Welcome to the October issue of Keeping In Touch

Normally, when we do this introduction we look at the challenges and sometimes the opportunities which are going to arise. This time we see very few opportunities. Even the challenges are not ones where there are real positives that can be taken.

The issues which we see arising are;

1. Redundancies. These are already happening. Employers are making individuals redundant. Until November, at the earliest, employees are going to have to hold off issuing claims for redundancies because they have been on lay off or short time. The sad reality is that many employees recognise that there will never be a job to go back to. Employers believe that they can keep individuals on short time or lay-off currently and we will deal with that issue next.

2. Where an individual employee has been placed on lay- off or short time and there is no provision in their contract for same then claims under the Payment of Wages Act are going to issue seeking those monies. There had been some commentaries that the claims should be under the Industrial Relations Act. They should not be under those Acts. They should be under the Payment of Wages Act. A claim under the Industrial Relations Act is not enforceable. Now some industries will legitimately be able to say that they had no alternative but to place the employees on lay off. That will be those in the hospitality industry especially and in sporting organisations where Government rules restrict those businesses opening.

3. There are going to be significant delays in having cases dealt with in the Workplace Relations Commission. Before March the average time from a claim being lodged to a decision issuing was 8 months. For 3.5 months the WRC was effectively closed. They were not working. They are now trying to catch up. There is already an increase in the number of cases going in. That

number will expand in the coming months; the number of sittings is unlikely to rise. There will be remote hearings but there are challenges about that. We have yet to get Legislation to allow claims to be dealt with by way of Submissions only. Some 300 cases were already identified as being ones that could be dealt with on that basis.

4. The WRC is proposing to have remote hearings. Unless there is a complete and utter mind change within the WRC as regards ensuring that submissions are lodged in advance then remote hearings are just not going to work. There is absolutely no way that an employee representative can deal with a submission and take instructions from a client where there is a remote hearing and the documentation is only delivered on the day of the hearing or the day before.

5. There is no doubt that there is going to be a significant increase in Sexual harassment claims. Unfortunately with individuals working remotely, matters are being posted on Social Media groups which is completely inappropriate. Some employers have recognised this and have put in place appropriate policies and procedures to address same. Some have not. What is however clear is that a significant number of claims are going to arise.

6. Remote Working is very much on the agenda. Those who argue in favour of remote working point to the advantages for employees on a work life balance. Those who may not be as enthusiastic about remote working point to a number of factors from the cost to employers of putting in place remote working to the disconnect between remote workers and those who will be working in the workplace. Remote working in itself is creating stress for some. There is a bigger issue however. In our towns and cities, many businesses rely on office workers. From coffee shops to clothes shops to restaurants office workers on a daily basis prior to March were buying coffee on the way in, buying

their lunch or a coffee at lunch time and possibly during the week meeting up with friends in a restaurant or going to a pub on a Friday afternoon or a meal with colleagues and others whom they would know who work in that town or city. If we get to a situation of more people working remotely for a lengthy period of time then this is going to put significant stress on the viability of businesses in our towns and city centres in particular. These service businesses will see a significant drop off in turnover which will result in either those organisations closing or having to make some staff redundant. In addition a considerable amount of employees rely on offices for their employment. This is everything from cleaners to those who provide security and check people coming and going from buildings. A lot of these jobs are going to go if there is nobody working in offices. Even in offices traditional jobs such as secretaries and receptionists will go. As workers work from home then in those circumstances a lot more will be expected to do a lot more online. We are already seeing in the legal and accountancy professions more and more individuals sending their own letters by email and doing the drafting and typing up of submissions, Court documents and settlement documents. There are huge advantages to remote working but if we are going to have remote working we do have to accept that it is going to create job losses.

7. Right to Disconnect. There has been a movement recently in the area of the Right to Disconnect. We had posted about this. Those rights are already there in the Organisation of Working Time Act. At the same time it is probably useful to have these properly restated. The reason for this is that it appears that a lot of those remote workers are now finding that in fact they have to be available longer and because they have been set up to work from home it is known that they have the equipment there to be available.

8. In the area of redundancy we certainly see various groups looking for enhanced redundancy packages. At the present time that may be possible. However if we look at the last recession that was one where the enhanced packages were at the start and thereafter it went to statutory. That was a different time. At one stage an employer could get 60% of the cost of a redundancy repaid by the State. That reduced to 40% and then reduced to zero. At the present time the packages which are being offered to those who are being made redundant, even where there is an enhanced package, is significantly less than what it would have been at the start of the last recession. Redundancy is likely to be statutory redundancy going forward.

