Welcome to the September issue of Keeping in Touch.

For those involved in employment law we are seeing the Labour Court, which was the first to have hearings and now the Workplace Relations Commission having hearings. For those attending hearings it is a new experience compared to what happened prior to Covid-19. However, this firm along with everybody else will adapt to the new arrangements.

In the area of employment law there are a number of developments.

The first of these is remote working. There has been quite a volume of calls for remote working. This has also been coupled with calls for a right to disconnect. The right to disconnect is actually already there in the Organisation of Working Time Act. Of course there are benefits with remote working. The down side of remote working is that it is already having a negative impact on business life in our cities. A lot of business premises, in cities, are under significant stress. This is everything from coffee shops to restaurants to our main street stores due to the lack of office workers in our cities. There will have to be a discussion as to whether to promote remote working or to have people come back to offices. If we as a nation vote for remote working as some form of right or it is to be proposed by employers then we will see the death of many businesses in our city centres and that will be the cost and that will be the cost of remote working. If as a country we go the other way to bring people back to offices then there is the issue of work life balance being affected. It is not an easy discussion. There are no easy answers. There will however have to be a discussion on this.

The second major issue which is arising is the issue of redundancies. Redundancies are significantly on the increase. We have a considerable number of individuals still on the PUP. In addition, we have many employers now looking to Redundancy. We would expect to see employees looking for Redundancy later. However, redundancies are clearly on the horizon and they are likely to be significant in their numbers.

The third issue which is arising is relating to Redundancy and that is employers simply paying Statutory Redundancy. Already there is a number of disputes with employers in such circumstances and we would expect to see more industrial action in the coming months. This will invariably lead to injunctions.

The fourth trend which has not occurred yet but is likely to occur, if the experience of the last recession applies namely that there will be a lot of employers, who make individuals redundant, who will not pay the Statutory Redundancy. This will mean a significant number of cases will have to go to the Workplace Relations Commission.

Fifthly, there is a worrying increase in the number of cases involving those who are pregnant or who are finishing maternity leave not being called back to work.

There are of course a number of other trends but the ones that we have set out above are some of the more common ones we are seeing. Some might say these trends would be good for Employment Law Solicitors. The opposite is actually the position. As Employment Lawyers there is more work and better fees, to be honest, when there is a thriving economy. Equally Employment Law Solicitors are not here necessarily looking for cases involving people losing their job or in making people Redundant or dismissing individuals. Yes, that is part of our function but unlike the last recession currently the numbers on lay off and the likely numbers whose jobs will go is not spread out over years but it would appear to us an issue which is now going to arise over what will be a very short period of time.

Our legislation is completely out of line with having to deal with the issues surrounding a pandemic. That is not to criticise the Government. Nobody could have foreseen a pandemic. The issue now will be however, to make sure that appropriate steps are made to bring our legislation in line with how our economy will be working, or in some cases not working, to make sure that disputes in the workplace can be kept to a minimum to save as many jobs as practicable.

Out and About in August 2020

On 5 August Irish Legal News published an article by us on the issue of redundancy traps for employees.

On 6 August Richard was interviewed on the Hard Shoulder on Newstalk FM on the issue of claiming redundancy and the requirement for those on lay off to look for work. We expressed concern over the restriction on claiming redundancy and questioned how somebody on lay off could be required to look for work particularly as lay off is intended to be a short-term period with the employee returning to work.

On 7 August Richard was interviewed on Kildare FM on the issue of the requirement to wear face masks in shops and the legal and health and safety issues relevant to both employers and employees.

On 8 August Richard was quoted in The Irish Times in an article by Ronald Quinlan on the issues relating to remote working. The article was headed *"Are we really facing the death of the office?"*

On 10 August Richard was interviewed on Highland Radio again on the issue of mandatory face masks and the issues relevant to employers and employees where Richard was critical of the fact that no guidelines had issued from either the Health and Safety Authority nor the Workplace Relations Commission on how employers and employees could safely request those entering shops to wear face masks.

On 12 August Richard was on Today with Sarah McInerney along with Simon McGarr Solicitor discussing the data protection and employment law issues around reporting Covid-19 by both employers and employees.

Richard was quoted in the Dublin Inquirer on 12 August about redundancy and in particular difficulties in relation to the Debenhams redundancies.

On 14 August Richard was on Today FM again discussing issues around the reporting of Covid-19 in workplaces and pointing out the

difference between employment law and data protection law and the problems this is causing.

On 18th August Richard was on the Hard Shoulder on Newstalk FM to discuss Maternity and Pregnancy rights.

On 24 August Richard was on Waterford FM with Damien Tiernan to answer issues which are affecting both employers and employees in the employment field due to Covid 19.

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Private & Confidential
Minister Leo Varadkar
Department of Business Enterprise and Innovation
23 Kildare Street
Dublin 2

19 August 2020

Richard Grogan

Dear Minister,

We are attaching some proposals in relation to remote hearings, submissions, management meetings and mediation for the WRC which may also in some ways benefit the Labour Court.

Kind regards,

Yours sincerely,

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

Remote Hearings.

We would ask you to consider giving the WRC the right to direct that hearings would be held remotely. Again we would contend that this could be done in whole or in part for particular cases. There may well be cases where there are technical issues which could reasonably be dealt with by an Adjudication Office hearing that element of a complaint remotely and making a preliminary determination on that issue. Such a situation may well then determine whether a full hearing is needed or not. It would again assist the WRC in maximising the physical space they have for them.

We would propose that Section 41 of the Act be amended by the insertion of a new subsection (20) as follows.

''the Director General may direct that a dispute shall be heard by way of a remote hearing in respect of the whole or part of a dispute as determined by the Director General''

Submissions.

There is an issue in relation to cases in the WRC that submission are not received. This often means that cases have to be adjourned or at a minimum adjourned to another date or at a minimum postponed for a period of time to enable one or other party an opportunity to review the submission received. With Covid-19 the opportunity to do so at a physical hearing is extremely limited because of the physical layout of the WRC premises and the necessity for party and their representative to have an opportunity for a confidential meeting. Social distancing creates a problem and therefore a postponement for a period of time to allow submissions to be considered and instructions taken is going to be a lot less practical. In addition there can be issues that there can be substantial legal submissions at times put in where a party does not have a real opportunity to review same and simply results in appeals to the Labour Court which could have been avoided. For this reason we are proposing that a new section be inserted into the Act as follows.

'' The Director General shall be authorised to direct a party to a dispute to lodge a submission within thirty days of being directed to do so by the Director General or such extended time as the Director General may in their discretion consent to include

(i) Such records or documents as the Director General shall direct;
(ii) Any documents or records which a party intends to rely on;
(iii) Any legal submissions which the party intends to make;
(iv) A list of the witness or witnesses which the party intends to call and an outline of the evidence of such witness or witnesses shall give;
(v) Unless an Adjudication Officer directs otherwise the contents of any written submission or documentation furnished shall be deemed for all purposes to be matters upon which a party shall be deemed to have been heard;
(vi) In the event that a party does not submit submissions the Director General shall be entitled to advise to the parties that the case will be determined on the basis of the written submissions if any received which would include the complaint form and that the complaint shall be determined on the documentation, and submissions if any along with the complaint form as lodged with the Workplace Relations Commission and no party to the said dispute shall be entitled to object''.
(vii)

Management meetings.

