In the case of ADJ-00023574 the Adjudication Officer in this case set out tests in relation to whether there had been a transfer of undertaking.

1. The first test was was the undertaking a stable undertaking with an ongoing life of its own.

2. Has the entity retained its identity?

3. Has some or all of the staff been taken over by the new employer.

4. Has the customer base transferred?

5. Are the activities post transfer similar to those carried out before the transfer?

6. Has there been any interruption of activity?

7. Has there been a transfer of assets?

The Adjudication Officer in this case was referred to a number of precedents between Susan Spijkers, ADJ00004491 being a Medical Practice Nurse -v- A General Practitioner, Ryan -v- O'Flaherty UD354/2003, Maria Scanlon -v- Edwina Kelly UD134/2004, Canon -v- Noonan Cleaning Limited RP327/1998, case C-247/96, Mary

Dunne and the Department of Social Protection and Family Affairs being a case upheld by the High Court No.173MCA and Stitching -v- Bartol and Others C-29/1991

The Adjudication Officer referred to Regulation three of the Regulations and held that while in the particular case not all the test set out by Spijkers were met the overwhelming conclusion is that there was a transfer of undertaking as defined by the Regulations at Section 3 (2). In this case the Adjudication Officer held that the employee should be re-instated.

This is a well thought practical decision in relation to these Regulations.

Transfer of Undertakings Regulations – Who is responsible for a breach

In ADJ-00023612 the Adjudication Officer addressed this issue quoting the case of Rotsart De Hertaing –v- J Benoidt SA case C-305/94 where the CJU held that,

''Article 3(1) of the Directive is to be interpreted as meaning that the contracts of Employment and employment relationships existing on the date of the transfer of an undertaking, between the transferor and the workers employed in the undertaking transferred are automatically transferred from the transferor to the transferee when the mere fact of the transfer of the undertaking despite the contrary intention of the transferor or transferee and despite the latter's refusal to fulfil this obligation''

This is a helpful restatement of the law. It has been stated on a number of occasions but consistently employees seem to get this wrong.

Take a situation where an employee has a claim for breach of the Organisation of Working Time Act. Those breaches occurred, for example in January and February 2020. Business is transferred to a new employer on 1 March 2020 and the new employer is fully compliant with the Organisation of Working Time Act thereafter. The employee then issues a claim. The claim is not against the old

employer. It is against the new employer. The employee may have no right with the new employer but the reality is the claim is against the new employer not against the old employer. This comes as a surprise to some employees and often as a surprise to some employers who have taken over an undertaking.

Employment Equality Act 1998, As Amended – Burden of Proof

This issue arose in case ADJ-00026178.

The Adjudication Officer set out that the burden of proof to establish a prima facie case lies with the complainant. The Adjudication Officer pointed out that where in any proceeding's facts are established by or on behalf of the complainant for which it may be presumed that there has been discrimination in relation to him or her it is for the respondent to prove the contrary. However, the Adjudication Officer set out that the law on this was acknowledged in relation to the burden of proof in ICTS (UK) Limited -v- Magdi Ahmed EDA3/2004 that there will be situations where the test to demonstrate primary facts will not be appropriate. Where the alleged discrimination consists of discriminatory questions or comments made in the course of a recruitment process the Adjudication Officer pointed out that it is accepted that the only evidence which the complainant will generally be able to adduce will be his or her own uncorroborated testimony.

It was pointed out that in Nevins -v- Portroe Stevedores 2005 /16ELR280 the Labour Court followed Barton -v- Investec Henderson Crosthwaite Securities Limited 2003 1ICR1205 where it was held that since the facts necessary to prove an explanation would usually be in the possession of the respondent it required cogent evidence from the employer to discharge that burden. This means that where an employer presents a series of unsatisfactory explanations or relies on mere denial a Tribunal must be mindful that discrimination is usually covert and often rooted in the subconscious of the discriminator.

Victimisation under the Employment Equality Act 1998

In case ADJ-00015253 being a case of Regina Foley And Lansdown Care Limited trading as Home Instead Senior Care this issue arose.