9. The elephant in the room at the present time is Brexit. Even without the Covid-19 Pandemic, Brexit was going to be a challenge for Irish businesses and was going to put businesses under stress. If there is a No Deal Brexit coupled with an ongoing Pandemic it is going to create significant pressures on the Irish economy resulting in businesses closing and therefore leading to redundancies and bankruptcy.

We don't want to be seen to be negative. However, we have to be realistic. There are positives. We now know how we have to live with the Pandemic. We know that scientists are working to bring forward fast and cheap tests so that individuals can test themselves on a daily basis for a cost of less than €1. That form of testing even if it is only 90% correct will have a huge impact on defeating this virus and reducing it in our communities. Of course we hope for a vaccine. However, unless there is significant take up on a vaccine it in itself is not the magic formula. It may well be that this is not going to be a once off vaccine and that individuals will have to get the vaccine at least every year.

We had challenges. We hope that some of our predictions as to what is going to happen will not happen. What we do say is that we will be available to support our clients and to provide the best services we can to those business people who have issues and to employees who

equally will have issues. There are challenging times ahead. We will all have to rise to that challenge. The real challenge will be to maximise businesses surviving and minimise the number of job losses.

INDEX

Out and About in September

On 2nd September Richard was mentioned on Morning Ireland in the Section '*What it says in the Papers'.*

Richard had been quoted in an article on 2nd September by Jess Casey and others on the issues relating to Parental Leave being Force Majeure Leave and Parental Leave if schools where forced to close due to Covid-19.

Also on 2nd September Richard was on Today with Claire Byrne on RTE.

On 15 September Richard Grogan was quoted in the Sunday Business Post on the issue of sexual harassment in the workplace.

On 15 September Richard was also interviewed on DriveTime, on RTE, relating to the extension of the restriction on claiming redundancy until November.

On 21 September Richard was quoted in an article by Anne Marie Walsh of the Irish Independent on the legal issues surrounding parents with Children where a child, who is not suffering from Covid 19, but is required to stay at home because another child contracted the illness, would not be in a position to claim either the Pandemic Illness Benefit nor Sick Pay from an employer. The article is interesting in that the answer from the Department of Employment Affairs and Social Protection was that employers should be "compassionate", which effectively means that the Department is not prepared to extend the Covid Pandemic Illness Benefit to parents in such circumstances. We had been calling for parents in those circumstances where a child is required to stay at home particularly where they are very young children that in those circumstances the payment should be paid by the Department.

On 22 September an article by Anne Marie Walsh of the Irish Independent where Richard of this firm was quoted on 21st September was referred to by Catherine Murphy TD in the Dail on the issue of payment to parents where a parent is sent home from school because of Covid 19 fears, not relating to the child itself, but to other children

in the class. Richard had identified that there was an issue relating to the non-availability of Force Majeure Leave nor an entitlement to sick pay from an employer. In addition the employee who would be required to look after the child would not be entitled the Pandemic Unemployment Benefit or to the Pandemic Illness Benefit. We were delighted to note that after this issue was raised in the Dail the Taoiseach did say that he would look at this issue in a positive way. This was a different approach than that taken by the Department a day earlier. We do believe it is important to raise these types of issues and are delighted that we were interviewed by Ms. Walsh and that this issue was taken up in the Dail.

On 23 September Richard was interviewed on KFM Radio in Kildare on the issue of Redundancies.

On 24 September this office had an article in Irish Legal News relating to the issues which will arise should mandatory sick pay and mandatory pension schemes have to be put in place. We pointed out that as matters stand if both of these were put in place the cost of employing an individual on €30,000 a year would be an actual cost of over €40,000 to the employer if that employee went out sick in the first year and there was a mandatory pension scheme. We also raised the issue that a mandatory pension scheme is going to require a contribution by employees. With many employees now on reduced salaries and wages or on short time there may be a significant opposition from employees to have a further reduction in their salary for the purposes of funding a pension sometime into the future. We pointed out that a serious discussion is going to have to take place over the next few months to bring in a scheme that is fair and workable. It may well be that it will be necessary to be innovative in bringing in these schemes so that they will work and will get buy in from employers and employees.

Settlement Agreements – Get them wrong – Loose the tax reliefs

A recent decision of the Tax Appeal Commissioners where there has been a request that the matter goes to the High Court under reference 153TACD2020 should raise alarm bells for every Solicitor or Barrister dealing with Settlement Agreements.