At the present time the WRC list cases on the basis of the type of case that it is. For example, an Unfair Dismissal case was usually assigned 4.5 hours but now 2.5 hours. Some case will take that length of time. Some will take a lot less time. Some will have to be adjourned for a second or even a third day. By having submissions in in advance the WRC will be able to more effectively determine the length of time which may be required. There will also be cases where it will be evident from submission that certain facts are or are not in dispute.

For the effective management of time the Labour Court is known to have management meetings where issues in dispute can be refined down for more effective management of time. We would propose that the WRC would equally be entitled to have management meetings. These could be undertaken remotely. It would mean that adequate time could be allocated. There are Unfair Dismissal and Equality cases that can run a number of days. There are others where representatives will agree as to the issues in dispute and where there may need to be very limited evidence taken. This would mean that more effective use of the limited space that the WRC have could be maximised and we would propose that there would be specific statutory power for the Director General to direct a management meeting by having a new section inserted into the act as follows.

"The Director General may direct that an Adjudication Officer shall undertake a preliminary hearing with the parties to deal with any practical or administrative issues relating to the complaint to include the management of the hearing and to determined to what extent, if any, matters can be determined not to be in dispute to provide for the effective and efficient hearing of a dispute, and may direct it shall be in person or done remotely".

Mediation.

Currently mediation in the WRC is not covered under the Mediation Act. Therefore, there is no obligation representatives and by this I mean solicitors or those who would be appearing a profit such as HR professionals or IR professionals or not for profit entities such as a Trade Union to be required to advise a party on the benefits of mediation. We wold also propose that the provisions of the Mediation Act 2014 would apply to the WRC. This would mean that if a party did not take part in mediation in good faith, which is entirely different than actually reaching a mediated settlement, that this is an issue that can be referred to the Adjudication Officer by the mediator. There may be objections to the Mediation Act applying to the WRC And the Labour Court. However, as a minimum there should be a requirement

to advise on the benefits of Mediation, therefore we would propose that Section 15(a) be amended by a new (aa).

'' A person or body who shall represent a Complainant or Respondent shall be obliged to produce such evidence as the Adjudication Officer or Labour Court shall require that that person or body advised the Complainant or Respondent of the benefits of Mediation and the provisions of the Mediation Act, 2014 in particular Section 10, 11 and 14 of the said Act''.

We would also propose that the Labour Court should be entitled to require the parties to attend to Mediation. At a minimum the provisions of Section 44(9)(a) would be similarly be amended by the insertion of a new (aa) as would apply before the WRC.

Conclusion.

I do apologise for this lengthy letter but all of those who practice in the WRC, in my opinion, want to see the WRC operate along with the Labour Court in as efficient and effective manner as possible and at the same time being a safe environment for both employers, employees, their representatives and the staff of the WRC and Labour Court to work in. by having more effective and efficient procedures the amount of interaction, by this I mean physical interaction, would be limited to that which is absolutely necessary. In addition, going forward when we have eradicated Covid-19 there would still be the benefit of a more effective, efficient and cheaper service for the State, Employees and Employers. A significant number of cases before the WRC either just before the case starts or sometimes the case is interrupted by one or other party to seek an opportunity to resolve matters. By having more effective and efficient procedures in place it would mean that resources being Adjudication Officers, the Labour Court and the physical premises could be more beneficially utilised. It may well have the benefit of having cases disposed of in a quicker and more efficient way. This benefits the State, Employers and Employees by reducing the amount of time involved which is a benefit to the State, and as regards employers and employees reducing the stress issues relating to a case hanging over them for a considerable period of time.

Companies (Miscellaneous Provisions) (Covid-19) Act 2000 (Commencement) Order 2020

You may wonder what this particular Statutory Instrument and Act has to do with employment law. In fact, it has everything. We did put in a submission which has resulted in Section 17 of the Act which has now come into effect.

The Companies Act had a provision in it that before a claim could issue against a company which was in liquidation an application would have to be made to the High Court.

There was an exemption from this where a claim would issue to the Employment Appeals Tribunal. This provision was in the Companies Act 2014. When the Workplace Relations Act 2015 was enacted the relevant provision of Section 607 of the Companies Act 2014 was not amended.

The effect of this, if it was not now altered would be for example that any claim going to the WRC where a company was in liquidation would have to have a prior application to the High Court. By changing the Companies Act 2014 to delete the words "Employment Appeals Tribunal" and inserting instead the words "Workplace Relations Commission" all of those problems are resolved.

If this had not been done there would have been substantial additional costs to employees in bringing cases to the Courts to get the consent. In addition, it would have tied up Court time.

We made a submission to the Minister saying that it made sense for the purposes of reducing costs to employees bringing claims and saving valuable Court time to have this Act be amended.

We are delighted that the amendment was taken on board.

A cautionary tale – Employers beware – Dismissal during probation

Ordinarily you think an Employee who is dismissed on probation will have less than 12 months service, in turn this means that they fall

outside of the Unfair Dismissal legislation, as they will not have the requisite 12 months of service.

Your mind would then turn to what claim could an Employee bring for dismissing them.

The answer is Section 20(1) of the Industrial Relations Act, 1969 (as amended) as there is no service requirement under this Act unlike the Unfair Dismissal Act mentioned above. However, cases that are brought under this Act are unenforceable. Therefore, even if an Adjudication Officer finds in favour of an Employee, they can not enforce the decision. In reality there is not much of a monetary risk to the Employer, bar legal fees if they choose to defend such a case. The risk here to an Employer is reputational, such cases could gain media attention, and have negative connotations for example in regards attracting Employees.

However, a very recent case of ***Donal O'Donovan - v - and Over – C Technology Limited and Over – C Limited [2020] IEHC 291,*** has made dismissing an Employee during their probation not as easy as perhaps once thought.

In this case the High Court granted an interlocutory injunction following the purported dismissal of a chartered management accountant during his probation.

Background:

The Employee Mr O'Donovan commenced employment with Over – C Technology Limited and Over – C Limited in July 2019, as CFO. His contract of employment included a probation clause, a clause on disciplinary procedures and a termination clause. The probation clause reads as follows:

"*An initial probationary period of 6 months applies to this position. During this period, your work performance will be assessed, and if it is satisfactory, your employment will continue. However, if your performance is not up to the required standard, we may either take remedial action or terminate your employment''.*

The Employee in January of this year was called for a meeting with the CEO. The CEO dismissed him. The Employee received a follow up letter setting out issues with his performance, and stating that the issues have previously been brought to the Employee's attention.

The Employee sought to appeal the decision to dismiss. The CEO confirmed in writing to the Employee he could appeal the decision, a date and venue was provided to the Employee for the appeal.

The Employee advised that the date of the appeal did not suit him or his legal representation. He received a response back stating that the Employee did not want to appeal and the termination still stood.

After correspondence between the Employee and Employers Solicitors the Employee proceeded to the High Court to litigate the matter. The Employee's argument was that he was unfairly dismissed in breach of his contractual and constitutional entitlements to fair procedures.

Namely that one, he had a right to reply to the allegations made against him in respect of his performance and two, a right of appeal of the dismissal. The Employer made counter arguments.

The High Court granted an interlocutory injunction stating that the Employee was to be paid 6 months of his salary. The Judge was cognisant of the fact that the Employee claimed that the relationship of trust and confidence had broken down and that reinstatement was not a possible outcome. The Judge was also aware the Employer may need to appoint a new CFO for the business. The Judge stated he was not going to deal with the substantive issues until the full hearing of the case.

