Welcome to the November Issue of Keeping in Touch

As we head into November, we are now in the six-week Level 5 lockdown.

There are a huge number of consequences that arise from this.

The first is of course that jobs are going to be at risk. There is no doubt about that. Businesses which kept going up to now have in many cases exhausted their cash reserves. They are under pressure and they still have bills and expenses to pay. The issue of liquidations is going to arise. With liquidations come redundancies.

Secondly, we have the issue of redundancies themselves. Businesses changing. Many businesses will not need as many staff into the future. This can be because of the way businesses are going to work with people working remotely requiring less facilities in an office to a business because people are not in offices, and they serve that office environment not needing as many employees themselves. There will be other businesses which will do very well but equally there will be businesses which will do very badly.

Thirdly, there are significant mental stress issues arising for both employers and employees currently. Employers have the worry about keeping the business open and making ends meet. This is a significant mental stress. For employees there is the mental stress of being concerned about their job. Will their job be there. Will there be redundancies. Will they be one of the people chosen for redundancy. Will there be lay-offs or short time. The whole issue of remote working itself is creating mental stresses. People feel divorced from the workplace. They feel they may not have the control that they had. They are concerned will they get back to the workplace and in some cases will they be required to go back to workplaces. There are significant mental health issues that would be one of the unforeseen results of Covid-19.

Now there are positives. There is no doubt about that. They way we do business will change. Online business will increase. How we communicate with clients and customers will change. The days of

people having to go and visit their solicitor or accountant at their premises is now changing. Social media platforms such as Zoom and Microsoft Team are the new meeting platforms. This is beneficial to both clients and professionals. A person no longer has to drive or get a bus or train to meet their solicitor. Times can be set. They can meet their solicitor or their accountant or whatever professional advice that they have from their own home or from their own office.

Many employees and employers are now finding that it is possible to make significant savings within organisations and there are ways in which businesses can become more profitable and where there can be greater profits to develop those businesses, create additional employment or give enhanced benefits.

We are in a changed environment our laws really in the area of employment law do not take account of what is needed for the new working environment. This is a huge challenge. From Data Protection Law to the Organisation of Working Time Act as just two examples. There are significant challenges but this means that the legislation which has been designed effectively for office workers and for people working from fixed bases will need to change to accord with the new environment.

These are worrying times. However, equally they are exciting times. We have opportunities as businesses and as professions to create a better working environment for everybody working in our respective professions and services, to create a better service for client's and customers and to create a work life balance which will assist and help all. That will be a challenge. It will be a big challenge but it is one that we all must address.

Out and About in October 2020

On 17 October Richard was interviewed on The Business on RTE on the issue of mask wearing and remote working. Also on 17 October Richard was quoted in an article in the Journal.ie in an article by Michelle Hennessy. This was in relation to the announcement by the Tánaiste that there were proposals to bring in a new law giving employees a right to request to work from home. The article also dealt with the difficult issues which remote working can throw up. Later on

the 17th October the Journal.ie decided to run a poll where Richard Grogan was quoted relating to the poll where the question was would people want a right in law, to be entitled to ask to work from home?
On 20th October Richard was interviewed on The Last Word with Matt Cooper on the issues surrounding remote working.
On 22nd October Richard was interviewed for an article by the sports desk of RTE on the issue of employers requiring GAA players who might travel to a county with a high level of Covid not to come to the workplace for 10 days.

We have been putting out a daily post since 1st day of Lockdown in March. We at first numbered the days. As the number of days increased past 130 we moved just to dating our Employment Law updates. With the new Level 5 Lockdown we are doing a daily post counting down the 42 days. Our posts seek to answer common Employment Law issues.

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Remote Working – There are Data Protection Issues

There is a view by some that data protection only involves loss of data. By this it is meant data that is sent to the wrong place or to the wrong person. Of course, it includes that. But it includes a lot more.
When it comes to the issue of loss of data there are certain issues which employees must be made aware of. A data breach will include: -

1. A deliberate or accidental loss of data.
2. By mistake sending personal data somewhere it should not have been sent. This would include by email.

3. Losing or misplacing a laptop.

There are some things that people can do: -

1. You should have guidelines in place for everybody. This includes the processing and storage and sending out of information.
2. Do not use personal computers for work.
3. Do not use unauthorised software or social networks for work. When using cloud services make sure there is the proper authorisations in place.
4. Make sure that everybody understands that when working at home or remotely is the same as if they are working in the office and the same protections need to be in place. That means including not leaving laptops unattended. Making sure that there is a security code on them, closing down laptops if somebody is leaving to go out and treating your workplace in the office as if it has now moved to your home but that in the home there are greater chances that somebody could access your laptop.

For employers it is necessary to look at having increased the security on laptops in particular, that that security requirements for the devices are made known to the employees.

It is important to educate and train people in relation to what happens and what they need to do.

It is important that staff understand that where a breach occurs the response time will have an impact on any fines, litigation and reputational damage. If a breach occurs you must remember that the notification must go within 72 hours of same happening.

It is very important that employees are advised of this and that if a mistake happens that they contact the appropriate person in the organisation immediately so that the appropriate report can be made.

Taxation of Certain Employment Law Awards

The case of ADJ-00022971 has an excellent statement by the Adjudication Officer in relation to the tax treatment of an award under the Unfair Dismissal legislation. The Adjudication Officer awarded the complainant the sum of €2,100 being equivalent to four months pay.

The very useful element of this decision is that it went on to state;

"*This amount is subject to the usual statutory deductions and taxable in the normal manner taking into account such Revenue rules as apply on the termination of employment*".

While it was not set out in the decision and there is no reason why it would be the basic exemption amounts to €10,165.00. Therefore this full award would be exempt from tax. In addition to the basic exemption an employee is entitled to an exemption of €765.00 for each complete year of service. There is an entitlement then also to claim an additional sum of €10,000 where the employee has not been made redundant or received a termination payment in the preceding 10 years and that this additional exemption has not been claimed. For higher paid executives there is what is known as the SCSB where up to €200,000 can be claimed tax free.