The Adjudication Officer set out that victimisation is defined by Section 74(2) of the Act. The case of EDA 1017 Department of Defence –v- Barrett was quoted where the Labour Court held that in order to make out a claim of victimisation under the Act it must be established that:

A. The complainant had taken action of a type referred to in Section 74(2) of the Act (of protected Act).

B. The complainant was subject to adverse treatment by the respondent, and

C. The adverse treatment was in reaction to the protected action having been taken by the complainant.

The Adjudication Officer set out that in the case of Public Appointment Service -v- Roddy EDA1019 the Labour Court held that to be encompassed within the ambit of Section 74(2)(b) proceedings must come within the definition as defined by Section 2 under interpretation where proceedings mean proceedings before the person, body or Court dealing with a request or reference under the Act on behalf of a person, and any subsequent proceedings including proceedings on appeal arising from the request of reference but does not include proceedings for an offence under the Act. Under the Act the complainant must prove that the catalyst alleged for the adverse treatment complained of came within the ambit of one of the protected Acts referred to in Section 74(2) of the Act.

The Adjudication Officer pointed out therefore in order to maintain a claim of victimisation within the meaning of the Employment Equality Acts it is necessary that the complainant demonstrates a connection between her actions in relation to defending her entitlements under the Act and the adverse treatment complained of namely reduced hours. The complainant in this case noticed that things got worse when she started complaining about clients care plans and after reporting her fellow care givers work ethic. The Adjudication Officer stated that the solicitor's letter to the owner dated the 22nd March 2018 was the first record where there is a mention of discrimination or the Employment Equality Acts. The Adjudication Officer held that this is when there is concrete evidence that the respondent was on

notice of the complainants feelings and possible actions to defend her position. The Adjudication Officer stated the evidence was that the reduced hours happened before that date and the complaint was rejected.

This is an important case in setting out that if an employee believes that there has been discrimination under the Employment Equality Act it is important that appropriate complaints are made. Of course it is better that these are made in writing and possibly be email also so that there is a record of a complaint having been made.

What is a Disability Under the Employment Equality Act 1998, as Amended

This arose in ADJ-00026178 where the Adjudication Officer in that case set out that disability has been interpreted in an extremely broad way. The Adjudication Officer referred to the case of An Employee -v- Bus Eireann 2003 ELR351 where it was held that heart conditions amounted to a disability for the purposes of the Act. Further in the case of Mr O -v- A Named Company DEC-E2003-052 it was held that work related stress may amount to a disability. In the case of a Government Department -v- A Worker EDA094 de minimis rule applies and the condition must manifest itself in a minimum level of symptoms to be classified as a disability.

In this case the employee had a turn in his left eye. The Adjudication Officer pointed out that no evidence was presented that his eye sight or use of the eye was in any way effected or reduced as a result of the turn in the eye. The Adjudication Officer held that a turn in one's eye or a lazy eye does not meet below the threshold for a disability under the Act.

Period of Time Which Can Be Considered by an Adjudication Officer in an Employment Equality Act Case

This issue arose in ADJ-00021550 where the Adjudication Officer in making their decision relied on the determination of the Labour Court in a case of A School -v- A worker EDA2/2012 where the Labour Court held that the complainant could only rely on alleged acts of

discrimination which occurred before the presentation of his or her complaint to the Equality Tribunal for the purposes of seeking redress. The Court added that the evidence tendered in relation to later incidents which had probative value in respect of any issue in relation to matters comprehended by the complainant at the time it was made could be admitted.

Reasonable Accommodation for a Person with a Disability

This issue arose in the case of Robert Cunningham appellant, Irish Prison Service respondent and the Labour Court notice party in a judgement given by Mr Justice Barr delivered on the 9th June last.

The case revolved around the provisions of Section 37 subsection 3 inserted by the amending Act of 2004 as it related to the prison service.

The decision however is particularly relevant not only in respect of that but in respect of the approach the Court took relating to the issue of reasonable accommodation.

The judgement set out that it is clear that the decision in the Nano Nagle case was that there has been a paradigm shift in the way that disability is to be reviewed in European and Irish law. This has been brought about by the implementation in Irish law being the framework Directive in the Employment Equality Act as amended and in particular the general duty of providing reasonable accommodation which is placed upon an employer by Section 16 of the Act. The judgements of the CJEU referred to in the judgement and the judgement of the Supreme Court in the Nano Nagle case make it clear that the provisions of the framework Directive and Act to provide rights of real substance to persons with disabilities who wish to enter or remain in work.

The judgement set out that it may well be that a particular disability will in fact render a person incapable of performing the necessary functions in a particular emergency service. Everything will depend on the circumstances of the case.

His honour pointed out:

"For example, if the emergency service involved a small unit, for example, if the Kerry Mountain Rescue Service was a full time or part time paid position and it only had a relatively small number of employees, if one of them suffered an injury whereby they were confined to a wheelchair, there would be no accommodation which could be made to enable them to continue to act as part of the team, because a rescuer would have to be able to climb and hike considerable distances to reach an injured climber."