Ramifications for Employer:

This decision in effect means that the Employer is paying the Employee 6 months of salary and possibly appointing a new CFO, essentially paying on the double.

Additionally, the employee in this case being paid for 6 month means he will accrue the 12 months service requirement for the Unfair Dismissal legislation.

In light of the above decision, and further decision pending we would urge Employers to proceed with caution when dismissing an Employee on probation, fair procedures still apply. Legal advice should be sought prior to any dismissal for employees equally legal advice should be obtained.

It must be pointed out that injunctions are expensive to bring and defend. Especially so for the party who losses. The case of injunctions normally only are open for higher paid senior executives and managers as an option due to the cost involved.

Children returning to school – an issue for both employers and employees.

We are in novel times. Children are returning to school. The evidence is that children are going to get Covid 19. As of 23rd August some 100 children between the ages of 4 and 15 contracted the disease.

We are told that it is unlikely that children will contract the disease in schools and that it will be contracted in their homes.

That raises a significant number of issues for both employers and employees.

Take a situation where an employee is at work and is contacted to say that there is a child who is ill. Under the new protocols for school that child will need to be collected. There is no doubt that under Force Majeure Leave the employee in those circumstances, who is contacted, would be immediately needed to attend. On that basis the employee would be allowed leave the workplace and be paid for that day.

The entitlement of Force Majeure Leave is three days in any twelve months or five days in any thirty six month period.

Unless there is effectively immediate testing parents will be in a situation where there will be potentially a young child, who cannot be left alone, and who cannot be sent anywhere else such as to a grandparent or a relation to be minded or for them to come in to mind that child and therefore in the case of a couple one or other parent will have to remain with the child.

So what is the position as regards Force Majeure Leave?

If this was a single parent then there would be a very strong argument that the parent would have to remain with the child and therefore should get the Force Majeure Leave provisions which would mean that they are paid. The total of course would be for three days including the day they left work to collect the child. However is their attendance "indispensible".

What is the position where there is a couple?

In those cases there is going to be an argument. One parent decides that they will mind the child. The employer in that case can quite reasonably say well why would the other parent not have minded the child. The test in the Legislation is that their "immediate attendance" is required. There will be arguments on this as to why one employer rather than another employer should have to pick up the cost of the Force Majeure Leave. Of course there will be employers who will be very supportive of employees but we are looking at this from a purely employment law point of view.

If the test is not done immediately there is going to be a situation where a parent will not be able to claim Force Majeure Leave. They will have used up their full entitlement. They will have no entitlement to be paid. Unless they themselves are ill they will not get the Pandemic Illness Benefit. In fact they will get no Social Welfare.

Let us assume that the child has contacted Covid-19. Parents will then be told that they will have to self isolate. They will also have to be tested. Let us assume that the parent tests negative they will still have to self isolate. Because the parent is not ill they will not get the benefit of any sick pay scheme. They will receive Social Welfare but not monies from an employer's Sick Pay Scheme. The reason for saying this is that a Sick Pay Scheme will require employees to be actually sick. You will have some employees who will need to be paid and will look to take a holiday to look after their child. It is doubtful whether an employer agreeing to the employee getting holidays at that stage will be holidays which actually can be counted towards the holiday entitlement in the Organisation of Working Time Act. The reason for this is that the Labour Court was quite clear that holidays are there

as a period of time for an employee to relax and recuperate from the stresses of work. It is going to be difficult to argue that giving an employee time off by way of holidays to stay at home and mind a sick child is going to comply with the requirements of rest and relaxation. Therefore employers may be very slow to agree to providing paid holidays other than days in excess of the statutory entitlement. By this we mean for example an employee has 35 days holidays and has taken none this year maybe in a position where an employer will say they can give 15 days while reserving the Statutory entitlement as any claim under the Organisation of Working Time Act only applies to Statutory entitlements.

The next issue is going to be what happens if a child tests positive and subsequently the parent does also. The testing at present is worked on the basis of the person being tested is tested. Their close contacts are not tested unless a positive result is obtained. Take a situation then if a child comes home ill from school. It is going to take some days for the test to be done. The child tests positive. The parents have been in very close contact probably with that child particularly if they are very young over those days and may themselves test positive. They will of course then get sick pay under the company Sick Pay Scheme or alternatively the Pandemic Illness Benefit. The difficulty then for employers however is going to be in light of the fact that NPHET have being saying that it is very unlikely a child will contract Covid 19 in the school and that it would have been by transmission in their household. Then we have the issues that an employer will be looking at a situation that all their employees will need to be tested who have been in close contact with the relevant employee. If children are being infected by a parent then this is one where the employer will know that they have a problem in their workplace. If it is however that the child was infected in the school which will not be something that an employer will know, then in those circumstances the risk to other employees may be much less as the likelihood is, possibly, that between getting infected getting tested and the parents then getting tested which all takes time, that in fact the parents got infected by the child rather than the other way around. In either event an employer, once they are aware of an employee having become infected or even the potential effectively of same where a parent has to leave the workplace to collect their child that appropriate issues will have to be put in place to protect the other employees.

From an employment law perspective we have no planning in place, in our legislation, to deal with the practical issues of a parent, with a young child, who has to be removed from school taking time off work to mind that child. Our Legislation was drafted in a different period. This issue is going to have to be addressed. The issue that has to be addressed is whether that period of time being absent from the work will be paid by the employer or by the State. There is also the issue of the employee being entitled to stay out and mind the child in those circumstances. Currently the Legislation does not appear to allow that from an Employment Law perspective. There is also the issue then of what payment the parent should receive from the Social Welfare if they have to leave work, they cannot avail of Force Majeure Leave and are not in receipt of any income. Again the Legislation is silent on that.

A considerable amount of planning has gone into having children return to school. Absolutely zero planning has gone in to how employers and employees deal with a situation where an employee is required to leave work to collect a child who is ill and how matters are dealt with from that time until the all clear is given that it is not Covid 19 in respect of the child and his or her parent or parents.

There has been zero planning in relation to the issue of how this will be dealt with by way of Social Welfare where the parent does not become ill or is not ill.

As we head into the winter months children are going to get colds. It is normal that there is a degree of flu in schools which may be unrelated to Covid19 but the symptoms can be very similar.

These issues do need to be addressed and addressed sooner rather than later. We will see are they addressed.

It will probably be ad hoc planning.

Protected Disclosure – Time Limit to bring a claim for Interim Relief in the Circuit Court.

This issue arose in a case of Paul Cullen and Kilternan Cemetery Park Limited.

Section 11 (2) and Schedule 1 of the Protected Disclosures Act, 2014 created a statutory mechanism which permits employees who contend they have been dismissed wholly or mainly by reason of having made a Protected Disclosure to seek interim relief from the Circuit Court pending the outcome of their Unfair Dismissal claim.

The Legislation provides that the Circuit Court will not entertain an application for interim relief unless it is presented to the Court before the end of a period of 21 days following the date of dismissal or such longer period as the Court may allow.

In this case the proceedings were not commenced within 21 days of the date of the dismissal.

In this case Mr. Justice O Connor quoted the decision of Comerford J in the case of Michael Duggan and Sean Clark –v- Lifeline Ambulance Limited 2018 29 ELR210 where in that case the Court held that an application for interim relief under the Act was one where the test to be applied was did the employee have substantial grounds for claiming a connection between the dismissal and the protected disclosure.