In this case the Revenue Commissioners took the view that the entire settlement was subject to tax. The appellant contended that between €80,000 and €150,000 related to defamation, victimisation and injury to his professional reputation and was exempt under Section 192A.

Two significant issues arose in this case.

The first was that the employee had not issued any proceedings. The second was the statement which said;

"The payment at 3.1 above is made strictly without admission of liability on the part of the employer".

The appellant claimed that the sum representing damages was exempt from income tax in accordance with Section 192A TCA97 and also relied on Section 613 TCA1997. The Revenue contended that it was in accordance with the termination of the employment.

It must also be pointed out that the documentation did not specify what element of the settlement related to those elements which would be exempt from tax under Section 192A being the element relating to the injury and victimisation.

The relevant legislation is Section 192A.

The other relevant portion is Section 123 and Section 201. Section 123 is a charging provision and Section 201 TCA97 is what is known as the €200,000 exemption.

In the decision it was set out that Section 192A provides for an exemption from income tax for payments made to an employee or former employee by his or her employer or former employer where the main payment is made under a relevant Act in accordance with a recommendation decision or determination under that Act of a relevant authority as defined.

There was no such recommendation.

It was pointed out that Section 192A (4) provides for an exemption from tax in respect of a payment made under a written agreement in circumstances where had the claim not been settled by agreement it is

likely to have been the subject of a recommendation, decision or determination by relevant authority.

This will include everything from the High Court to the WRC. The Section refers to the retention of the Statement of Claim in subsection 4 (a) (iii). The Statement of Claim would be deemed to include of course, although it is not stated in the decision, a claim issued to the WRC on one of their claim forms or submitted in writing to them.

Because there was no breakdown it was held that it was not possible to conclude that any part related to defamation or injury.

This decision issued on 5th June 2020. The Tax Appeal Commissioners had been requested to state and sign a case for the opinion of the High Court in respect of the determination. This can be done under the provisions of Chapter 6 of part 40A of the Taxes Consolidation Act, as amended.

When it comes to settling a case there are some basic requirements that need to be addressed.

1. A claim must issue. That can be a claim to the Workplace Relations Commission or the Courts.

2. The claim cannot be settled without admission of liability. The compromise agreement does need to specify that an award of this amount is likely to have been made to enable the relief to be claimed.

3. When there is a termination of employment and part of the compensation relates to the termination, then it is necessary to specify what element relates to a matter where a relevant authority could have given an award or decision and what element relates to general termination. By this we mean that if there was a claim for personal injury, possibly a claim for breach of the Organisation of Working Time Act and a termination payment that each of these elements would need to be individually valued.

When it comes to settling claims before the WRC or the Courts there is a huge resistance from those acting for respondents to have any

agreement that does not provide for same being "without admission of liability". If the words "without admission of liability" are included then no part of the claim can get the exemption under Section 192A Taxes Consolidation Act and the full amount is taxable.

When representing an employee if the employer wants to put in a provision that the settlement is without admission of liability then in those circumstances it is advisable to require a statement that the employer will be responsible for the full tax. If the parties want to have the agreement so that tax relief can be obtained then in those circumstances the "without admission of liability" clause cannot go in.

Take a very simple situation of a claim of discrimination. The case is before the WRC or the Labour Court. A settlement is reached. On the basis that that is a reasonable settlement the provisions of Section 192A TCA 1997 will apply. The entire amount will be exempt from tax. The employee will pay no tax on the settlement. The employer will not pay any employers PRSI at 11.5% on that amount. If however the employer's representative requires the settlement to be "without admission of liability" then in those circumstances the full amount if subject to employers PRSI at 11.5% payable by the employer and the full settlement is subject to income tax.

In a case where an employee has left employment then the effective rate of tax (subject to a refund application) will be in the region of 50% because the employee will have no tax credits from that particular employer. Where the employee is still in employment it will be at their effective rate of tax.

It is a regular issue which arises in cases in the WRC where an employer representative will say that they do not deal with tax and therefore they require the settlement to be without admission of liability.

There are going to be issues because of this decision , which is merely restating the law, that if an employee is met with that situation, they may well be better off running the case than entering into the settlement agreement because of the issue that it will be without admission of liability and the consequential tax liability which will arise.

Now, it must be noted that where a settlement is reached under a mediation agreement, in those circumstances the settlement is automatically getting the benefit of Section 192A where it is a compensation figure.

