Keeping in Touch - January 2021

Introduction

In 2020 when we issued our January newsletter, we were all looking forward to a great year. The economy was booming. There was significant employment. The level of unemployment was very low. There were significant job opportunities. In March of 2020 all of that changed.

As we now look to 2021, we see a significant number of individuals on the PUP. There are equally a significant number of individuals who are unemployed having lost their jobs. Depending on which forecast you look at while the economic outlook is good as regards GDP the issue as regards employment indicates that we could have anything between 10% and 20% of the workforce unemployed in 2021.

Some businesses will do very well. Some businesses have done very well during the pandemic. Others have not. Even within various service sectors some services will do very well and have done well. Others will not.

The way we work has changed. It probably has changed for good and by that we mean the way people work. Remote working is now going to become a fact of life. That will suit some. It will not suit others. There will be split working. By this we mean there will be individuals who will work two or three days in an office and the rest remotely. This itself is going to have a significant impact on job opportunities in 2021. Everything from coffee shops to restaurants serving office workers have seen and probably will see a significant reduction in their turnover as remote working and partial remote working becomes the norm. This will have a particular impact on cities and in particular city centres. This will lead to businesses closing and to job losses.

As we head into 2021, we are looking at lockdowns until the vaccine has been distributed significantly enough to create herd immunity.

In the area of employment law there is going to be significant issues which will need to be addressed. Of course, there will be redundancy work. There will be claims relating to unfair selection for redundancy.
There has been and will continue to be an increase in discrimination cases. At the same time employment lawyers are going to have to be involved, to a greater extent than ever before, in writing policies and procedures relating to remote working and health and safety.

In the area of personal injury and accident claims there will be cases arising relating to Covid-19 which is contracted in the workplace because of unsafe working conditions. In reality many of these cases will have only a small value. If somebody contracts Covid-19 and recovers very quickly the level of compensation is going to be minimal. However, in cases where an individual takes longer to recover or has ongoing issues then in those circumstances more significant claims may arise. There may even, unfortunately, be Fatal Injury claims.

On the issue of personal injury claims and accident claims generally it is likely that the level of awards that will be given in personal injury claims will fall dramatically. We regularly hear how awards in Ireland for whiplash are higher than in the UK. What we do not hear about is that in the UK their severity of whiplash injuries is far less than it is in Ireland. The reason for this is actually quite simple. It is not people exaggerating claims. It is that in the UK if you have an accident you will get physiotherapy from the NHS within two weeks. In Ireland it can take 3 or 4 months. The medical evidence is very clear. If a person gets physiotherapy within 2-3 weeks of having an accident where a whiplash injury occurred then in those circumstances a severe whiplash reduces to a moderate whiplash and a moderate whiplash reduces down to a minor whiplash. This fact is regularly overlooked but it is one which is there.

Finally, some good news. Sorcha Finnegan has joined this firm and will be working in our litigation department primarily working in our personal injury and accident claims section. Sorcha will also be working partly in our employment law section. The reason for this is that we are involved in a number of workplace accidents where there is a connection between employment law and personal injury and accident claims. Equally, in a number of workplace accident cases we also have the issue, which can arise, of discrimination cases as a result of a person being treated differently because of the fact that they have had an accident where they have suffered a disability, or, they are subject to victimisation for having raised a complaint under the Safety Health and Welfare at Work Act. We are delighted that
Sorcha has joined this firm and you will be hearing from Sorcha in the coming months in relation to the personal injury and accident claim services of this firm.

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Out and About in December 2020

On 2 December Richard Grogan of our firm gave a talk to the Citizens Information Board where approximately 220 people attended a virtual conference. Richard’s role was to advise on the bringing of cases to the WRC and to outline the tips and traps for those bringing those claims. We were particularly delighted to facilitate this seminar. The individuals attending are providing voluntary services and we are delighted to assist them providing these services to individuals who otherwise would not be able to afford legal services. In addition, they helpfully are in a position to bring claims for those which have low value claims, where a solicitor just could not be afforded, even if the solicitor was to be paid out of any award or settlement but where it is important that there is somebody to represent those individuals. Unfortunately, as Richard pointed out in the seminar there is no free legal aid for individuals bring these cases to the WRC. There will however as we pointed out be free legal aid for those bringing Protected Disclosure Act claims by the end of 2021 on the basis of the terms of the Directive which is coming into effect.