Therefore it is not necessary for a Court to find that an employee was dismissed for making a protected disclosure for the interim relief to apply.

The case of McNamara –v- An Board Pleanala (No. 2) 1996 IEHC 60 is one where the Carroll J stated at paragraph 20;

"In order for a ground to be substantial it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous.

However, I am not concerned with trying to ascertain what the eventual result will be. I believe I should go no further than satisfy myself that the grounds are "substantial".

The ground that does not stand any chance of being substantial ...could not be said to be substantial."

The respondent referred to Section 5 (5) of the Act which states;

"A matter is not a relevant wrong doing if it is a matter which it is the function of the worker or the workers employer to detect, investigate or prosecute and does not consist of or involve an act or omission on the part of the employer".

The respondent also referred to the case of Baranya –v- Roseera Irish Meat Group 2020 IEHC56 where O 'Regan J held that there is a spectrum where at one extreme exists a grievance and the other a protected disclosure. However, there was also the possibility for the two to overlap when he stated;

"Although the concept of a protected disclosure is effectively a term of art as defined by the 2014 Act, the word "disclose" as the ordinary meaning of "reveals" or "make known".

The respondent submitted that stating that there was a planning irregularity is a general allegation and does not satisfy a requirement of relevant information as required by the Act.

In this case the issue then was looked at as to whether there were grounds to extend time. The application for interim relief issued three and a half months after he was dismissed. It was acknowledged that a month prior to the dismissal he threatened to do so unless an exit package was enhanced. The Court held a threat to an employer is not a protected disclosure. The Court held that the applicant had engaged his Solicitors giving legal advice on 18 months prior to his dismissal and he therefore is deemed to be fully aware of the law. The Court held that the applicant attempted to use the protected disclosure as a sword of Damocles over his employer to enhance his negotiation stance with his former employer. The Court held he was entitled to do so however it is not a good reason as to why the Court should grant an extension of time.

The Court rejected the application for an extension. The first reason recorded by the employee was that he was waiting the outcome of his application for new employment and it was submitted that it would have been inappropriate to have applied to Court for interim relief while an application for alternative employment was pending.

The second reason contended by the employee for the delay was that he was waiting the outcome of the appeal process in relation to the termination of his employment.

The Court held that neither of these were grounds to extend time. The case is interesting in relation to the issue of the extension of time but also in relation to the fact that the Court took the time to set out the law on this issue in great detail.

Protected Disclosures Act 2014.

This arose in case ADJ-00019117.

In this case the Adjudication Officer helpfully quoted the case of Aidan & Henrietta Partnership -v- Monaghan PDD162 where the Labour Court held:

''A grievance is a matter specific to a worker whereas a Protected Disclosure is where a worker had information about a relevant wrongdoing…. The Court must first establish that a Protected Disclosure has been made before it can examine whether a penalisation within the meaning of the Act has occurred''.

This decision of the Adjudication Officer is helpful in setting out what has to occur in such a case.

There are many cases where employees fail to understand that to obtain the benefit of the Act they must actually be able to show that they made a relevant disclosure of a relevant wrongdoing. If they cannot show that then there is no penalisation. If they can show they made a protected disclosure of a relevant wrongdoing and they can then show that subsequently they were penalised then they will have passed the burden of proof sufficient to pass that over to the employer to show that the penalisation was not as a result of the making of a protected disclosure.

Repudiation of an Employment Contract.

A person may be considered to having repudiated their contract if they wilfully disobey a lawful and reasonable order of their employer. This

was held in the case of Brewster -v- Burke A Minister for Labour 1985 for JIS LL98.

The Swedish Derogation – How it is used to avoid the equal pay and condition provisions of the Protection of Employees (Temporary Agency Work) Act, 2012.

The Swedish derogation as it is called is one of the most nefarious systems, being effectively a State sponsored scheme, to ensure that agency workers do not get the benefit of equal pay conditions. It is particularly prevalent in certain high-profile industries.

Unlike the UK where the UK Government brought out a plan called 'Good Working Plan' where there was a proposal to end the derogation, no such proposal is here in Ireland.

It must be pointed out that the Swedish derogation is a particular work system in Sweden that is quite legitimate and is one that is actually beneficial for a number of their employees. The Irish system and the UK system effectively does not have the same protection as the Swedish National Law has and therefore this has become a method of effectively providing employees, primarily non-Irish National with inferior terms.

It is important to understand what the legislation actually sets out. Section 6 of the Act provides that subject to any collective agreement an agency worker shall for the duration of his or her assignment with a hirer be entitled to the same basic working conditions and employment conditions which they would have had if he or she was a direct hire. The derogation is set out in subsection 2. This provides that in so far as it relates to pay an agency worker employed by an agency under a permanent contract of employment does not have to receive the same rate of pay provided before the worker enters into the contract of employment the employment agency notifies the agency worker in writing that if the agency worker enters into that contract of employment that subsection 1 of Section 6 in so far as it relates to pay shall not apply to the agency worker.

The proposed provision which is often trotted out is that between assignments the agency worker if work is not provided will be entitled

to a sum equal to not less then half of the pay which he or she was entitled to in respect of their most recent assignment.

So how does this work in practice.

In practice what happens is the first issue is that the agency worker who invariably will not be Irish when this scheme is being used, will be provided with a contract. There is no requirement to give the employee a contract in their own language. There is no requirement for them to get any legal advice or advice form a Union before signing the contract. There is no requirement that the employee is advised as to the actual effect of what they are signing up to so that they can make a reasonable decision as to whether to enter into the contract or not. That is the first objection.

The second is that effectively what happens is that the employee will find that there is a local hire on say €18.20 an hour and they are on a rate of say €11.00 or €12.00 an hour. If they seek to bring an Equal Pay claim they are effectively caught with the provisions of Section 6(2) of the Act. If they bring a claim under the Act of 2012 itself again the provisions of Section 6(2) is of full defence.

The third issue which might be seen as one where the employee actually has some protection is that between assignments they are guaranteed at least 50% of their wages. The reality is that these schemes are set up where the employee will be going to a particular hirer being the end user through being assigned there by the agency and there will never be a situation where they will between assignments.

The Swedish Derogation in Ireland is a way of obtaining cheap labour and avoiding any Equal Pay claim. The scheme is virtually always targeted at individuals who are non-Irish national.

The definition of pay is not just their normal pay. Pay would include issues around bonus payments, holiday pay, over-time, shift allowances and unsociable hours premiums. It does not include sick pay or pensions. Therefore because of the derogation it is also possible to have direct hire obtain sick pay and to effectively exclude the agency workers from any sick pay scheme.

There is of course no political appetite in Ireland to address the abuse of agency workers. The particular abuse scheme was written into the legislation by the Oireachtas in 2012. In the Dail debates it will set out that it was not the intention of the Bill that an agency would take on workers and provide different set of terms and conditions than those of a full-time direct hire in the company the agency worker is hired to. However, the effect of the legislation is that is exactly what happened.

The reality of matters is that any non-Irish national who signs one of these Swedish Derogation agency contracts is going to find it extremely difficult, if not impossible in reality, to progress a claim for equal pay.