There is a lot of misconception about awards as to whether they are taxable or non taxable. It is extremely helpful that the WRC is now starting to set out whether an award is a taxable or non taxable award.

Settlement Agreements

This issue arose in the case of Tallaght University Hospital and Gopalan UDD2025.

In this case the Labour Court set out that the Settlement Agreement listed a number of Statutes including the Acts under which claims could not be pursued.

This was signed by the employee and witnessed by a Union representative.

When claims subsequently were made the Respondent relied on the Decisions of Smyth J in Sunday Newspapers –v- Kinsella and Bradley 2008 ELR53 in holding that the complainant was estopped from proceedings with the claim in circumstances where the Settlement Agreement was expressed to be in full and final settlement of all claims arising from the termination of the employment. In that case Mr. Justice Smyth stated;

"*..advised of his entitlements under the Employment Protection Legislation and any agreement or compromise should list the various applicable Statutes or at least make it clear that same have been considered by the employee. In addition, the employee should have been advised in writing to seek appropriate advice of his rights*".

The Labour Court pointed out that the Court was satisfied that the Complainant was professionally represented by a long standing and respected Trade Union Official. The Court held that the claims were precluded by virtue of the Settlement Agreement.

Unfair Dismissal – Termination of a Fixed Term Contract

This issue arose in the case ADJ-00022629.

The Adjudication Officer referred to Section 2 (2) (b) of the Unfair Dismissals Act 1977-2017 which was considered by the Labour Court in the case of Malahide Community School –v- Dawn-Marie Conaty UDD1837. This case was appealed to the High Court on a Point of Law and sent back to the Labour Court. When the matter came back to the Labour Court in Determination UDD1837 the Labour Court set out the criteria for the application of Section 2 (2) (b) in a list form and highlighted the obligations to apply these strictly. The Labour Court stated as follows;

"

(a) The contract must be in writing
(b) The contract must be signed by or on behalf of the employer
(c) The contract must be signed by the employee
(d) *The contract must provide that the Act shall not apply to a dismissal consisting only of the expiry of the fixed-term.*"

In that case the Labour Court went on to state;

"*Section 2 (2) (b) essentially allows an employee who wishes to accept a temporary employment arrangement from an employer to waive his or her rights to protection under the Unfair Dismissal Act. In a situation where the employee is giving up what would otherwise be a very valuable employment protection right it is essential that the agreement clearly stipulates in writing what is being waived and that the parties indicate through their signature express agreement to it. These conditions must therefore be fully and completely satisfied*".

Unfair Dismissal – The Test

This issue arose in case ADJ-00026127.

The issue often arises as to what is the test to determine if a dismissal was fair or not. Very often employees will claim the dismissal as regards the penalty was too severe.

The Adjudication Officer in this case reviewed the law on this matter and referred to the case of Bunyan -v- United Dominions Trust (Ireland) 1982 ILRM 404, where the EAT endorsed and applied the view in the case of N.C.Watling Co Limited -v- Richardson 1978 IRLR 225 EAT (ICR1049) where it was stated;

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

This is the law which is applied by the WRC and the Labour Court. It is important that employees understand that the fact that a dismissal might be seen by some as unfair does not in itself maker it unfair. The fact that the dismissal might be harsh and that even the Adjudication Officer might believe that a lesser sanction might be imposed is not in

itself sufficient to actually turn a dismissal into an unfair dismissal. It is necessary for an Adjudication Officer to decide whether a reasonable employer would have dismissed. If it is within the range of options which was reasonably open to the employer then that is the test which will be applied.

Disciplinary Hearings – Fair Procedures – Appeal Hearing

This issue arose in ADJ-00027054. In that case the Adjudication Officer referred to a case of An Employee -v- An Employer ADJ-000381 relating to the issue of appeals where it was stated:
"An appeal is not just an afterthought or a procedure that must be completed as a matter of course. It is a very important part of the disciplinary process and the greater the sanction that has been imposed the greater its importance. An appeal allows a dismissed employee the last chance to make a case, highlight any mitigating factors and seek protection from faulty procedures or disproportionality of sanction"

Constructive Dismissal

This issue arose in case ADJ-00024751.

In that case the Adjudication Officer set out the law in some depth. They referred to the case of UD1146/2011 where the Employment Appeals Tribunal held;

"In such cases a high level of proof is needed to justify the complainant's involuntary resignation from their employment i.e., he must persuade the Tribunal that his resignation was not voluntary".

The Adjudication Officer also set out that it is well established that the complainant must exhaust the company's internal Grievance procedure in an effort to resolve the grievance prior to resigning and claiming unfair dismissal.

The case of McCormack –v- Dunnes Stores UD1421/2008 held;
"*the notion places a high burden of proof on an employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her*

grievance with his/her employers. The employee would need to demonstrate that the employers conduct was so unreasonable as to make the continuation of employment with the particular employer intolerable".

It was also pointed out that in the case of UD1350/2014 where the EAT stated;

"*It is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair".*

The issue of employees having to go through the grievance procedure is one which often arises. Often we will be told that there was no point in going through the Grievance Procedure. In reality that is an opinion. Unless the employee can show that going through the Grievance procedure was not going to be of any use and the proof is on the employee, the employee will lose a constructive dismissal case.

In every case except in the most serious an employee must go through the internal Grievance Procedures. At a minimum the employee must raise the grievance with the employer and give the employer a reasonable opportunity to address same before resigning.

In reality nobody should resign without getting legal advice. A considerable number of Unfair Dismissal claims brought by way of constructive dismissal will be lost simply because the employee acted too quickly.