However, the exemption from mediation only applies to mediation as specified in a relevant Act and therefore only mediation before the WRC will get that automatic exemption.

If mediation is being done outside of the WRC then in those circumstances the same rules will apply to the agreement as if it was negotiated between representatives without the benefit of a mediator.

There is also some confusion, it does not relate to this particular case, as regards what compensation relates to. Compensation which is exempt under section 192A TCA1997 does not apply to anything which would be classified as "wages". Therefore settlement of an Unfair Dismissal case, an equal pay claim as regards the economic loss, a payment of wages case or a claim for non payment of holiday pay would not be exempt.

The issue in relation to holiday pay often comes up and for those running cases in the WRC it is useful always to request that an Adjudication Officer will deal with any award on the basis of the element that is the economic loss being specifically set out and the element of compensation being specifically set out. The reason for this is that a decision from the WRC which simply gives a global figure would be fully taxable whereas if the figures are split the element relating to the breach rather than the non payment would not be taxable. It often comes up that those dealing with employment law would say that they do not deal with tax. That is a fair statement. However there are some basic requirements of anybody dealing with employment law as regards the tax treatment of matters which they must be aware of.

For those who practice in this area, if they do not understand the provisions of Section 192A and the nuances of that section then it is vital that they have immediate access to a tax advisor before finalising any settlement agreement.

In this particular case before the Tax Appeal Commissioners €150,000 probably is a figure which could have been deemed to be exempt from tax if the settlement agreement was drafted in a different way.

At a minimum it would have been €80,000. In either case the potential exposure of a representative of an employee in those circumstances is substantial where as in this case the employee had left employment. As regards the additional tax that would be due and which it could have been avoided if the settlement agreement had been dealt with in a different way.

This is a significant warning for all those dealing with employment law to at a minimum read section 192A TCA1997 but better still to make sure that they understand the full nuances of same.

New WRC Rules

On 22 September the Minister for Business Enterprise and Innovation signed a statutory instrument under Section 31 of the Civil Law and Criminal Law (Miscellaneous Provisions) Act 2020 to provide for remote hearings. These are remote hearings in the WRC. This is good news. We would like to look at some of the issues which are going to arise.

1. If we are going to have remote hearings then submissions and documentation will need to be lodged in advance. The current procedure of having documentation and submissions handed in on the day is just not going to work if matters are being heard remotely.

2. Because the history in the WRC has been that submissions are not lodged in advance in the majority of cases we would be asking that the WRC would consider call over days. These would be days that cases would be called over by way of a remote hearing. An Adjudication Officer who would be the person going to hear the case would have the files to ensure that all documentation is on their file and has been exchanged. The Adjudication Officer in those circumstances if documentation

has not been lodged should then have the power to direct same to be lodged within a very short period of time and at that stage list the case for hearing. If documentation is not lodged then within that period of time then there needs to be provision that those submissions and documentation will not be taken and not taken account of. This may seem hard but if there is a provision that documentation is lodged within a set period of time and the call over is after that date then the parties will have had ample opportunity to get everything in order.

3. The rules need to be set out in a very precise way as to what will need to be done.

4. We do need the provisions of the Workplace Relations Act 2015 to be amended to provide for cases to be dealt with by submission only. We have written to the Minister for Business Enterprise and Innovation requesting that this would be done. Earlier this year the WRC themselves identified about 300 cases which couldn't be dealt with by submission only. This would include cases such as not having being paid holiday pay or not having received a contract of employment. Effectively it could cover very simple cases. By having these dealt with by submission only this would be a cost saving to employers, employees and the WRC.

The WRC is an essential service. It is important that it works well. It is important to deal with employment law rights of individuals and to resolve disputes that cases are got on and dealt with quickly, efficiently and at the lowest possible cost. Remote hearings will help resolve an awful lot of issues.

I do hope that this works. We in this office will cooperate fully with the WRC in having remote hearings and where hearings or matters can be dealt with by way of submission only. We are firmly of the belief that there are many cases where part of even the most contentious cases can be dealt with by way of submissions.

In remote hearings these will be dealt with initially in relation to the more minor cases. Cases where evidence will need to be given such as unfair dismissal cases and equality claims will still be by a face to face hearing. Even in those cases we believe that there is a huge potential for issues relating to legal submissions for these to be dealt with by submissions, sent in well in advance, and which also would set out the relevant broad outlines of claims. This will speed up cases being dealt with in hearings and facilitate a greater number of hearings.

We are in changed times. We all have to change. We all have to adapt.