If the Swedish Derogation was abolished it is likely that a lot of the difficulties in certain industries would evaporate immediately. It would mean that there would be no advantage to an entity using an agency for workers. It will be an unnecessary cost if Swedish Derogation was gone and that these individuals would then be engaged directly by those organisations.

One of the serious issues which is not addressed in our legislation is that employees with very limited English are getting contracts in languages that they just don't understand. There is actually no requirement in Irish law to give an employee a contract in a language that they are likely to understand. There is case law recently in the High Court which is held that where an employee signs a contract and the contract is clear and precise that in those circumstances they are bound by that contract. That case involved employees who had extremely limited English but his contract was in English.

It is one of the issues that is arising because of Covid-19 that some of the more dubious, if we can call it that, practices in Irish Employment Law are now coming to the forefront.

Who is an Employee

This issue arose in case ADJ-00021177.

The case is interesting for the case law that was quoted.

The employee relied on a case of Market Investigations Limited -v- Minister for Social Security 1969 QB173 which is a case which stated that there is no exhaustive list of factors that have established for the purposes of deciding the employment statue. While the matter of control will have to be considered it is not the sole factor. They also relied on a case of Payir -v- Secretary of State. Home Department 2006 ICR188 where an Au Pair working in the UK was held to be an employee. They also sided the case of Melhuish -v- Redbridge Citizens Advice Bureau 2004 Lexis Citation 1174 on the basis that the case differed from her situation as she was paid remuneration and there was mutuality of obligation. The employer relied on the case of Kirwan -v- Technical Engineering and Electrical Union 2005 ELR177 where that case was proposition for finding that worker to be an employee was an employee at the benefits received were effectively emoluments.

The employer relied on the case of Minister for Agriculture -v- Barry 2009 1IR21 where the issue of mutuality of obligation test was an important filter in determining the nature of the working relationship and also the case of McKayed -v- Forbidden City Limited 2016 IEHC722 where the High Court stated that the fact that work was given on a regular basis for a period of time does not determine whether one party has a legal obligation to provide the other party with work.

The case of Chris Lavan -v- Liberty Insurance Limited UD1575/2014 was also referred to. In that case the EAT stated:

''Whether a worker is an employee or self-employed depends on a large number of factors. The Tribunal wished to stress that the issue is not determined by adding upon the number of factors pointing toward employment and comparing the result with the number of factors pointing towards self-employment. It is a matter of the overall effect which is not necessarily the same of the sum total of all individual details. Not all details are of equal weight or importance in any given situation… When the detailed facts have been established the right approach is to stand back, and look at the picture as a whole… if the evidence is evenly balanced, the intention of the parties may then decide the issue…''.

Unfair Dismissal Act Claims – Level of Compensation.

An issue which regularly arises is whether the employee has sought to minimise their loss. This issue arose in ADJ-00023478.

The test in this matter was set out in the case of Sheehan -v- Continental Administration Co Limited UD858/1999 where the EAT stated:

''A claimant who finds himself out of work should employ a reasonable amount of time each week day in seeking work. It is not enough to inform agencies you are available for work nor merely to post an application to various companies seeking work.... The time that a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss''

This issue of mitigating loss is an issue which regularly comes up in employment cases in the area of Unfair Dismissal claims.

The issue is always going to be, has the employee sought to mitigate the loss. If the employee has not sought to mitigate their loss then in those circumstances the maximum compensation which can be won is four weeks.
Where the employee has sought to mitigate their loss but not fully and has not spent a reasonable amount of time seeking alternative work then in those circumstances the level of compensation awarded will be reduced.

Unfair Dismissal – Limiting Loss

This issue arose in case ADJ-00015988.

It is a principle of Unfair Dismissal cases that an employee must seek to minimise the loss by obtaining employment. The Adjudication Officer sets this out and states that the standard was set out in the case of Sheehan -v- Continental Administration Co Limited UD 858/1999 where it was stated that:

'' A claimant who finds himself out of work should employ a reasonable amount of time each work day in seeking work. It is not enough to

inform agencies that you are available for work nor merely to post an application to various company's seeking work.... The time that a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss''.

The Adjudication Officer set out that the maximum compensation payable in circumstances where no loss has accrued is four weeks remuneration.

Unfair Dismissal – Disciplinary Procedures – Fair Procedures.

This issue arose in case ADJ- 00023478.

In this case the Adjudication Officer helpfully set out that the constitutional right to fair procedures and natural justice was recognised in the case of In Re Haughey (1971) I.R. 217. The Adjudication Officer pointed out that the principles in that case were implied into Contracts of Employment by the Supreme Court in the case of Glover -v- BLN Limited 1973 I.R. 378 and have been cited in Labour Court decision including UDD 1815, UDD 1611. The Adjudication Officer set out that there are certain fundamental requirements of fair procedures as outlined in the case of Glover -v- BLN Limited and referred to in Kilsaran Concrete Kilsaran International Limited -v- VET 2016 27 E.L.R. 237 as:

''That cannot be dispensed with, regardless of the particular circumstances that arise in an individual disciplinary matter. They include.

(i) The requirement to make the employee who is then subject of the investigation aware of all the allegations against him or her at the outset of the process;
(ii) The requirement that the employer who has published a disciplinary procedure to its employees follows those procedures scrupulously when conducting a disciplinary process;
(iii) And in the event that the allegation against the employee is upheld, any disciplinary sanction imposed is proportionate to the complaint that has been substantiated''.

Constructive Dismissal – Using the grievance Procedure.

This issue was addressed in case ADJ-00015988.

The Adjudication Officer pointed out that an employee seeking to rely on a Constructive Dismissal claim must demonstrate that they have perused their grievance through he procedures laid down in the contract of employment before taking the steps to resign which had been the case set out in Conway -v- Ulster Bank Limited UDA474/1981.

The Adjudication Officer set out that there may be situations whereby failure to use or give prior notice of a grievance may be justified which was the position in the case of Liz Allen -v- Independent Newspapers 2002 13ELR.

In this particular case the Adjudication Officer held that while the employee had not formally used the formal grievance procedure the employee had put the employer on notice of his concerns and that the employer had made no efforts to resolve the issue and that the conduct of the employer in such circumstances was not reasonable.

Disciplinary Hearings – The Right of Employees.

This issue arose in case ADJ- 00020003.

In this case the Adjudication Officer pointed out that it is relevant to consider that the decision to dismiss is proportionate to the gravity of the complaint and referred to the decision of Mr Justice Flood in Frizelle -v- Newross Credit Union 1997 IEHC 137 where he stated:

''The decision must be proportionate to the gravity and effect of dismissal on the employee''.

The Adjudication Officer also pointed out that in Pacelli -v- Irish Distillers Limited 2004 ELR 25 the EAT stated that any investigation should have regard to all the facts, issues and circumstances.

It was also pointed out that the EAT in the case of Gearon -v- Dunne Stores Limited UD367/1988 held that the complainant in that case had an entitlement to have her:

''Submissions listened to and evaluated''

The Adjudication Officer also dealt with the issue of procedural defects stating:

''Procedural defects will not make a dismissal automatically unfair as an employer may be able to justify a procedural omission if it meets the onus of proving that, despite the omission, it acted reasonably in the circumstances in deciding to dismiss the employee''.

Right to Work from Home – Employment Equality Act, 1998.

While this is an issue where the claim was submitted on the 3rd of July 2019 and heard on the 29th November 2019 where the decision issued on the 11th June 2020 it is extremely useful at looking at the considerations and the law in this area.