Constructive Dismissal Claims

This issue arose in case ADJ-24448 where the Adjudication Officer quoted the case of Caci Non Life Limited –v- Paone 2017 UD1750, being a Labour Court case where the Labour Court stated;

"It is well settled law that a complainant who is advancing a claim of constructive unfair dismissal under the Act must demonstrate that his or her employer has acted so unreasonably and /or committed a fundamental breach of contract such that it was not possible for that person to remain in their employment any longer. Whether or not this

test has been satisfied in any particular case has to be considered from an objective perspective. Furthermore it is incumbent on an employee to avail himself/herself of the employers grievance procedure before resigning so as to put the employer on notice of the employees issues and to permit the employer an opportunity to address (see for example the determination of the Employment Appeals Tribunal in Conway –v- Ulster Bank Limited UD474/1981)".

We are simply referring to this case as again an example as to why employees lose cases. The use of the internal Grievance Procedure is an absolute necessity.

Minimum Notice Claims

This issue arose in case ADJ-00026861. The case is interesting in that the issue arose as to whether the notice given should be in writing or whether an oral notification is sufficient.

The Adjudication Officer in this case referred to the case of Bolands Limited (In Receivership) –v- Ward 1988 ILRM382 at 389 where Henchy J stated;

"...the Act is concerned only with the period referred to as the notice, and it matters not what form the notice takes so long as it conveys to the employee that it is proposed that he will lose his employment at the end of a period which is expressed or necessarily implied in that notice. There is nothing in the Act to suggest that the notice should be stringently or technically construed as if it was analogous to a notice to quit. If the notice actually given – whether orally or in writing, in one document or in a number of documents – conveys to the employee that at the end of the period expressly or impliedly referred to in the notice or notices it is proposed to terminate his or her employment, the only question normally arising under the Act is whether the period of notice is less than the Statutory minimum...".

This is extremely useful that the Adjudication Officer has taken the time to quote this case.

As a matter of practice it is of course far more advisable for an employer to furnish a notice in writing so that there is no dispute about same later.

Protected Disclosures Act 2014

The case of John Clark and CGI Food Services and CGI Holdings Limited is a judgement of Mr. Justice Humphreys delivered on 31 July 2020 IEHC368.

Mr. Clark in this case stated that he raised various issues relating to financial matters regarding personal spending on company credit cards and other matters to include Revenue issues and issues including food safety.

In the judgement it sets out that it appeared to the Court that issues relating to the performance of the plaintiff were only raised after the plaintiff started raising concerns about compliance with financial and health obligations.

The plaintiff was dismissed on 15th May 2019. On 29 May he commenced Circuit Court proceedings by way of an Equity Civil Bill under the 2014 Act. On 25th July 2019 the Circuit Court granted a stay pending the hearing of the plaintiff's application to the Workplace Relations Commission. The jurisdiction to do so is conferred by paragraphs 1 and 2 of Schedule 1 of the 2014 Act. The hearing was to take place on the 2nd September 2019 but was adjourned at the instance of the defendant. The application was then part heard and further adjourned on 22nd October 2019. It was adjourned again for a listing on 3rd and 4th February 2020 at the instance of the defendant and adjourned further from a listing on 17th and 18th of February 2020 because the plaintiff was unavailable. It was listed again on 23rd and 24th of March 2020 but adjourned due to the Covid 19 emergency. The employer in this case had appealed to the High Court. The Court pointed out that the employers argument was that financial matters which the plaintiff attempts to portray as constituting protected disclosures did not fall within the definition of a protected disclosure for the purposes of the Act.

The Court pointed out that the provisions of Section 5 Subsection (5) state that;

"A matter is not a relevant wrong doing if it is a matter which 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 Court pointed out where a person such as a Group Financial Controller discovers fraud or wrong doing by the employer that is a relevant wrong doing and drawing attention to that is making a protected disclosure. The legal submission attempted, as the Court pointed out, to place reliance on the decision of the Labour Court in Donegal Co. Council –v- Kar PDD161 being a decision of the Labour Court on 7th June 2016. The Court pointed out that that attempt was misconceived. The Court pointed out that the wrong doing there was by other employees, not by the employer, so the Labour Court naturally found that the complaints "related to matters other than an alleged omission of the employer".

The Court pointed out that a person may make a protected disclosure without invoking the 2014 Act or without using the language "protected disclosure".

The Court pointed out at paragraph 18 that it is likely that there are substantial grounds for contending that communications that constituted protected disclosures were engaged in by the Plaintiff in so far as he drew the attention of the employer to various potential illegalities and wrongdoings. That in principle is making a protected disclosure and the Court referred to Section 6 (1) (A).

There are some interesting aspects of this case.

In an Unfair Dismissal claim an individual needs one years' service. In a claim under the Protected Disclosures Act no such service is required.

The compensation in these cases can be up to 5 years remuneration. However, it must be remembered that the same rules apply as in an Unfair Dismissal case so an individual must be in a position to show that they minimised their loss.

Where an Order is obtained in the Circuit Court an employer may be required to continue paying the salary and benefits to a dismissed employee until the matter is determined before the WRC.

The decision is important in pointing out that the definition of a protected disclosure is very broad. It is not necessary to expressly state that a concern is a protected disclosure.

If the disclosure is sufficiently informational in nature and not merely allegations it will come within the grounds of a protected disclosure. See Baranya –v- Rosderra Irish Meats Group Limited 2020 IEHC56.

Where an employee raised a protected disclosure and is then dismissed it is imperative that there will be fair procedures. The Court pointed out as put by Lord Wisden in Royal Mail Group Limited –v- Jhuti 2019 UKSC55 at paragraph 60;

"If a person in the hierarchy of responsibility above the employee...determines that for reason a (here the making of protected disclosures), the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts (here inadequate performance) it is the Court's duty to penetrate through the invention rather than to allow it also to infect its own determination".

This is an important decision of the High Court. There are relatively few decisions in this area.

Notifications under Employment Legislation

This issue arose in case ADJ/00020154 which included the provisions of the Parental Leave Act.