The issue will be whether the WRC will be able to adapt quickly to the changed circumstances to ensure that the current backlog will be dealt with.

There is also a significant issue that issues relating to matters where there are multiple claimants with similar claims, which will arise in relation to redundancy cases, will be able to be heard at the same time like it was dealt with in the EAT. This will require an amendment to the legislation which is an issue which we have also written to the Minister about.

There is currently a backlog of 6500 cases.

Workplace Relations Commission – Remote Hearings

On 22nd September Minister Leo Varadkar signed a Statutory Instrument under the Civil Law and Criminal Law (Miscellaneous Provisions) Act, 2020 to provide for remote hearings.

In the last issue of our Newsletter we attached a submission which we had made to the Minister on the issue of remote hearings but also on the issue of dealing with cases by submission only.

During the lockdown the WRC identified some 300 claims which could be dealt with by way of a submission only. The new Statutory Instrument will not address this issue. There are many claims that can be dealt with by way of a submission without the necessity of a hearing.

These would include claims such as that an individual didn't receive a contract of employment or that they didn't receive it in time or that it didn't comply with the provisions of the Legislation. That's a very simple matter to be dealt with by way submission as the document itself will or will not comply and there will or will not be evidence that it was furnished. There will also be a number of simple claims such as an individual did not get their correct rate of pay for a public holiday. Did not get their holiday pay paid at the right time or in the right amount, that there was a deduction made from a salary which was not authorised. These are just examples. By enabling matters to be dealt with by submissions this will reduce the number of hearings and therefore speed up cases being dealt with.

There will be cases where part of case could easily be dealt with by way of submission only. In a lot of cases there can be issues relating to legal interpretation. All of that can be dealt with by way of submission.

There can be cases where there will be issues as to whether a claim has been issued in time or not. Again, that is one that can be dealt with by submission.

If we are to have remote hearings and this is to be welcomed, there is going to need to be proper rules put in place by the WRC as to how these cases operate. We cannot have a situation where submissions are produced on the day or documentation which is what is currently happening. Yes the WRC rules provide for information to be furnished well in advance that it is quite usual that one side or another will not produce documentation in advance. If there are issues relating to remote hearings it may not be possible for a representative to be able to take instructions from their client in such circumstances where the documentation is not provided well advance.

The particular Legislation which has been used in Section 13 of the Act of 2020 this does require that there are rules put in place. These will have to be then Statutory rules. If those Rules are not complied with and when running hearings an Adjudication Officer does not comply with those then there will be issues relating to the legality of any hearings.

It is going to be important in dealing with remote hearings that the rules are put in place and that the rules are applied and that documentation is provided well in advance. There will have to be penalties if documentation is not provided in advance.

We will await seeing the rules with interest.

Sick Pay

On 22 September the Labour Party introduced a Bill to provide for mandatory sick pay of 30 days. They were also proposing Force Majeure in respect of time off work for parents who have to mind a child who would be sent home from school due to Covid 19 issues. This would include a child who was sick or a child who had to self-isolate or who simply was told not to come to school because of Covid-19 issues.

The Government instead provided for a six month period during which the issue of Covid-19 is to be looked at. The Government have said there will be issues for in particular SME's and that the relevant stakeholders would need to be included.

There will be a number of issues which will need to be addressed;

1. Should sick pay be from day one or should it be tied to Social Welfare rights.

2. Should company sick pay be reduced by the amount of any Social Welfare entitlements?

3. Should it exclude single days? For example, should there be a minimum period that the employee must be out sick before the sick pay entitlement kicks in.

4. Should there be a maximum amount or should it be unlimited. By this we mean whether a person is on €15,000 or €115,000 per annum should they get full pay. The alternative is that it would be subject to a cap.

5. Should the entitlement to sick pay be subject to certification by a GP?

6. What happens if it is abused? Of course the vast majority of employees will never abuse a sick pay scheme but there will be a minority always.

7. Should it be net of tax or a gross payment? If it is a net of tax payment which is exempt from tax this will help the employee put also facilitate SME's being in a position to afford the payment. At a minimum there will be an issue as to whether the payment should be exempt from employers PRSI.

8. How will it apply to hourly or casual employees or those on if and when contracts.? The issue of calculating the rate of pay will be an issue that would need to be addressed. Will it be on the preceding week or will it be averaged over a period of time. That will need to be addressed for these types of employees.

9. Will it apply to Gig Workers?

10. Will it apply to employees on foreign contracts working here and if so what service will be needed here for it to apply?