In this case the Respondent did not dispute that it was informed of the Complainant's disability at the time and that the employee requested reasonable accommodation and discussed the use of her own or designated toilet and working form home. It was agreed that the Complainant could return to work on a part time basis and that she could take breaks whenever she needed to. The part time arrangement was to remain in place for one month. The employee went onto full time work on the basis of extra breaks but her Consultant stated that her Consultant would either support either two extra breaks or an arrangement where some work could be done from home. The Respondent contended that working from home was never suggested by any medical expert as an option to facilitate her at work. The Respondent stated that it did not have a working from home policy in place but confirmed that while there was no policy in place another member of staff was facilitated with working from home for a short period.

The Adjudication Officer helpfully set out the decision in the Nano Nagle School -v- Daly case reference 2019 IESC 63 and in particular the interpretation of Section 16 of the Act at paragraph 84 of that decision.

The Adjudication Officer stated that while facilities were given for one member of staff to work from home no explanation was given as to why the employee in this case was not permitted to work from home even for a short period.

The Adjudication Officer stated that they were satisfied that the various options of working form home were not assessed by the Respondent in respect of the Complainants individual circumstances rather the options were disregarded by the Respondent as there was no working from home policy in place at the time. The Adjudication Officer was satisfied that the Complainant was treated differently to another member of staff who was facilitated with working form home for a short period of time. In this case an award of €60,000 was made being a little more then one and a half years salary.

This is an important decision.

This issue is going to arise with employees wishing to work from home.

For an employee to be able to show that they have a right to work from home the employee will have to be in a position to show that the employee has a disability which requires the employee to be able to work from home.
It would be our opinion that an employee will not be able to insist on a right to work from home merely because they are at risk. They will have to show that they have an actual disability. This will require medical certification and equally medical certification that the employee would be required to work from home. We would be of the view that a certificate form a GP will not be sufficient. It will need expert medical advice that there is a disability and that there is a requirement that the employee works from home.

We expect to see a lot of cases on this issue arising.

Equality Claims – Capacity to Work

This issue was addressed in a case ADJ-00021550. The employee was not successful but the case is useful for setting out the law in some detail.

An argument was made that the respondent had not given sufficient serious consideration to the complainant's capacity as opposed to her incapacity and referred to a case of a Meat Company –v- A Meat Worker EDA28/2016.

Also the case of An Employer –v- A Worker EEA13/2004 (2005) ELR159, was also quoted where the issue of an employer's obligation in this regard was considered by the Labour Court in that case where it noted that the provision of special treatment or facilities necessarily involved an element of more favourable treatment as:

"A means to an end…"

It may be necessary to consider such matters as adjusting the person's attendance hours or to allow it to work partially from home. The duty to provide special treatment may also involve relieving a disabled employee of the requirement to undertake certain tasks which others doing similar work are expected to perform. The scope of the duty is determined by what is reasonable…".

Equally, the case of C-335/11 was quoted where the Court of Justice said the concept of reasonable accommodation should be defined broadly. The Nano Nagle case 2019 ELR221 was also quoted.

An interesting aspect of this case was that the case of A School –v- A Worker
EDA 2/2012 was quoted where the Labour Court had held that the complainant could only rely on alleged acts of discrimination which occurred before the presentation of his/her complaint to the Equality Tribunal for the purposes of seeking redress. However the Court added that evidence tended in relation to later incidents which had probative value in respect of any fact in relation to matters comprehended by the complaint at the time it was made could be admitted.

Discrimination in Relation to Promotion

This issue arose in ADJ-00025703.
The Adjudication Officer in this case referred to the case of Co Louth VEC being case EDA 0712 where the employee claimed that he was

discriminated on the grounds of his gender and his age when he was not appointed to the position of Assistant Principal. In that case the Labour Court stated:

'' The mere fact that a younger employee and an employee of a different gender was promoted in preference to the Complainant could not in itself constitute a basis on which discrimination on age or gender ground could be inferred. It would be necessary to show that the Complainant was better qualified or met the criteria for promotion to a greater degree than the younger/female successful candidate''.

The fact that a person may not get promoted it is not sufficient simply to show that the other person was of a different category than the person making the complaint. The individual must show that they were better qualified or at least met the criteria for promotion to a greater degree than the other person.

Unfair Selection for Redundancy

This issue was addressed in case ADJ-00023219.

In this case the employee contended that an unfair process of selection is sufficient grounds to find a redundancy dismissal unfair not withstanding other criteria being satisfied.

It was contended the Section 2 (3) of the 1977 Act provides that the claimant who has been unfairly selected for Redundancy had been unfairly dismissed.

It was submitted that a pool selection must be reasonably defined and applied to all employees in similar employment.

They relied on the cases UD12/2011 Moran –v- Ernst & Young, UD1259/2012 Mulqueen –v- Prometric Ireland UD206/2011.

In this case the Adjudication Officer while accepting there was financial evidence for the necessity to effect redundancies the Adjudication Officer found no credible evidence was advanced to justify the relevant employee for redundancy. No evidence was advanced to demonstrate that the selection was based on an unbiased

objective and transparent matrix of skills and competencies nor indeed was any evidence advanced to demonstrate that this was approached from an objective prospective where a job as opposed to a person was to the forefront of the deliberations on the matter.

No plausible explanation was advanced for the failure to explore part time work or temporary lay off as an alternative option for redundancy. The company failed to justify the very narrow time frame given to the claimant to come up with an alternative solution given the prolonged period allowed for the strategic review and no account appears to have been taken of the claimants limited insight into the financial imperatives during these redundancies.

This case highlights that when it comes to redundancy the issue that must always be looked at is are there any alternatives to redundancy.

Right to claim Redundancy

This issue arose in in ADJ-00024449. The Adjudication Officer helpfully set out the legislation in relation to short time work. This is set out in Section 11 of the Redundancy Payment Acts.

An issue is going to arise going forward, where employees are placed on lay off.

Subsection 2 sets out when an Employee would be deemed to be on short time. This is where the remuneration is less than one half of the normal weekly remuneration or the hours of worker reduced to less than one half of the normal weekly hours. Also the reduction is caused by a reductions either in the work provided to the Employee by the Employer or another worker for kind which under the contract of employment the Employee is employed to do and it is reasonable that the Employer believes that the reduction in work will not be permanent and he gives notice to that effect to the Employee prior to the reduction in remuneration or hours of work. Section 12 then provides that an Employee shall not be entitled to Redundancy by reason of having been on lay off or kept on short time unless the Employee has been on lay off or kept on short time for 4 or more weeks in a row or within a period of 13 weeks for a series of 6 or more weeks of which not more than 3 were consecutive.

In this case, the Employee did not have their hours reduced to such an extent that they met the definition of being on lay off.

Short Time Working

It is reported that the Government is planning a German style short time working scheme in 2021. The idea is that troubled firms will be subsidised to place the workforce on a two- or three-day week instead of laying people off. It then appears the idea that employees will be upskilled or retrained in other skills the days they are not working under a scheme likely to be modelled on Germanys Kurzarbeit Programme. This is a scheme which was introduced during the Global Financial Crisis of 2008 and 2009.