In this case the Adjudication Officer pointed out that the Adjudication Officer noted the decision in Lee –v- Vaiciulyte which relies on a previous EAT decision of Kelleher –v- DHL International P6/90 and the High Court decision in Ivory –v- Ski-line Limited 1989 ILRM433 where it states;

"... The ratio of these decisions is that in order to avail of the benefits of the Statute an employee must comply with his/her own statutory obligations under the Act. That included the obligation to give notice under Section 9. It follows that where a claimant fails to comply with a statutory condition precedent to the operation of the Act she cannot be held to have availed of statutory maternity under the Act..."

The Adjudication Officer also referred to a case of Quinn –v- AIN Investment Managers R-096584/PL/10/EH where a Rights Commissioner noted that the complainants about a Parental Leave request did not meet the statutory requirements in rejecting her claims.

The Adjudication Officer set out that Section 8 of the Parental Leave Act 1998 is clear in its construction. It sets out in simple terms what an employee must do should they propose to take Parental Leave under the Act. The Adjudication Officer set out that the language is prescriptive and mandatory. The Adjudication Officer pointed out that the applicant "shall" give written notification of the proposal to the employer as soon as reasonably practical but not later than 6 weeks before the commencement of such leave. That notice must be signed by the employee and state the date of commencement of leave, the length of the leave and how it is proposed to be taken. In this case the Adjudication Officer held that there was no evidence that the notice was furnished.

Employment Equality Acts 1998 – 2015 – What is a Continuum

This arose in the case of A Health Service Executive and Hannigan EDA2013.

The Labour Court in this case set out that the Decision of the Court of Appeal for England and Wales in Robertson –v- Bexley Community Centre 2003 IRLR 434 concerned a similarly worded provision of the UK Legislation to Section 77 (5) (A) of our Legislation. The Court pointed out that this case is authority for the proposition that the subsection (5) of Section 77 deals with a situation in which there are a serious of separate acts or omissions which, while not forming part of a regime, rule, practice or principle, are sufficiently connected so as to constitute a continuum.

The Court pointed out that the decision of the Court of Appeal of England and Wales in Cast –v- Croidin College 1998 IRLR318 is also of assistance in considering the issues arising in the particular case. The Court pointed out that here it was held that the mere fact that an act or omission has continuing consequences does not make it a continuing act for the purposes of applying a time limit. The case is also authority for the proposition that where an original decision is reviewed and a decision taken based on new consideration a fresh cause of action can accrue.

The Court pointed out that circumstances in which a complaint that a Respondent had in place a discriminatory regime, rule, practice or principle which discriminated against a person with a disability where considered by the Court in Ann Hurley –v- Co. Cork VEC. It was pointed out in that case that subsection dealt with a different form of continuing discrimination. It was pointed out that subsection 5 deals with a situation where there is a series of separate acts or omissions which while not forming part of a regime, rule, practice or principal or sufficiently connected so as to constitute a continuum. Therefore the Court pointed out in order to take into account acts of discrimination outside the time limit there must be a finding that a related act of discrimination occurred within the time limit. Under subsection (6)(A) an Act will be regarded as extending over a period so treated as having being done at the end of the period if an employer maintains and keeps in force a discriminatory regime, practice or principle which has a clear and adverse effect on the Complainant and referred to the case of Bartleys Bank Plc –v- Kapur 1989 IRLR387.

The Court pointed out that the approach by the Labour Court was approved by McKechnie J in the Supreme Court case of Co. Louth VEC –v- Equality Tribunal 2016 IESC40 where at paragraph 23 of the Judgement it was stated;

“At the outset it is important to understand that both Section 77 (5) (a) and 6 (a) are intended to capture quite different circumstances…subsection (6A) deals with a situation where a single act occurs and where it continues to occur over a lengthy period such as discrimination based on regime, rule, practice or principle of an ongoing nature. A term in a contract is a good specific example of the provisions or general meaning. In such a case the six month period

initiating the *process will only start to run when the offending regime or practice ceases; or, put another way the discriminatory act will be regarded for limitation purposes as having occurred only when such basis has ceased to exist".*

This is an important decision of the Labour Court in relation to the issue relating to a continuation of discrimination.

What must be set out in an Equality Claim Form

This issue was addressed in case ADJ-00015823. In this case the Adjudication Officer noted that a complainant can amend an original claim and this was considered by the High Court in the case of Louth VEC –v- The Equality Tribunal 2009 IEHC370 where McGovern J held;

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

The Adjudication Officer also referred to the case of Clare Co. Council –v- Director of Equality of Equality Investigations 2011 IEHC303 where Hedigan J stated;

"*It is clear from the forgoing that because the EE1 form is only designed to set out the generality of the complaint, the complainants should be allowed to expand on matters not specified in the form, so long as the respondents are not taken by surprise or alternatively given adequate time to answer then there can be no injustice therein*".

The Adjudication Officer referred to the Supreme Court case of Co. Louth VEC –v- Equality Tribunal 2016 IESC40 where it was held by McKechnie J that;

"*Therefore when considering the substantive issue, it must be remembered that the Tribunal inquires into inferred incidence of discrimination. It looks at prohibited conduct of which it is notified. It*

has no function in a situation such as this to embark upon a wide ranging enquiry into discrimination generally, or to generally investigate such discrimination; it does not conduct investigations proprio moto into discrimination which has not been the subject of a statutory referral to the Tribunal. Rather, it determines what lawfully has been referred to it with a view to providing redress to the applicant for any discrimination that is found. The Tribunal cannot as such freelance its inquiry".

The Adjudication Officer pointed out that it is clear that a complainant is not precluded from amending his or her original claims so long as the general nature of the complaint remains the same.

The Adjudication Officers pointed out that the question that the Adjudication Officer must decide is whether the inclusion of the claim of discriminatory dismissal and discriminatory treatment in relation to conditions of employment on the grounds of family status which was set out in the written submission constitutes the furnishing of further and better particulars in relation to her initial claim or if these constitute entirely different complaints. The original complaint is one where the box of "disability" was ticked.

The Adjudication Officer pointed out that while the ground of family status was not referred to the Adjudication Officer was satisfied that the broad nature and generality of the complaint of the discriminatory dismissal was set out. However, the Adjudication Officer pointed out that two other grounds were entirely different complaints.