On 14 December Richard presented a 2-hour seminar to post graduate students in NUI Galway. Richard was invited by Deirdre Curran to present this seminar to students studying in the area of human resources. This was very much a practical course dealing with the practical issues they would have in dealing with solicitors, dealing with claims going to the WRC and the Labour Court, and the practical issues to be addressed so as to avoid claims arising in the first place. We were delighted that Ms Deirdre Curran and NUI Galway extended this invitation to us and we were delighted as always to assist. This is the second time Richard has been asked to address the particular course.

On December 18 Richard had an article published in Irish Legal News on the need to have Working Time Records.
On 21 December Richard was quoted in an article by Ann Marie Walsh in the Irish Independent “Mountains of Annual Leave built up during lockdown”.


Comments From Our Distribution List Readers

We are always delighted to get feedback from those who receive our newsletter.

Some of the comments we received for the December issue were "Your newsletter makes very interesting reading - always enjoy it and learned from it"

Another was "As always it is great to get your newsletter, many thanks"

Another was “Always Informative, up to the minute and incredibly useful"

There is however as regards the December issue of our newsletter one sad element. That was that we used to always get an email every month to the firm from Eamonn G. Hall thanking us for our newsletter. Eamonn was unfortunately taken from this world.

Eamonn was a giant in the legal profession. He had a unique level of knowledge and experience and was regarded both as a great academic, a great lawyer and, in particular, a great teacher of the law. While we will miss the very kind comments, we always received from Eamonn we do greatly appreciate the positive comments we receive from those who are on our mailing list.

We hope those who receive the newsletter find it useful and helpful. We thank all of you who are on the mailing list and in particular those who take the time to respond which we do greatly appreciate.

Is There a Need for a Specific Right to Disconnect in Ireland

Since March 2020 as a result of the Covid-19 pandemic home working has now increased significantly. There are issues which are seen as positive such as the work life balance where people are not having to commute to work. At the same time there is issues of work life balance because of the perceived availability of employees because they are working from home.
There is an ongoing discussion as to the issue of the right to have remote working. However, at the present time with no definite date or time when the Covid-19 crisis will be over working from home is going to continue to be a significant issue for a large number of those at work.

The pandemic has transformed how we all work. Even when the pandemic is over there will be long lasting effects on employment and how people work going forward. There will be many who want to continue working from home even when their workplaces reopen. Others will want a split between the workplace and their home. There are those who want to get back to their usual workplace.

There are many challenges affecting both employers and employees in this discussion which is ongoing.

There are certainly health and safety issues and the potential for significant health issues to arise. The Irish Heart Foundation has estimated that those working from home are sitting down for an extra 2 hours and 40 minutes longer each day as compared when working from their usual place of work. There may be many reasons for this. The first can be the fact that employees are not commuting. Equally the movement around offices for meetings or to deliver something to another colleague has now stopped. Equally, those working from home are unlikely to be going out for lunch as may have happened when they were in the workplace. We also have the issue of back pain and possibly back injury from excessive sitting and lack of movement. There is the further issue of the potential for eye injuries due to the fact that employees will no longer be working on paper files but online. These are all challenges. There is then also the issue of the right to disconnect.

Those who are remote working are saying that there is a difficulty with disconnecting. The office is in your home. There is a consultation on flexible working and the Government is going to be looking at the issue of considering how to deal with this. There has certainly been a campaign to have a right to disconnect.

The issue is whether there is already that right. The Organisation of Working Time Act 1997 provides strong protections. Employees cannot work for more than four and a half hours or six hours without
taking a fifteen minute and thirty-minute break. The Act provides that employees cannot work in excess of 48 hours per week averaged over normally four months. Employees have to be given notice of overtime so that their contract provides that they work from 9 to 5 then asking them to work after 5pm or before 9am is one where notification needs to be furnished. There is no option for an employee to opt out. In Irish law the rest periods are mandatory and the obligation is on the employer to make sure that they employee receives those. There is an argument that employees who would not break the 48-hour rule are therefore effectively available up to 48 hours per week. That is not a correct interpretation of the legislation. The Labour Court has been clear that where a person’s contract provides a start and finishing time, and even if that would be less than 48 hours in a week, the employee is entitled to finish work at the allocated time unless notification has been given to them 24 hours in advance of a requirement to work overtime. In addition, the contract which the employee has would have to have a provision relating to overtime.

Moving ahead it is important that employers and employees know what their working hours are and know how those rights will be implemented. Bringing in new legislation will not change the current law which is quite strong. However, if this issue is to be addressed it will really have to be addressed on the issue of enforcement. Equally there needs to be clear and definitive guides which are legally enforceable which are available to employers and employees and which will be enforced by the WRC and the Labour Court.