He went on to state:

"The person who was confined to a wheelchair clearly would not be able to perform the range of functions which they would be called upon to perform as part of a mountain rescue team. In such circumstances the employer would be relieved of the obligation to make reasonable accommodation for them and they would not be the subject of discrimination if they were not retained in employment"

His honour however went on to state:

"However, in a larger organisation there may not be a single characteristic function, which is essential to be performed by all employees so as to preserve the operational capacity of a particular emergency service. For example, in An Garda Siochana, most Gardai would have to be able to chase and append suspect criminals, intervene in situations of violence and carry out searches of buildings and other locations. A person in a wheelchair would not be able to perform those functions. However, if they Garda was employed in the forensic document section or in the cyber-crime section, he or she could probably be relatively easily accommodated if they had an accident and had the use of a wheelchair, because their work is completely desk bound. In these circumstances, they could be accommodated in their use of the wheelchair, without in any way compromising the operational capacity of An Garda Siochana"

It was pointed out that the law makes it clear that an employer does not have to create a job for the person with a disability nor do they have to provide measures that are unduly burdensome. The court pointed out that the test is proportionality or reasonableness. But the court pointed out that that includes the consideration of financial and other costs entailed in providing appropriate measures, the scale and financial resources of the employer's business and the possibility of obtaining public funding or other assistance. It would also include a consideration of the operational capacity of the organisation.

The court pointed out:

"Everything depends on the circumstances of a particular case. If it can be established that notwithstanding his disability, a person is capable of performing the functions that they may be called upon to perform in their particular role within the prison service, and that can be done without adversely affecting the operational capacity of the prison service, it seems to me that the requirement of the Directive mandate that he be given a reasonable accommodation, if not unduly verbal and thereby be committed to continue in employment."

This is a very important re-instatement of the law by the Court.

In looking at the issue of reasonable accommodation following the issues set out in this case it is clear that what will be required by a large employer is more extensive than would be required by a small employer. It does mean that an employer has to look at the practical issue of whether or not it is possible to accommodate the employee, without creating a new post, but possibly by ensuring that they can be accommodated as far as is practicable within the organisation.

This particular case has been sent back to the Labour Court.

The issue of reasonable accommodation is an issue which is going to arise more and more into the future and this is a further important decision of the courts as to the test which will need to be applied.

Disability Discrimination

An excellent case to read in relation to this is case ADJ-00023749. The Adjudication Officer in this case helpfully went through some of the law in some depth. In particular, it is looking at what enquiries an employer should undertake.

The first issue is what is a disability.

As the Adjudication Officer pointed out in the case of HK Danmark –v- Dansk Case C-335/11 and C-337/11 where it was held that;

"The concept of disability in Directive 2000/78 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 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".

An issue which comes up is whether an employee is required to formally notify an employer of his or her disability in order to avail of the protections.

The Adjudication Officer pointed out that in the case of Swan O Sullivan –v- Seamus O Conihan EDA1810 the Labour Court was asked to determine if an employee who had not formally notified his employer of his alleged disability had been discriminated against on the grounds of disability where he was dismissed from his employment due to performance issues.

The Labour Court found and stated;"As was pointed out by Rimer LJ in Gallop –v- Newport City Council 2013 EDCA Civ 1583 before an employer can be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person. The knowledge need not be of a diagnosed condition or disorder constituting a disability within the statutory meaning but to material facts which could reasonably indicate the existence of such a condition or disorder. While a respondent's knowledge of a disability goes to the question of causation, the existence of a disability can operate as a threshold or locus standi issue. That arises because, except in cases of associative

or imputed disability, a cause of action for discrimination on grounds of disability can only accrue to a person whose circumstances comes within the meaning ascribed to that term by Section 2 (1) of the Acts.

The Adjudication Officer in this case held that the employer was under a duty to make those enquiries. The Adjudication Officer also helpfully quoted the case of Humphreys –v- Westwood Fitness Club 2004 ELR 296 at page 300 where the Labour Court stated;

"The nature and extent of enquiries which an employer should make will depend on the circumstances of each case. At a minimum, however, an employer should ensure that he or she is in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision. In practical terms this will normally require a two stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at medical evidence available to the employer either from the employee's doctor or obtained independently. Secondly, even if it is apparent that the employee is not fully capable, Section 16 (3) of the Act requires the employer to consider what, if any, special treatment or facilities may be available by which the employee can become fully capable. The Section requires that the cost of such special treatment or facilities must also be considered. Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a fully opportunity to participate at each level and is allowed to present relevant medical evidence and submissions".