In dealing with complaints under the Equality Legislation it is important to tick the correct boxes. However this is a box ticking exercise. The claim form allows particulars to be set out. It is useful to set out a factual matrix of the issues being complained of. Provided these are set out regardless as to whether the particular box is ticked this will be sufficient in our view to have a situation where the complaint has been referred. The form is not a Statutory Form. In theory the complaint can be set out on a piece of paper. On that basis it is useful to set out an outline of the facts and to set out the grounds that somebody says that this occurred on.

There is a view by some that you can only tick one box. That is not the position. In fact an employee can tick every single box if they so wish. In setting out the claim form therefore it is important to avoid getting

into discussions as to whether or not particulars of the claim have been submitted to set them out at the start. When it comes to making submissions it is equally useful to get the submission in as early as possible. The submission document itself is effectively a complaint form. If that is submitted within 6 months of the last date then it itself will be deemed to be part of the complaint and provided the relevant complaint is set out in the submission then it is effectively covered. For this reason it is useful if lodging claims to get the submission in as early as possible so that all legal arguements are put in and therefore if anything is missed on the complaint form that it would be covered within the relevant six month period of time.

In reality this is what is needed to be done in an Equality case anyway because of the WRC rules. Now of course the WRC rules have no legal status. They are ignored by many if not the majority. They have no legal status. They cannot be enforced. However, at the same time when acting for an employee it is important to cover off all matters. In the case which we refer to here two relevant complaints could not be heard. The reason is that they were submitted out of time. They were in the legal submission but that submission came in after the relevant six month time period to lodge a complaint.

Discrimination in Irish Law

An issue which comes up at times is that an individual sets out that they come within one of the relevant grounds of the Employment Equality Acts. This issue was addressed in case ADJ-00026823. In that case the Adjudication Officer helpfully dealt with this issue which sometimes comes up namely that an individual believes that because they come within a particular category that that is sufficient to bring a discrimination case.

In the relevant case the Adjudication Officer quoted the case of Margetts –v-Graham Anthony & Company Limited EDA038 where the Labour Court stated;

"*The mere fact that the complainant falls within one of the discriminatory grounds laid down under the Act is not sufficient in itself to establish a claim of discrimination. The complainant must adduce*

other facts from which it may be inferred on the balance of probability that an act of discrimination has occurred".

It is useful that this matter was restated by the WRC Adjudication Officer.

Claiming a Disability

This arises often in cases involving discrimination. The employee will claim that they have a disability.

This issue was addressed by the Labour Court in the case of A Retail Company & A Worker EDA2012. In that case the Labour Court pointed out that the Court has no medical expertise and relies heavily on medical evidence in cases such as this to determine the existence of a disability or otherwise.

The Court pointed out that the burden of establishing this falls on the employee.

It is useful that this issue has been restated by the Labour Court.

Burden of Proof in Employment Equality cases.

This issue was addressed in the case of *Microsoft Ireland and Shaaban* EDA 2016.

The Court in this case set out the law clearly.

The Burden of Proof is set out in Section 85A(1) of the Act.

The Court then pointed out that in its determination in *Southern Health Board -v- Mitchel* 2001 ELR 201, the Court considered the extent of the evidential burden imposed by Section 85A of the Act that held;

"The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicated that a claimant must prove, on the

balance of probabilities, the primary facts on which they rely on seeking to raise a presumption of unlawful discrimination. It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principle of equal treatment''

The Court pointed out that if follows that a complainant has to establish both the primary facts of which he or she relies and also that those facts are of sufficient evidential significance to raise an inference of discrimination.

The Court quoted the case of Cork City Council -v- McCarthy EDA 21/2008 where the Court stated in this regard;

"*The type of range of facts which may be relied upon by a complainant may very significantly from case to case. The law provides that the probative burden shift where a complainant proves facts from which it may be presumed that there has been direct or indirect discrimination. The language used indicated that where the primary facts alleged are proved it remains for the Court to decide if the inference of presumption contended for can properly be drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn to explain a particular fact or a set of facts which are proved in evidence. At the initial stage the complainant is merely seeking to establish a prima facie case. Hence, it is not necessary to establish that the conclusion of discrimination is the only, or indeed, the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts''.*

The Court also helpfully pointed out that in the case of *Melbury Developments Limited -v- Valpeters* 2010 ELR 64, the Court stated that;

"*Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn''.*

It is a very useful restatement of the law by the Court.

Burden of Proof in Equality Claims

This issue was addressed in case ADJ-0001582. The Labour Court case of Ms. Niscayah Limited –v- Rachel McCarthy EDA1328 was quoted where the Labour Court set out;

"*Where a prima facie case is made out the onus shifts to the respondent to prove the absence of discrimination. This requires the Respondent to show a complete dissonance between the protective characteristic relied upon (in this case family status) and the impugned act or omission alleged to constitute discrimination. In Wong –v- Igen Limited and Others 20058 IRLR 258 (a decision of the Court of Appeal for England and Wales) Peter Gibson L.J. pointed out that where the Respondent fails to show that the discriminatory ground was anything other than a trivial influence in the impugned decision the complaint will be made out. In practice the Court will look to the Respondent to show that the protected characteristic relied upon had no material influence whatsoever in arriving at the impugned decision".*

The decision of the UK Employment Appeals Tribunal in Barton –v- Investec Henderson Crothwaite Securities Limited 2003 IRLR 332 is authority for the proposition that where the burden of proof rests on the Respondent a Court should normally expect cogent evidence to discharge that burden since the facts necessary to prove a non-discriminatory explanation would normally be in the possession of the respondent.

It is helpful that this has been set out.