As Employment Law and Personal Injury Law Solicitors we are conscious of the fact and aware that excessive working hours does create health issues which can ultimately end up not as a claim under the Organisation of Working Time Act alone but as a claim for personal injuries. We are also concerned that failure by employers to put in place appropriate work stations and to take account of the issue of working constantly online is going to create injury claims particularly in the area of back injuries and eye injuries.

This is a challenge. We have a new working environment. It is totally different than the environment that was in place in January 2020. January 2021 is different. In would be our view that January 2022 as regards remote working is not going to be any different than it is now except hopefully that we will not have the pandemic. Remote working
or partly remote working is here to stay. It will apply to a lot of companies but not all. Some businesses will, because of the way the business operates, be fully back in the workplace. There will be other businesses who will be possibly remote working all of the time.

What the pandemic has done is to turn the spotlight on to how we work, when we work, the issues of work life balance and the right to disconnet. The discussion on this is only starting but it will have to continue. It will be important for employers and employees to get the balances right.

**Covid 19 Vaccination – Can employers direct their employees to be vaccinated?**

The issue of vaccination against coronavirus have many employers in Ireland eager for their employees to be vaccinated. Employers are anxious for workplaces to get back to normality. However, the question is, is it feasible for an employer to insist on employees being vaccinated.

1. Should employers be encouraging employees to take the vaccine? The Safety, Health and Welfare at Work Act 2005 requires employers to carry out a risk assessment to identify health and safety risks. Employers must then take steps to remove or minimise any risks identified. As coronavirus is a risk certainly employers can encourage employees to be vaccinated to protect themselves and to protect anyone else in the workplace whether fellow employees, visitors or customers.

2. Can employers provide the vaccination to their employees? The simple answer to this is No. The rollout of the vaccine will be to those aged 65 and over in long term care, front line health care workers and those aged over 70. Younger employees will be offered the vaccine much later. The vaccine of course is not going to be commercially available for many months. There is also no current option for an employer to pay for the vaccine.
3. How will a vaccine impact on an employer’s risk assessment? Once the vaccine is available employers will need to update the risk assessment. This is to reflect the availability of the vaccine when it is rolled out. In view of the fact that some employees may well refuse vaccination this will have to be taken into account in any risk assessment. It is probably that additional measures may need to be put in place where an employee chooses not to be vaccinated but this in itself will cause difficulties which we will cover later.

Currently Covid-19 is not a notifiable disease under the infectious disease Regulations 1981 only in certain settings such as health and care. In those circumstances choosing not to be vaccinated could put patients at risk. Unless there is some legislation in place which requires mandatory vaccination, which is highly unlikely taking into account our Constitution, even in those settings, there are going to be difficulties certainly in requiring vaccination and then dealing with the risk assessments relating thereto.

4. Some employers will look to make it a mandatory health and safety requirement for employees to be vaccinated. The Safety Health and Welfare at Work Act requires employers to identify and reduce workplace risks as part of the risk assessment. It is likely that employers will ask employees to be vaccinated. Employees will have a duty also under the Legislation to cooperate with their employer to reduce workplace risks.

It may well be that employers will be able to show that having the vaccine is the most reasonably practicable way of reducing the risk of Covid-19, in the workplace, having carried out a risk assessment. On that basis it might be though in theory the employer could mandate the vaccination as a health and safety requirement. The Irish Constitution protects certain personal rights of Irish citizens including the right to bodily integrity, private and autonomy. This means that a competent adult must consent to medical treatment and can refuse it. Now
coronavirus is a contagion which threatens public health however, the public health interests to over write these individual rights would at a minimum require legislation. It would require legislation to be introduced to implement mandatory covid-19 vaccination however it is highly unlikely, in our opinion, that the Government will introduce a mandatory vaccination programme. It is as yet unclear as to whether even the HSE will require staff to have a Covid 19 vaccine when it is available.

In relation to the vaccine we are being told that the vaccine will prevent an employee, who has the vaccine from getting ill from Covid 19. It is however not clear whether someone who has received the vaccine could be asymptomatic but still infectious and currently it appears that may be the position. Therefore an employer trying to say that employees must get the vaccine to prevent the spread of Covid 19 in the workplace to other employees may not necessarily amount to a legitimate reason for mandatory vaccination as the vaccinated person could still be infectious. The difficulty which employers have at the present time is that there is a lack of evidence as to how effective the vaccine is going to be in preventing the spread of Covid 19. Employers will however have to take this into account when carrying out the risk assessment.