This is a helpful overview of the Legislation, which the Adjudication Officer has set out and this is a decision which is well worth reading in full.

Payment of Wages Claims

In the case ADJ-00023775 the Adjudication Officer helpfully set out the issue as to what a deduction is. The Adjudication Officer referred to the decision of Mr Justice McGrath in Balans –v- Tesco Ireland

Limited when considering Section 5 (6) of the Payment of Wages Act 1991 which provides that where the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages which are properly payable to the employee then accept in so far as the deficiency or non-payment is attributable to an error of computation the amount of deficiency or non-payment should be treated as a deduction made by the employer from the wages of the employee on the occasion.

This is useful restatement of the law on this point.

Lodging Claims in the WRC

An issue that sometimes comes up is that relating to whether a matter has been properly referred to the WRC.

This arose in case ADJ-00019188.

A complaint issued. There was a complaint put in that the employer did not keep statutory records. Such a claim can only be made under provisions of SI 36/2012 which relates to mobile workers. The employee was not a mobile worker. There is no equivalent general right to be referred to an Adjudication Officer complaints relating to records. However, the remainder of the complaint relating to Annual Leave entitlements and the complaint form set out that the employee needed the issue of outstanding holidays sorted.

The Adjudication Officer looked to see whether this claim could be amended to be included under the Organisation of Working Time Act and concluded it could. The Adjudication Officer referred to the cases of Co. Louth VEC –v- Equality Tribunal 2009 IEHC370 where the High Court stated;

"I accept the submission on behalf of the respondent that the Form EE1 was only intended to set out, in broad outline, the nature of the complaint. If it is permissible in Court proceedings to amend pleadings, where the justice of the case requires it, then a Fortiori, it should be permissible to amend the claim as set out in a form such as an EE1, so long as the general nature of the complaint, in this case,

discrimination on the grounds of sexual orientation, remains the same.

The Adjudication Officer also referred to the case of Louth/Meath ETB –v- Equality Tribunal 2016 IESC40 where the Supreme Court it was held;

"It goes without saying, first that the duty of the Equality Officer is both statutory, and, ultimately, delimited by constitutional considerations. As part of fair procedures, it is necessary, that all parties be aware, in a timely way, of the case which they must meet. Consequently, it would be wrong, where a situation to evolve in this investigation, where one or other of the parties was under a misapprehension of precisely the range of legitimate inquiry.

Second, it is hardly necessary to reiterate that it is not possible for any Tribunal, upon which a particular jurisdiction has been conferred by statute, to extend or confine the boundaries of the jurisdiction by an erroneous determination of fact…

There may also be circumstances in which a Tribunal, although holding jurisdiction to enter upon an investigation or inquiry, may render its decision a nullity by, for example, a denial of fair procedures".

The Adjudication Officer then went on to quote the case of Galway /Mayo Institute of Technology –v- Employment Appeals Tribunal 2007 iehc210 where it was started;

"It follows from the forgoing that a judicial or quasi-judicial tribunal is not entitled to invoke a statutory remedy which no one has sought and in respect of which no one is on notice. For the purpose of fulfilling the requirement of natural justice however, I would have thought that if any such Tribunal does have jurisdiction to give a remedy under a particular Act, then if this remedy is sought in an originating document, for instance by ticking a box giving a choice of remedies, or if it is orally sought in the course of the hearing, such a Tribunal is entitled to make a choice in favour of it. If that happens, parties have to be taken as being aware that in the event that a decision goes in a particular way the Tribunal may look to a remedy claimed. In that regard, I would regard a written claim or an oral

assertion seeking a particular remedy as being sufficient for the due administration of constitutional justice provided the Tribunal has jurisdiction in respect of it.

If remedies are complex, and a Tribunal has ruled as to notice in the form of simple originating documents, then it should abide by its own procedure or consider the grant of an adjournment to a genuinely surprised party".

The Adjudication Officer in this case granted the application to include the Organisation of Working Time Act as the issue of holiday pay was always there.

There is another aspect of these decisions which were quoted which was not covered by the Adjudication Officer and was not one of the issues which the Adjudication Officer had to address.

The issue in this relates to the issue of fair procedures and both the Louth/Meath ETB and the Galway / Mayo Institute of Technology case raised the question of the procedures in the WRC where submissions are not given.

As the WRC has procedures relating to submissions if a submission is provided late or on the day then taking the judgement of Mr. Justice Charleton the WRC should abide by its own procedures or consider the grant of an Adjournment to a genuinely surprised party. If it does not there is always the potential following the decision in Lough/ Meath ETB that the decision could be a nullity if fair procedures are not applied.