Disability Claims

This issue arose in case ADJ-00015823. The Adjudication Officer in this case set out that the Employment Equality Act transposes EU Directive 20/78/EC. It was pointed out that the Directive does not define disability but that the European Union has approved the definition of disability as set out in the UN convention on the rights of persons with disability. This provides that a disability is an evolving concept and arises from the interactions between persons with impairments and attitudinal and environmental barriers that hinders

their full and effective participation in society on an equal basis with others. Article 1 of the Convention sets out that persons with disabilities include those who have long term, physical, mental intellectual or sensory impairments. The Court of Justice of the European Union has held that a disability must be long term and the Adjudication Officer quoted the case of HK Denmark E-335 and 337/11.

The Adjudication Officer pointed out that disability has been interpreted in a broad manner and noted the established precedent from the Labour Court that anxiety and stress can fall within the definition of disability under the acts under certain circumstances. The Adjudication Officer quoted the case of A Government Department -v- A Worker EDA094

"The Court must take the definition of disability as it finds it. Further, as the Act is a remedial social statute it ought to be construed as widely and as liberally as possible consistent with fairness (see Bank of Ireland -v- Purcell 1989 IR327). Nevertheless, no statute can be construed so as to produce an absurd result or one that it repugnant to common sense. The common law rule of construction has now been given statutory effect by Section 5 (1) of the Interpretation Act 2005. It would appear to the Court that if the statute were to be construed so as to blur the distinction between emotional upset, unhappiness or the ordinary human reaction to stressful situations or the vicissitudes of life on the one hand, and recognised psychiatric illness on the other, it could be fairly described as an absurdity".

In relation to the definition of disability the Labour Court noted:

"It is expressed in terms of the manifestations or symptoms produced by a particular condition, illness or disease rather than the taxonomy or label which is ascribed thereto. Further, the definition does not refer to the extent to which the manifestations of symptoms must be present. However, a de minimis rule must apply and effects of symptoms, which are present to an insignificant degree, would have to be disregarded. Moreover, the classification of a condition, illness or disease as a disability is not limited by its temporal effect on the subforum. This is clear from the definition which provides that – "shall be taken to include a disability which exists at present or which previously existed but no

longer exists or which may exist in the future or which is imputed to a person"

The Adjudication Officer also quoted the case of Health Service Executive North West and Cullen Killoran EDA 1830:

"While disability is broadly defined by the acts each of the examples given in the acts relate to malfunctions or abnormalities of the mind or body"

It is useful that the Adjudication Officer took the time in this case to go through the law in some depth.

Constructive Notice in an Employment Case

This issue arose in case ADJ-00022892. The Adjudication Officer helpfully quoted the case of Somers –v- W.1979 IR94 where Henchy JJ described the concept as follows:

"*When the facts at his command beckoned him to look and inquire further, and he refrained from doing so, equity fixed him with constructive notice of what would have ascertained if he had pursued the further investigation which a person with reasonable care and skill would have felt proper to make in the circumstances*".

The Adjudication Officer pointed out that the applicability of this Doctrine in an employment context was confirmed by the High Court of England and Wales in Sayers –v- Cambridgeshire County Council 2006 EWHC 2029.

Redundancy

The issue of redundancy is going to come up more often. A recent case on this is ADJ-0020512.

Section 6 (4) of the Unfair Dismissal Act provides that a dismissal should be deemed not to be unfair if it results wholly or mainly from one of the following and that includes redundancy of the employee.

Redundancy is defined itself in Section 7 (2) of the Redundancy Payment Acts.

The relevant applicable law was set out by the Adjudication Officer. The Adjudication Officer referred to the case of St. Leger –v- Front Line Distributors Ireland Limited 1995 ELR160 where the EAT held;

"*Impersonality runs throughout the five definitions in the [Redundancy Payment] Act. Redundancy impacts on the job and only as a consequence of the redundancy does a person involved lose his job... Changes also run through all five definitions. This means changing the workplace. The most dramatic change of all is complete shutdown. Change may also mean a reduction in the need for employees, or reduction in numbers. Definition (d) and (e) involve change in the way the work is done or some other form of change in the nature of the job. Under these two definitions change in the job must mean qualitive change. Definition (e) must involve, partly at least, work of a different kind, and that it is the only meaning which can put on the words "other work". More work or less work of the same kind does not mean "other work" and is only quantative change*".

The Adjudication Officer also referred to the case of Panisi –v- JV (Europe) 2011 IEHC297 where the High Court held;

"*In all cases of dismissal, whether by reason of redundancy or for substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of employment came within a lawful means... In an Unfair Dismissal claim, where the answer is asserted to be redundancy the employer bears the burden of establishing redundancy and of showing what kind of redundancy is apposite. Without that requirement, vagueness would replace the precision necessary to ensure the upholding of employee rights. Redundancy isn't personal. Indeed it must result from, as Section 7 (2) Of the Redundancy Payment Act 1967, as amended, provides "reasons not related to the employee concerned*".

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

In addition the High Court in Panisi held;

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

The Adjudication Officer also referred to the Labour Court case of Component Distributors (CD Ireland) Limited and Byrnes UDD1854 where the Labour Court said;

"*The Court accepts that the respondent was entitled to restructure the business and reduce the workforce if necessary. While the Court accepts that the respondent was entitled to decide on the most appropriate means of achieving its operational requirements, its entitlement in that regard is not unfettered. The right of the complainant to retain her employment must have been taken into consideration. That necessarily obliges the respondent to look at all available options by which this could be achieved*".

In Byrnes the Labour Court noted that the claimant had not been supplied with all company documentation as the Board of Management proposals were confidential.

In Edwards –v- Aerials & Electronics (Ireland) Limited UD236/1985 the EAT considered the case which Dublin based MD dismissed following a reorganisation and the employers decision to run the company from Belfast.

The EAT held;

"*The Claimant has raised major doubts as to whether the redundancy was genuine. We recognise that the function of a full time Managing Director no longer exists, but we must direct our minds to the cause and effect relationship between redundancy and dismissal. The issue was whether he was dismissed because the employer had decided to reorganise the structure of the company, or whether the decision was taken to dismiss him for some other reason. In other words, was the reorganisation a cause or a consequence? On balance we are inclined to the latter view".*

The Adjudication Officer also looked at the issue of the selection process.