11. Will an employee on extended sick leave get it every year even if out for years. By this we mean if an employee is kept on payroll but not paid and are out for a number of years, as can happen, will they get the 30 days sick pay each year?

12. What happens if there is an Income Protection Plan in place? Will the insurance company be able to seek the 30 days from the employer or will their entitlement be dealt with under the Income Protection Plan. Most Income Protection Plans only provide for a percentage of income.

The above are twelve issues which will need to be addressed. We are told that stakeholders will be included in the review process. We would hope that employment law Solicitors will be involved in the process and their view sought. This is to reduce disputes

subsequently going to the WRC. If new Legislation is going to be introduced it needs to be robust, clear and precise.

The above are only some initial thoughts we have on this issue and it is likely that there is going to need to be a serious review of our employment law to cover this issue.

Mandatory Pension Scheme

This issue has been around for some time. It will be interesting to see what is going to happen in relation to this. The reason we are mentioning this is that there is a proposal now for effectively a mandatory Sick Pay Scheme. If we have both a mandatory Sick Pay Scheme and a mandatory Pension Scheme this is going to put significant costs on employers. This is going to mean that there will have to be a debate as to how employers are going to afford this.

It would be relatively easy for employers who are taking on new employees. If there has to be a mandatory Pension Scheme, a mandatory Sick Pay Scheme then that would be taken into account in the remuneration packages which will be offered. That's a simple fact of life.

The problem will arise in relation to employers with existing employees where there could be a significant additional cost placed on the employer.

Take the position of an employer who has an employee who is paid €30,000 per annum. The employee works five days a week. Therefore if the employee goes out sick the actual cost for the employer in providing sick pay will be a gross amount of €3461.53. In addition the employer will pay 11.5% Employers PRSI, which is a further €398.07. If we have a mandatory Pension Scheme and say there is a contribution of say 10% this adds another €3000 to the payroll cost for an employer. Therefore the actual cost of employing an employee on €30,000 per annum will in fact be closer essentially to €40,000 per annum, certainly over €36,000 per annum if only employer PRSI and pension contributions have to be paid. If the employee goes out sick the cost goes up to over €40,000.

Now of course not every employee is going to go out sick. However, there will be an issue on putting a significant additional payroll cost on employers as to how this is going to be funded and the issue will be particularly in relation to employers taking on new employees will those salaries be reduced to take into account the potential cost. The reality is that will happen. The next issue then will be whether employers will look at redundancy to effectively give employees a choice of taking Statutory Redundancy or taking lower terms so as to cover the additional cost which an employer is going to issue.

We do need to have an open and transparent discussion on this issue so as to avoid problems arising in the future. These will have to be a recognition by employers that there is going to be an additional cost in mandatory pension schemes and sick pay. At the same time there is going to have to be recognition that employers, in employing individuals look not at the headline cost but at the real cost of taking on an employee.

There are no simple answers. There will be calls from employers and employee representatives. However we have to get to a situation which is workable for both large and small operations.

When it comes to mandatory pensions there will be an issue of employees having to contribute to that pension themselves. This will create certain stress in workplaces where employees see their net salary going down and there will be claims and calls for additional monies to cover this when the take home pay falls.

There will therefore need to be a proper public consultation and public education as to what a mandatory pension scheme means.

One thing is very clear. There will be no reduction in employers PRSI or employees USC just because a mandatory pension scheme is put in place.

Senior Executives and the Insurance Industry

In July 2018 the Central Bank of Ireland published proposals for an Individual Accountability Framework for those who are in regulated financial services.

The framework includes conduct standards and changes to the existing Fitness & Probity Regime and a new Senior Executive Accountability Regime. This will require new Legislation. On the 18th September the Government published the agenda which provides for priority to be given to the Central Bank Act 1942 designed to support the advancement of an improved culture in the Irish Financial System with greater accountability in the Regulated Sector.

The proposal is to ensure clearer responsibility and accountability by placing obligations on those companies and firms and senior individuals within them to set out clearly where responsibility and decision making will lie in respect of the particular business. It looks like these new rules will apply to board members and to executives who report directly to the board together with those who head up critical business areas.

This will impact to a significant extent on the insurance industry.

The new rules will set out responsibilities. Senior executives will be allocated responsibilities relative to their role. There will need to be a statement of responsibilities to provide specific responsibilities to individual senior managers. There will also be a management responsibility to identify senior executives who will be responsible for any given area or work. This is going to have significant changes in employment law as well as in insurance law. It means that going forward contracts of employment will have to have a detailed job description. A precise description of responsibilities, setting out what those responsibilities are and what responsibilities other individuals have along with very clear reporting lines.