Claims to the Workplace Relations Commission

An issue arose in ADJ-00024725. In this case the Complainants representative wrote to the WRC stating that the Complainant wished to pursue a claim for unfair dismissal but did not set out the reasons, he alleged the individual was unfairly dismissed.

The Adjudication officer set out that the minimum standard that is required is that a complainant would file a complaint form setting out some details of the complaint and/allegations being made against the respondent. The Adjudication Officer determined that the Adjudication Officer did not have jurisdiction to hear the complaint.

At some stage this issue was going to arise and that is that firstly the WRC has a complaint form. However, the complaint form is not a statutory form. At times the complaint form did not actually include all the complaints that could be sent to the Workplace Relations Commission. In addition Section 6 of the Unfair Dismissal Legislation in subsection 1 sets out that the dismissal of an employee shall be deemed for the purposes of the Act be an unfair dismissal unless having regard for all the circumstances there were substantial grounds justifying the dismissal.

We would have to disagree with the approach of the Adjudication Officer in this case. Once a complainant puts in a complaint complaining that they were dismissed then in our view the position in relation to matters is that the complaint is there. Section 6 provides that the burden of proof is then on the employer to justify the dismissal. Now we may be reading the discussion incorrectly in that if the Adjudication Officer is stating that some details of an allegation is made then we would agree with the view that the employee must put in a complaint that says they were unfairly dismissed. However, once that was done that is as far as the employee needs to go.

As regards using the WRC claim form there in no provision for the current claim form. The Act does specifically provide for a claim form but no claim form has been prepared in accordance with the legislation. For a complaint form to be statutory compliant form and one which individuals would need to use then an order by way of a Statutory Instrument has to be made by the appropriate Minister.

There is a converse situation where an employee claims that they were constructively dismissed. In that circumstance the employee has to of course set out all the relevant facts and the burden of proof in on the employee. In that case when it arises the employer is entitled to wait and see what the evidence is, they do not need to lodge anything or make any submissions until they have heard the allegation. Equally in relation to an unfair dismissal case the employee is effectively entitled

to sit there and hear the employer defend the situation and if the employer does not prove that the dismissal was fair then the employee wins.

We see this issue is going to arise time and time again in cases, for example under the Organisation of Working Time Act. The decisions of the European Courts of Justice are now very clear that the burden of proof is most definitely on the employer and all the employee is required to do is to set out matters with sufficient particularity for the employer to know what the claim is.

In those types of cases an employee need only put in I worked over 48 hours' a week. They can set in the averaging period but that is as far as they need to go the burden then passes to the employer to produce the relevant records and evidence to show that the employee did not work over 48 hours' a week.

We can certainly understand the approach of the Adjudication officer in this case. There were many things that the employee could have done. The employee could have sought a request under Section 14 of the legislation for the employer to set out the grounds in which the employer said that the employee was dismissed. If the employer had not responded to same then the employee could simply have said they looked for request under Section 14, it was never responded to and that the burden of proof is on the employer.

It would be far more beneficial if there were statutory rules as to having a statutory claim form and having statutory rules as to what information must be furnished in line with the legislation.

A further interesting aspect of this case is that the Adjudication Officer in this case held *''the complaint fails''.*

This issue was looked at in the case of Walsh and Dunne Stores being a decision of the Labour Court which gave a detailed decision in relation to the wording that must be used in an unfair dismissal case as a preliminary ruling and determined that under the unfair dismissal legislation a bad decision must use the statutory words, in the unfair dismissal legislation in dismissing a case the Adjudication Officer according to the Labour Court has to use the words *'dismiss'* in the form of the decision.

This issue is going to the High Court relating to a claim under the Terms of Employment (Information) Act where similar wording was used rather than the words *'founded'* or *'not well founded'.*

It would be interesting to see if this case goes on appeal whether the Labour Court will accept jurisdiction to hear an appeal.

Format of Decisions

There is an issue arising with the number of cases and we are picking out just simply one at random and that is case ADJ-00024403. In this case the Adjudication Officer awarded six weeks pay for minimum notice. There is no difficulty with that. The difficulty is that the decision is not one that sets out what the weekly pay was and nowhere in the decision is the rate of pay set out. Therefore, if it comes to the implementation of the decision an issue is going to arise as to how it can be implemented.

Where a case goes for implementation it is on the basis of the decision. If the decision does not specify the amount or within the body of the decision it is not possible to work out what the rate of pay was then in those circumstances there is going to be a question as to how such a decision can be implemented.

It would be preferable in decisions if the actual amount was specified, it would avoid confusion.

***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.**