The UK case of Babar Indian Restaurant –v- Rawat 1985 IRLR57 was referred to. Here the employer operated three separate businesses. One of which was a restaurant. The restaurant owner closed a frozen food business. He redeployed two staff to the restaurant. Mr. Rawat was an employee of the restaurant and was dismissed to make way for the redeployment. It was held that the restaurant was a separate business from the now closed frozen food entity. Looking solely within the restaurant business, there were no grounds for redundancy. The claim of Unfair Dismissal was upheld.

In Murphy and Regan Employment Law in the section under redundancy the Adjudication Officer pointed out that in it it is stated;

"*For a redundancy selection to be fair, objective selection criteria must be applied to the correct pool of employees. In particular, the pool of selection must be reasonably defined and the selection criteria applied by the employer must be applied to all employees "in similar employment*".

In this case the Adjudication Officer did award compensation. What is most relevant about this case is that the Adjudication Officer in this case has set out the law in some depth and this is most helpful.

Parental Leave

The Parental Leave (Amendment) Act 2019 set out changes to the rules for Parental Leave.

The first set of these changes came into force in September 2019. Since 1 September 2020 further changes have been made.

These changes set out that an employee can now take 26 weeks of unpaid Parental Leave per child. Previously it was 22 weeks unpaid leave.

The leave can be taken for every child where the child is;

a. Up to 12 years of age; or;
b. Up to 16 years of age where the child has a disability or a long term illness; or
c. For up to two years after the date of the Adoption Order if adopted between the ages of 10 and 12.

It should be noted that the changes mean that a parent who has used the 22 weeks unpaid Parental Leave can take a further four weeks provided that their child still falls within the age provisions set out above.

Issuing Proceedings in the Wrong Name in the WRC

This issue arose in the case of a Hair Stylist and a Hair Dressing Salon in ADJ/00015823.

The employee in this case issued the proceedings against a trading name rather than against the owner of the business who traded under that name.

The Adjudication Officer pointed out that it was necessary to look to see had the Adjudication Officer the power to amend the proceedings and substitute the correct name. The Adjudication Officer pointed to the case by the Labour Court in the case of Auto Depot Limited and Matelu UDD1954. In this case the employee had issued the proceedings against Auto Depot Tyres Limited rather than Auto Depot Limited. The Labour Court allowed the amendment as the Court stated;

"*Accordingly, the Court considers the erroneous inclusion of "Auto Depot Tyres Limited" on the WRC complaint form to be no more than a technical error. The Court is fully satisfied that the respondent's name can simply be amended on the paperwork to reflect its correct legal title, that of Auto Depot Limited*".

The Adjudication Officer pointed out that the Labour Court in that case provided an extensive analysis of the Jurisprudence and the authorities. In that case the Labour Court said;

"*Having regard to the forgoing and relying in particular on the High Court decision in Capital Food Emporium the Court is fully satisfied that the correct employer has been pursued by the complainant. The Court is further fully satisfied that the respondent party that appeared before the Court was the complainants employer. The party was fully aware of the complainant's complaint to the WRC from July 2017. He knew precisely from whom the complaints were and to what the complaints referred. The respondent party has had a fully opportunity to be heard and to answer those complaints. The Court is therefore equally satisfied that the employer will suffer no prejudice or injustice by its decision on its preliminary point".*

In arriving at this conclusion, the Court is also conscious of the High Court judgement in O Higgins –v- University Dublin & Another 2013 21MCA wherein Mr. Justice Hogan held;

"*Even if the wrong party was in fact, so named, no prejudice whatever was caused by reason of that error (if, indeed, error it be)... In these circumstances for this Court to hold that the appeal was rendered void by reason of such a technical error would amount to a grossly disproportionately response and deprive the appellant of the substance of her constitutional right of access to the Courts*".

In that case the Labour Court went on to state;

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

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

The Adjudication Officer held that the Adjudication Officer in this case was entitled to change the name.

There is always a difficulty with these cases. The difficulty is where proceedings issue in the wrong name if the respondent employer does not appear in the WRC and there is no application to change the name then in those circumstances an award being a decision will issue against an entity which does not exist and there will be no way that that decision can be implemented.

There is provision to change an administrative error. It does however appear that if that error is not brought to the attention of the WRC before a decision issues then in those circumstances it may be difficult, if not impossible, to have the proceedings changed as regards the name.

Even if that is allowed there is always then the issue as to whether the proceedings have to be reheard in the WRC because the employer may not have been on notice. This is particularly so in the case of companies.

There is always then also the issue which has to be looked at which is is this a genuine mistake. It is important when acting for employees to check their contract of employment. That should have a name on it. That should be the legal name. That is not always the position. The other document to check is of course their payslip. That again should have the legal name on it. The third issue is to ask employees to check the Revenue online documentation. Let us take a situation where the Trade Name only is on the contract. For example, Joe Blogs Hardware. If the name of the company is Joe Blogs Hardware Limited and the proceedings issue and all the documentation being contracts and payslips and also the Revenue records show the name Joe Blogs Hardware then the employee is in a very strong position to ask for a change of name. If however the contract of employment, the payslips and the Revenue online forms have the correct legal entity it is more difficult. In this example clearly it is simply the words Limited to be added in. The problems can arise more often where there is a limited company which has its registered office at one address but which has a number of branches and where the proceedings are issued against that entity using a trade name at the location of one of its branches. There will always be issues where proceedings issue against the wrong entity. It is however important as far as possible particularly when acting on behalf of an employee to ensure that the correct name is used. For professional advisors it is beneficial to ensure that

documentation going to the employee advises of the requirement that you need to know the legal name and that it is a matter for the employee to advise you of same. It is also useful to ask the employee to check Revenue online if the contract or payslips do not give the full legal name.

Bringing Claims to the Workplace Relations Commission

An issue which regularly arises, particularly with employees, is this belief that if they bring a claim to the WRC and are successful that they will receive their legal costs. That is not the position. Cases before the WRC whether the case is won or lost or not one where costs can be awarded.