5. Are there other employer issues? Employers might think that it would be a good idea to provide that only those who get the vaccine can come back into the workplace. Those who do not have the vaccine will then be told they have to continue working remotely.

This is going to cause a number of difficulties.

The first is going to be a GDPR issue. If an employer has a policy that only those who have the vaccine can return to the workplace then every employee in the organisation is going to
know who has and who has not received the vaccine. This creates huge GDPR issues as regards private information relating to an employee. It would be our view that an employer, who attempts to put in, such a procedure, runs a significant risk of a claim.

There are a number of individuals who will not want to receive the vaccine. Some of these will actually be advised not to receive the vaccine. For example an employee who is considering having a child has been advised not to get the vaccine if they intend to get pregnant within the next three months. Again, refusing to allow an employee into the workplace in those circumstances raises not only issues relating to GDPR but also potential claims under the Employment Equality Acts for being treated differently because of their gender status. There will also be some on religious grounds who will object to getting the vaccine.

6. There will be those who have allergies and again there are health issues with an employee who has an allergy getting the vaccine currently. Requiring an employee in those circumstances to get the vaccine then creates issues again under GDPR if they do not get the vaccine and possibly again issues under the Employment Equality legislation in relation to disability discrimination.

There will be side effects of the vaccine. That has already been stated. An employer who requires an employee to get the vaccine, so that they can return to the workplace, then runs a significant risk that if the employee is one of those who has a reaction to the vaccine or subsequently suffers some form of injury as occurred with the swine flu vaccine the employer in those cases may well find that they have a potential liability for the Personal Injury sustained by the employee. Therefore employers who are even considering this as regards requiring employees to have the vaccine will need to check with their insurance company that they will be covered in the event that
the employee is one of those who suffers an injury as a result of receiving the vaccine. There will then be issues relating to individuals who have either religious or ethical objections. While most religions have no difficulty with vaccination some do. Therefore on that basis again there will be issues under the Employment Equality Legislation of potential discrimination claims.

**Conclusion**

Of course there are huge benefits for employers and employees that vaccination takes place. There will however be a number of employees who will have concerns. Therefore at the present time it would appear that while employers may encourage employees to get the vaccination employers would be and should be wary of bringing it in as a requirement to return to the workplace.

There may well be matters which will arise in the coming months which will make having the vaccine a necessity for a lot of employees. It may well be that for the purposes of taking a flight individuals will need to have a vaccination certificate. It may well be that for those wishing to attend large sporting or cultural events that there will be a requirement to have a vaccination certificate. So it may well be that somebody who wishes to go on holidays to Spain or who wants to go to a GAA hurling final or an indoor concert may despite any reservations which they may have may take the view that it will be better to actually get the vaccination so that they can get on with their social life outside of the workplace and that may then assist in increasing the numbers who will actually get the vaccination.

This is an area where employers will need to get appropriate advice so as to avoid potentially significant claims against them. Equally, it will be one where, we have no doubt, employees will be getting advice.

It is to be hoped that the Health and Safety Authority will bring out guidelines on what risk assessments need to be undertaken in light of the vaccine. What employers should do where only some of the employees are vaccinated and how, employers are going to deal with the complex legal and GDPR issues around obtaining information on
vaccination and how it is dealt with in the workplace. This is an evolving issue and it is one we will be keeping under review. Saying this at the present time our advice to employers is that they do not insist on vaccination. Where an employee discloses that they have received the vaccination then employers have in place the appropriate policy to deal with Data Protection and GDPR issues surrounding that information being maintained on a system or on a file, and, that employers are extremely careful to make sure that information relating to vaccination is only disclosed to those within the organisation who absolutely need to have that information.

Selection for a Position

This issue arose in case ADJ-00018470 under the Equality Legislation. The Adjudication Officer in this case pointed out that the law requires the complainant to discharge the burden of proof being the initial burden of proof.

They Adjudication Officer quoted the case of Southern Health Board - v- Mitchell where the Labour Court said

"The test requires the complainant to prove the primary facts upon which he or she relies in seeking to raise an inference of discrimination. It is only if the initial burden is discharged that the burden of proving that there was no infringement of the principles of equal treatment passes to the respondent. If the complainant does not discharge the initial burden which he bears, his case cannot succeed"

The Adjudication Officer pointed out that the respondent had submitted the case of Cork City Council -v- Ciaran McCarthy EDA 0821 where the Labour Court stated that the complainant must demonstrate that the primary facts grounding his complaint are of sufficient significance to raise an inference of discrimination. The Adjudication Officer pointed out that the respondent also submitted the case of Graham Anthony & Co. Limited -v- Margaretts EDA 038 that mere membership of a protective class is insufficient in itself.