It will be important for employers covered by the new Legislation to make sure that appropriate contracts are put in place. For senior executives and managers equally it will be important to make sure that their contracts are properly checked to make sure that they clearly understand the roles and responsibilities and that the contract accords with their understanding of the management structure and their understanding of their roles and responsibilities in the organisation.

For employment Lawyers it is going to be important to be up to speed with the new rules when they come into play whether to be in a position to draft contracts of employment or to advise on them.

This is going to be a complex area of law and going forward it will be important that employees signing up new contracts get appropriate legal advice. It will be interesting to see whether employers seek to ensure that employees do get same so as to avoid conflicts into the future.

Protected Disclosures

Where an employer is dealing with the dismissal of an employee where the employee has made a Protected Disclosure there are a number of issues which the employer needs to be aware of;

1. Under a normal Unfair Dismissal claim the employee requires one years' service. There is no service requirement if there is a Protected Disclosure.

2. In a normal Unfair Dismissal claim compensation can be awarded up to two years wages. In a case where there has been a Protected Disclosure and this is the reason for the dismissal the compensation can be up to five years remuneration.

3. In relation to the level of compensation an employee who is dismissed is still required to minimise their loss.

4. Employers may be required to continue to pay salary and benefits to a dismissed employee pending a decision on their Unfair Dismissal claim before the Workplace Relations Commission where relief is sought in the Circuit Court.

5. It is useful for employers to have a full Whistle Blowing Policy in place.

6. It is important that any Whistle blowing Policy can be easily accessed by employees.

7. It is important that any policy is consistently applied.

8. A Protected Disclosure under the Act is extremely wide. The fact that a person making a protected disclosure does not state that it is being made as a protected disclosure does not mean that the disclosure falls outside the Act. Employers therefore need to be careful where a grievance is raised as to whether that could be deemed to be Protected Disclosure.

Where a Protected Disclosure has issued and where there is an issue relating to the performance of an employee or a disciplinary matter it is of paramount importance that fair procedures are consistently applied. It is important to look to see is there a clear gap between any Protected Disclosure and any disciplinary process being put in place.

Gender – Fluid and Non - Binary workers have obtained protection under the UK Equality Act.

In the UK recently, protection under their Equality Act, for those going through gender reassignment extends to those who identify as Gender- Fluid or Non-Binary a UK Employment Tribunal has said. This was a case against Jaguar Landrover.

The employee in this case brought a claim for harassment, direct discrimination and victimisation on the grounds of Gender Reassignment at the Birmingham Employment Tribunal. The employer argued that because the employee was a Gender-Fluid / Non-Binary individual she did not fall within the definition of Gender Reassignment under Section 7 of the Equality Act 2010 being the UK Legislation.

In its judgement the Tribunal found that the claimant had the protected characteristics of gender reassignment and held that the employer's argument was without merit. What is interesting in this case is that the employment Tribunal in the UK stated;

"*Having heard submissions on this point, this Employment Tribunal considers it appropriate to award aggravated damages in this case because of the egregious way the claimant was treated and because of*

the insensitive stance taken by the respondent in defending these proceedings. We are also minded to consider making recommendations in order to alleviate the claimant's injury to feelings by ensuring the respondent takes positive steps to avoid the situation arising again".

This case is interesting in that the UK Employment Tribunal took into account in awarding compensation for the insensitive stance taken in defending the proceedings.

In discrimination cases in Ireland there can often be a very insensitive approach taken by employers in defending those proceedings. There is a serious argument that where that is done that should be taken into account in setting the compensation.

Redundancy

With the issue of redundancy going to be probably a significant issue going forwards it is useful to look at a recent case ADJ/00018737.

In that case where redundancy is unavoidable there is still an onus on a respondent to establish reasonable and objective criteria for selection and must apply such criteria fairly.
It was pointed out in the case of Mulcahy –v- Kelly 1993 ELR36 where the EAT held that;

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

In that case it held;

"Having heard the evidence presented the Tribunal is satisfied that a redundancy situation existed in September 1990 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 the claimants 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".

It was held that the duty may involve location, alternative work within the organisation even if this involves dismissing another employee with shorter notice.