This is an issue which every solicitor dealing with cases in the WRC and the Labour Court will point out to their client. It is surprising the number of clients who ultimately believe that they will receive their costs is quite staggering.

There is issues raised of fairness and equity and various other arguments brought forward as to why costs should be paid.

The position is that there is no provision to pay costs in cases before the WRC.

Section 39 Workers

Who are Section 39 workers? These are workers in certain state funded health and social care bodies. They are known as Section 39 organisations. It is reported that workers in these organisations are to be balloted for strike action over a failure to restore pay cuts imposed during the economic crisis. These Section 39 bodies are funded by the HSE to deliver healthcare disability and social services to vulnerable individuals. The employees of these organisations do not have the status of public servants.

An unusual situation arose when public sector pay was cut after the 2008 banking collapse. Yes, we're going right back into for some what was ancient history now. Employees in Section 39 bodies had similar

reductions put on them in line with those who would work in the public service. Now the government has over time restored pay to public sector workers. However, many working in Section 39 entities have not seen their wages improve.

There are around 300 such entities. 50 of these had issues resolved. It appears some 250 smaller entities have not seen any resolution at all. The strike action has been proposed by SIPTU Forsa and the Irish Nurses and Midwives Union.

It must be noted that the agencies facing the prospect of such strike include such organisations as the National Council of the Blind and South Doc's in Cork.

The difficulty is that many of the smaller organisations do not have the additional funding to provide the increased salaries. The other issue is that these individuals provide through the organisations which they are in essential services for very vulnerable individuals.
The argument is clear that they took cuts equivalent to public servants in 2008 but while the public servants had their salaries and wages restored these workers did not.

It is a fact of life that there is always going to be disputes.

EWSS Payments

The Revenue have confirmed in October that EWSS payments due to eligible employers will be made as soon as possible after the 5th day of the following month. This payment date is in line with the availability of the monthly employers PAYE Return Submission Statement. This is made available to employers on the Revenue online service by the 5th of the following month.

Effectively, it means that shortly after the 5th November the EWSS will be paid in respect of eligible employees in October.

It is to be welcomed that this payment date has been moved forward.

Transfer of Functions from Minister for Employment Affairs and Social Protection to Minister for Business Enterprise and Innovation.

S.I. No 438/2020 Employment Affairs and Employment Law (Transfer of Departmental Administration and Ministerial Functions) Order 2020, provides for the transfer under the following Acts to The Department of Business Enterprise and Innovation from the 14th October 2020 last.

The relevant Acts are;

Minimum Notice and Terms of Employment Act, 1973 to 2005;
Protection of Employment Act, 1977 to 2014;
Protection of Employees (Employers' Insolvency) Act, 1984 to 2019;
Payment of Wages Act, 1991;
Terms of Employment (Information) Act, 1994 to 2014;
Organisation of Working Time Act, 1997;
National Minimum Wage Act, 2000;
Protection of Employees (Part-Time Work) Act, 2001;
Protection of Employees (Fixed-Term Work) Act, 2003;
Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act, 2007;
Protection of Employees (Temporary Agency Work) Act, 2012;
Redundancy Payment Acts, 1967. Being Sections 15 to 17 of that Act;
Unfair Dismissal Act, 1977 to 2015.
As regards Section 20 of the Workplace Relations Act, 2015 in so far as it relates to Codes of Practice in relation to employment enactments.
In addition, the European Communities (Protection of Employees on Transfer of Undertakings) Regulations, 2003 also transfers.

Unfair Dismissal - Code of Practice on Disciplinary Procedures (Declaration) Order 1996 S.I. Number 117 of 1996.

The case of ADJ-00023303 is one where the Adjudication Officer helpfully set out the issue of what is natural justice to be applied in any disciplinary case as set out in the Code of Practice. They are;

1. The details of any allegation or complaint are put to the employee concerned.
2. That the employee concerned is given the opportunity to respond fully to any such allegations or complaints.
3. That the employee concerned is given the opportunity to avail of the right to be represented during the procedure.
4. That the employee concerned has the right to a fair and impartial determination of the issues concerned taking into account any representations made by, or on behalf of, the employee or any other relevant or appropriate evidence, factors or circumstances.

While it is not set out in the particular decision as it would not be relevant to the particular case the right of representation has been held by the High Court to be limited to a fellow employee or a Union Official. There may be very limited situations in which a solicitor or barrister would have a right of representation.

The fact that an individual is not a member of a Union does not mean that they should not be advised of the right to be represented by a Union Official if they so wish. The fact that an employer may not recognise a Union for bargaining purposes is irrelevant when it comes to representation in a disciplinary matter.

Redundancy.

In case ADJ-00012159 this case involved a situation where the employee worked for the company as a steel fixer from 4 May 2015 until 19 May 2017 on a 45 hour week. It appears that the employment was transferred to an agency on the 19th May 2017. This lasted until the termination on the 11th July.

The Adjudication Officer pointed out that they had to look at the provisions of Section 9(3) of the Act as a possible exception to the issue relating to a termination. This particular Section provides that an employee shall not be taken as having been dismissed if;

1. He/she is reengaged by another employer immediately on the termination of his/her previous employment.

2. The reengagement takes place with the agreement of the employee, the previous employer and the new employer and;

3. Before the commencement of the period of employment with the new employer the employee receives a statement in writing on behalf of the previous employer and the new employer which;

   (a) Sets out the terms and conditions of the employees' contract of employment with the new employer;

   (b) Specifies that the employees' period of service with the previous employer will, for the purposes of the Act, be regarded by the new employer as service with the new employer;

   (c) Contains the service mentioned above and;

   (d) The employee notifies in writing the new employer that the employee accepts the statement required by this subparagraph.

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Effectively the position on it is that to avoid the Redundancy Payment Acts applying where an individual transfers from one company to another company these procedures have to be applied. This will apply equally where an employee is transferring to an entity completely outside the organisation or to associated companies within a group.

***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.**