It is gong to be interesting to see how such a scheme will be introduced. Will individuals be paid a sum equal to that as if they were at work or will it be a reduced amount. The issue then is how many days this will apply for. Normally if a person was on a three-day week then they will not be able to claim Redundancy as they will be working more than fifty percent of the time for more than fifty percent of their normal wages. If it is a two-day week then it is only forty percent and therefore they will be entitled to claim. For such a scheme to come into place it would be necessary to amend the Redundancy Legislation if it is going to apply in situation where an employee would only work two days a week. The issue then would be for the employee that there right to claim Redundancy would go.

The next issue is how long an employee will be able to be kept on this reduced Short Time Working.

Providing upskilling or retraining in other skills is going to require considerable resources in itself. It will be interesting to see where the trainers come from. It will also be interesting to see at whet level this will be addressed to. For example there could be professional firms which will be in difficulty. Where would the upskilling or retraining come from in respect of such individuals. It is different if you are talking about individuals on lower wages or salaries who could be upskilled or retrained.

The concept as a concept is extremely good but it is going to have to be thought out. Individuals will not be able to be kept for an excessive

length of time under a scheme which will not allow them claim Redundancy.
There will also need to be amendments to the Payment of Wages Act to cover situation where an employer does not have a layoff clause of Short Time Working clause in the contract of employment. This will mean that the contract of employment will have to be amended to imply such a clause. This will create a significant legal issue in itself. It will be retrospectively implying or placing a clause into a contract which has been signed between an employer and employee to radically change the terms and conditions of their employment. The issue then will be for what period this new clause applies or will it be applied to all employment contracts going forward. Certainly there is an argument that it would be fair that it would cover a period while there is this effective emergency in place and for some short period thereafter. However, there would be, probably an issue with having this as a clause that would apply to every contract of employment whether stated or not for all contracts into the future. There will also need to be addressed the issue as to bona fide element of employees being placed on short time. Apparently there is nothing really to stop an employer putting employees on short time where the contract provides for same whether that is legitimate or not or whether there is a business reason for doing so.

We would also have a concern that this is going to take until 2021 to put in place. The challenges will be from September onwards with many employers trying to keep employees in work.

When these schemes are being talked about one feels that it is likely that the Government is again going to extend provisions relating to employees being able to claim Redundancy.

There is an argument that that period of time should again be extended for somebody who is on layoff. However, there are some employers currently terminating employment on the grounds of Redundancy and not paying Redundancy. In those circumstances there are difficulties with the employee bringing claims to the WRC. Equally there really does need to be an issue if the Redundancy Payment Act is going to be again restricted as to a fast track system as to where by an employee can challenge whether it is a valid layoff or not or whether it is simply a scheme or arrangement put in place by

an employer to see is it possible to get rid of employees without having to pay them Redundancy.

We are not being critical of this new scheme that is being talked about. In fact any scheme that is going to protect jobs and save jobs has to be given very serious consideration.

At the same time it is important that the legislation is put in place in a way which ensures that there is no abuse of a Short Time Working Scheme.

Claims Under the Safety Health and Welfare at Work Act for Penalisation.

This issue was dealt with in case ADJ-00022469.

The Adjudication Officer set out that Section 27 Subsection 3 set out the circumstance in which penalisation is rendered unlawful. The Adjudication Officer set out that while the Act is silent on the question as to whom the burden of proof rests the Labour Court in the case of Department of Justice, Equality and Law Reform -v- Kirwan HSD082 held:

'' It is clear, however, that in the absence of any contrary statutory provision, the legal burden of proof lies on the person who asserts that a particular fact and issue is true (see) Joseph Constantine Steamship Line -v- Imperial Sheltering Corporation 1942 A.C. 154."

The Adjudication Officer set out the provision for penalisation under the Act must be a matter connected with Safety, Health and Welfare at Work. The Adjudication Officer pointed out that furthermore the act of penalisation must arise from a retaliation for an employee who has made a complaint. The Adjudication Officer pointed out that the Labour Court had stated that the concept of penalisation should, similarly to victimisation, be construed as widely and literally as can fairly be done and referred to the case of Panuta -v- Watters Garden World Limited 2010 E.L.R.86. It was pointed out that Section 27(3) provides that the employee must suffer a detriment. The Labour Court has also had regard to the case of Shamoon -v- Chief Constable of the

Royal Ulster Constabulary 2003 UKHL. In that case it was said by Lord Hope that:

'' *The test for what constitutes a detriment is an objective one and the Court should consider if a reasonable worker would or might take the view that the treatment complained of was, in all the circumstances, to his or her detriment''.*

The Labour Court had as the Adjudication Officer pointed out had stated that there is a requirement.

''To show a chain of causation between the impugned detriment and the protected act or omission''. – Oglaigh Naisiunta Na hEireann -v- McCormack HSD115.

The Adjudication Officer set out that the requirements to establish that penalisation under Section 27 of the Act had occurred were set out most clearly in the case of Paul O'Neill -v- Toni & Guy Blackrock Limited 2010 21E.L.R.1. The Adjudication Officer pointed out that firstly it is necessary to establish that there has been a protected act. The second limb of the test is that the Complainant must have suffered a detriment for having raised a concern protected by the Act. As the Adjudication Officer pointed out this requires that a Complainant must show that there was a determent and that 'but for' having made a protected act under the Subsection the determent would not have happened.

While in this case the employee was not successful the Adjudication Officer has helpfully set out the law in some depth.

Penalisation under the Safety Health and Welfare at Work Act 2005.

This issue was addressed by an Adjudication Officer in case ADJ-00019117.

The Adjudication Officer in this case set out the issue relating to the standard of proof and quoted the Labour Court case in Patrick Kelly trading as Western Installations -v- Girdzius HSD 081 which set out that the burden of proof required in such circumstances is as follows:

''It is clear from a plain reading of Subsection(3a) of this Section that penalisation is rendered unlawful under the Act when it is perpetrated on an employee for having performed or committed one or more of the acts referred to in the succeeding paragraphs of this section. Thus, it is perfectly plain that in order to succeed in the cause of action grounded on the Section a claimant must establish not only that he/she suffered a detriment of the type referred to at Section (1) but that the detriment was imposed because of or was in retaliation for the employee having acted in a manner referred to in Subsection (3a)''.

The Adjudication Officer summed it up that for an employee to win they must show *'but for'* having made a complaint the penalisation would not have occurred.

Parental Leave Rights

The Parental Leave Scheme currently allows employees two weeks paid parental leave. This paid parental leave is paid by the State not by the employer. This must be taken within the first twelve months of the child being born. This increased to five weeks leave with the benefit being paid by the State since 1 September and that this leave can be taken within the first two years of a child's life.

Annual Leave Year Claims

There are constant issues arising in relation to claims being made and also defences being raised in relation to annual leave.

The claim is usually that the employee did not receive their annual leave in the company leave year which is usually the calendar year. Equally the defence is regularly trotted out that the employee received their leave in accordance with the company leave year where that would be the calendar year.

Under the Organisation of Working Time Act the leave year for bringing a claim is the period from 1 April in one year to 31st March in the subsequent year. There is no other leave year.

This issue was held by the Labour Court in the case of Waterford City Council –v- O Donoghue, DWT0963 where the Court stated;

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

The UK Legislation is more beneficial.

The UK Legislation has a Statutory Leave Year. However, it has the added protection for both employees and employers equally that the Statutory Leave Year is the default Leave Year unless a different leave year is set out in a contract of employment.

It is unfortunate that the Irish Legislation does not provide for this as it constantly creates problems when issues are raised relating to annual leave.