In Thomas & Beets Manufacturing Limited –v- Harding 1980 IRLR255 the English EAT found that a dismissal was unfair because the employee could have found work as a packer even though this would have meant dismissing a recently employed packer. In 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 is to be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted never the less the criteria adopted will come under close scrutiny if an employee claims he or 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 in Section 7 which provides;

"*Without prejudice to the generality of Subsection (1) of this section, in determining if a dismissal is an unfair dismissal, regard may be had, if the Adjudication Officer or the Labour Court, as the case may be, considers it appropriate to do so – (a) to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal*".

It is important that the employer sets out reasons to the employee as regards the selection process and to show that alternatives had been considered.

Calculating Redundancy Payments

This issue was addressed by the Labour Court in case RPD203 being a case of Tarosa Frehill Limited and Mary O Reilly.

The Court referred to Section 7 of the Act in relation to the general right to redundancy as being one where an employee is dismissed by

reason of redundancy or is laid off or kept on short time for the minimum period then the employee would be entitled to a redundancy payment.

The Court pointed out under Section 24 that the time limit to bring a claim is 52 weeks beginning on the date of the dismissal or the date of termination of employment.

The Court also pointed out that there is provision to extend the time for 104 weeks. That extension applies where there is ignorance of the identity of the employer or employers or ignorance of a change of employer involving the dismissal and engagement under a contract with another employer and where the ignorance arose or was contributed to by a breach of Statutory Duty to give the employee either notice of the proposed dismissal or a redundancy certificate.

The Court in this case accepted that the employee had hand delivered a letter on 7th December seeking payment of redundancy and met the requirements set out in Section 24.

The Court noted that there was not an immediate transfer of undertaking and as a consequence the employment ceased on 17th November 2017 and from that time until the business reopened in July 2018 there was only two possibilities as to the status of the employee. Either the employee was laid off or her role was being made redundant. In the absence of any proof that the required notice of lay off had been given to her as required by Section 11 the Court stated they could only conclude she had been made redundant within the meaning of the Acts.

The Court pointed out that because the working hours of the employee varied from week to week the provisions of Section 20 of Schedule 3 of the Act was applicable in calculating the correct weekly earnings. The Court pointed out that this requires a calculation of the average earnings of the employee in the 52 weeks before the redundancy.

This is an important decision of the Court. Firstly it highlights the importance of an employee serving the appropriate notice. It equally highlights the importance for employers if somebody is being placed on lay off, which was contended in this case, that the appropriate

notification is given and the evidence of same is available should same ever be questioned. An oral lay off is always going to be one which an employer is going to have difficulty proving. While it was claimed in this particular case that the employer has laid the employee off by way of an oral statement the Court rejected same.

The issue of lay off is going to be an issue which is going to arise and if an employer is placing an employee on lay-off or short time it is always better that an appropriate notice is given in writing and that there is evidence of the delivery of same either by way of an email to the employee or by way of a letter with some evidence of service such as a Certificate of Positing or Registered Post slip.

Time Limit to Lodge an Appeal to the Labour Court

This issue arose in a case of McNelis Hospitality Bars Limited and O'Dowd MND204.

The Labour Court in this case referred to Section 44 of the Workplace Relations Act 2015, which provides that an appeal must be lodged within 42 days.

The Labour Court pointed out that under Subsection 4 an extension can be granted due to the existence of "exceptional circumstances".

The Court looked at this issue and referred to the case EET034 where the Court stated;

"*The Court must first consider if the circumstances relied upon by the applicant can be regarded as exceptional. If it answers that question in the affirmative, the Court must then go on to consider if those circumstances operated so as to prevent the applicant from lodging her appeal on time. The term exceptional is an ordinary familiar English adjective and not a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course or unusual or special or uncommon. To be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered*".

The Court pointed out that the burden of proof on establishing the existence of exceptional circumstances rests on the person appealing. In this case the Court was of the view that there were no exceptional circumstances.

Paid Paternity Leave

France has doubled paid Paternity Leave to 28 days.

Of this leave, 7 days will be obligatory. Therefore, fathers will not have the option of not taking that leave.

Companies who refuse to give a new father the minimum of 7 working days off will pay fines of up to €7,500.

There is an interesting aspect when you look at the 28 days. Only 3 of those days are paid by the Employer. The rest is paid by the State.

Now, one of the issues that there is in France is that there is an extremely high level of social security payments made by both, Employers and Employees. The amount charged in the equivalent of USC, to French Employees is a significant multiple of the amount charged in Ireland. At the same time, that is there to fund matters such as Paternity Leave, Maternity Leave and Pensions.