National Minimum Wage Act – Requirement to seek a statement

In case MWA/19/5 being a case of Mogisa and William Quick the Labour Court refused jurisdiction to hear the case. The Respondent submitted that the Complainant had not made a request for a statement as provided for in Section 23 of the Act. The Labour Court held that having regard to the provisions of the Act and in particular Section 24(2) as the Complainant had not sought a statement under Section 23 the Court refused jurisdiction and affirmed the decision of the Adjudication Officer.

This case confirms something which we have been saying on many occasions that it is absolutely imperative for an employee to bring a claim under the National Minimum Wage Act that they request a statement under Section 23.

At the same time it is completely illogical that there is any requirement to request such a statement. A considerable number of claims get dismissed in the WRC and as in this case on appeal to the Labour Court simply because no valid request was made. Why it is necessary to make a request under Section 23 before issuing a claim it is illogical. However, that is what the law says and therefore employees must issue the appropriate request and then wait the requisite time before issuing the claim unless a statement is furnished.

Preliminary Matters in Employment Cases

This issue was addressed in case ADJ-00020849. In this case the employer relied on a case of An Employee -v- An Employer UD969/2009 where the EAT was asked to make a decision on a preliminary matter first before moving to hear the substantive case. Given the significant preliminary point raised, the Tribunal moved to hear the preliminary matter first and reached a decision on same. In Bus Eireann -v- Siptu PTD8/2004 the Labour Court indicated that a preliminary point should be determined separately from other issues arising in a case where it could lead to considerable saving in both time and expense and where the point was a question of pure law where no evidence was needed and where no further information was required.

Now the WRC who previously would hear the entire case will hear the preliminary point where it could dispose of the case.

Equally the issue of preliminary points may very well shorten cases considerably if there is an argument in relation to the legal interpretation of certain matters.

Delay in Bringing a Case – Extension of Time.

This issue arose in case ADJ-00025687.

The Adjudication Officer set out that the established test for deciding if an extension should be granted for reasonable cause is set out in

the Labour Court case of Cementation Skanska -v- Carroll DWT0425 where the Court considered 'reasonable cause' in the following terms.

''It is the Court's view that in considering if reasonable cause exists, it is for the Claimant to show that there are reasons which both explains a delay and afford an excuse for the delay. The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd''.

In the context in which the expression reasonable cause appears in the statute it suggests an objective standard but it must be applied to the facts and circumstances known to the Claimant at the material time. The Claimants failure to present the claim within the six-month time limit must have been due to the reasonable cause relied upon. Hence there must be a causal link between the circumstances cited and the delay and the Claimant should satisfy the Court as a matter of probability, that had those circumstances not been present he would have initiated the claim in time. The length of the delay should also be taken into account. A short delay may require only a slight explanation whereas a long delay may require more cogent reasons. Where reasonable cause is shown the Court must still consider if it is appropriate in the circumstances to exercise its discretion in favour of granting an extension of time. Here the Court should consider if the Respondent has suffered prejudice by the delay and should also consider if the claimant has a good arguable case.

Subsequently the Labour Court in Salesforce.com -v- Leech EDA1615 held:

''It is clear from the authority's that the test places the onus on the applicant for an extension of time to identify the reason for the delay and to establish that the reason relied upon provides a justifiable excuse for the actual delay. Secondly the onus is on the applicant to establish a causal connection between the reason proffered for the delay and his or her failure to present the complaint in time. Thirdly the Court must be satisfied as a matter of probability that the Complainant would have presented the Complaint in time where it not for the intervention of the factors relied upon as constituting reasonable cause''.

The Adjudication Officer also pointed out that Mr Justice Costello in O'Donnell -v- Dun Laoghaire Corporation 1991 ILRM30 is one where it was held that a Court should not extend a statutory time limit merely because the applicant subjectively believes that he or she was justified in delaying the institution of proceedings.

Delay in Lodging Cases.

This issue arose in case PWD 2020 being a case of Ervia and Healy.

In this case the representative of the employer contended that the referral of a complaint to the Inspectorate of the WRC could not constitute reasonable grounds and referred to the case of Globe Technical Services Limited -v- Kristin Miller UDD 1824 where the Labour Court summarised the situation where an employee being unaware of the jurisdiction of the Workplace Relations Commission for a considerable period of time and held:

''It is set law that ignorance of one's legal rights, as opposed to the underlying facts giving rise to a complaint, cannot provide a justifiable excuse for failure to bring a claim in time''.

The Court in this case stated:

'' The Court does not accept that the processing of an internal grievance can be considered as a cogent reason which prevented the lodging of a complaint under the Act in time. The Court is of the view that the Complainant cannot circumvent the time set out in the Act by seeking to rely on an internal procedure that did not prevent him from bringing his complaint within the statutory time limit''.

The Court addressed this issue in Brothers of Charity Services Galway -v- O'Toole EDA 177 where it held:

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

The law on this has been very clearly stated by the Labour Court. It is still surprising that in a number of cases arguments would be raised by employers that employees should have used internal grievance procedures before lodging anything in the WRC.

The exact opposite is the position when you take account of the decision of the Labour Court in this case and in previous cases.

An employee should lodge the claims early. There is nothing to stop an employee lodging a claim telling the WRC that they are using an internal procedure and asking that the matter is put on hold pending that procedure being concluded. Equally there is nothing to stop an employer once they get a complaint from the WRC putting in place an internal procedure to investigate the complaint before the matter goes the WRC for actual hearing.

It is helpful however that the Court has again set out the law in such clear terms.

A second issue came up and that is whether an employer should advise an employee of any statutory time limits in the Act.

In this case the Court stated.

'' The Court cannot accept that there was any obligation on the Respondent to advise the applicant of the statutory time limit provisions of the Act''.

The Court went on to state.

'' The Court is of the view that it is a fundamental principle that ignorance of one's legal rights and responsibilities does not provide a justifiable excuse for a failure to bring a claim in time or to the appropriate body, as held by the High Court in Minister for Finance -v- CPSU and others 2007 18 ELR36''.

Again, it is helpful that the Court has set this out in clear terms.

Signing Employment Documentation

This issue arose in case ADJ-00025505.

The Adjudication Officer helpfully set out the case of National University of Ireland Maynooth -v- Doctor Ann Buckley FTD092 being a case where the Complainant alleged that she did not understand what she was signing. The Labour Court in that case stated:

'' She did not understand what she was signing but was afraid that if she did not do so the Respondent might refuse to host the research project. The Court cannot accept this. The sections are plainly expressed, and it was made clear that further fixed term work, rather than a contract of indefinite duration, was being offered. These were the stated reasons why. She did not consult her Union, nor did she take legal advice. If she was in any doubt what the clause meant and especially as it concerned her future employment then the logical course of action was surely to seek such advice before signing the form. She then saw the clause encapsulated into a binding contract, which she also signed three weeks later, again apparently without taking advice.… The Court is of the view that the Claimant, having signed a binding contract agreeing to the objective reasons for its renewal on a fixed term basis, cannot subsequently resile from this position and is therefore not entitled to a contract of indefinite duration''.

It is helpful that the Adjudication Officer has set this out. This issue often arises in many cases that an employee will say that they did not understand the document that they wee signing. If somebody does not understand the document that they are being asked to sign then in those circumstances they should not sign before obtaining appropriate advice.

***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.**