When it comes to the issue of selection for a post the Adjudication Officer in their decision stated that the Labour Court had stated that it has not any function in placing itself in the position of those
carrying out an assessment of candidates to a role. In the case of Director of Public Prosecutions and Sheehan EDA 0416 the Court described its functions as follows

"In the present case, the responsibility for assessing the merits of the candidates for the disputed post was deputed to a selection board consisting of members whose qualification for the task assigned to them is beyond question. In these circumstances, and in the absence of evidence of unfairness in the selection process or manifest irrationality in the result, the court will not seek to undertake its own assessment of the candidates or substitute its views on their relevant merits for those arrived at by the selection board"

This is a helpful decision by the Adjudication Officer on the law in this area.

**Unfair Dismissal**

In ADJ-00026601 the Adjudication Officer was dealing with an Unfair Dismissal case.

The Adjudication Officer quoted the case of Devaney -v- DNT Distribution Company Limited UD412/1993 where it was held that what was necessary was to determine what was the employer's intention towards the employee considering all the circumstances. In the circumstances of the incident case the MD's actions in telling the complainant "make arrangements to get your belongings out of this kip tomorrow" and also told him to "go get out" when he presented at the workplace the following day coupled with the fact that the respondent did not write or contact the complainant following him being dismissed clearly shows the respondent intended to dismiss the complainant. The Adjudication Officer also quoted

21-17 employment law in Ireland - Neville Cox, Val Corbett, Desmond Ryan first edition 2019 where it states

"The Tribunal will be sympathetic towards employers who may have spoken in the heat of the moment. In Martin -v- Yeoman Aggregates Limited 1983 IRLR49 the employee was asked to collect a part for a car that needed repair and when he returned with the incorrect part, he
had a row with his employer (one of the directors of the company). He refused to return and collect the correct part and his employer dismissed him for disobeying the order. Within a couple of minutes, the director realised that by summarily dismissing the employee, he had breached his own company disciplinary procedures. He immediately informed the employee that he was suspending him with full pay for 2 days. The Tribunal held, that as a matter of policy, it makes good industrial relation sense to allow employers and employees an opportunity to recant words said in the heat of the moment. There was no dismissal”.

It is helpful that the Adjudication Officer has set this out.

In addition, the Adjudication Officer pointed out that it was not helpful that the employer did not have a disciplinary policy or procedure.

**Dismissal for Misconduct**

This issue was addressed in case ADJ-00025649.

The Adjudication Officer pointed out that it is the role of the Adjudication Officer to assess what a reasonable employer in the respondent’s position and circumstances might have done. The Adjudication Officer pointed out this is the standard of the respondent’s action which must be judged against. The Adjudication Officer also pointed out it is well established in case law that it is not the role of the Adjudication Officer to establish the guilt or innocence of the employee.

It was pointed out that in assessing the duty of an employer before dismissing an employee for misconduct the Employment Appeals Tribunal laid down a three-part test in the case of Bigaignon -v- Powerteam Electrical Services Limited 2012 ELR195. The test was set out as follows

1. Did the company believe that the employee misconducted himself as alleged? If so
2. Did the company have reasonable grounds to sustain that belief? If so
3. **Was the penalty of dismissal proportionate to the alleged misconduct**

The Adjudication Officer pointed out that the EAT had held that any employer who satisfies the above test can lawfully dismiss an employee for misconduct. This is a useful statement of the law on this issue by the Adjudication Officer.

**Unfair Dismissal, the test of whether it is a Fair Dismissal or not**

In case ADJ-00021140 the Adjudication Officer quoted the case of Reilly -v- Bank of Ireland 2015 IEHC241 where the question is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned.

The case of Adesokan -v- Sainsbury’s Limited 2017 EWCA Civ 22 was also quoted which was an appeal by a manager against a dismissal for gross misconduct. The decision to dismiss was upheld as Lord Elias found that the manager’s omission constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. The Court in that case noted that the manager seemed to have been indifferent to what in the company’s eyes was a very serious breach of an important procedure. It found that gross negligence is sufficient to amount to gross misconduct and deliberate conduct is not required.

**Discrimination on the Race Ground - Employment Equality Act 1998**

In case ADJ-00027767 being the case of Krzysztof Tryka and Thermal Insulation Distributors Limited the employee claimed that the company’s sick pay scheme was applied less favourably to him, being a Polish national, when compared to Irish nationals who had been treated more favourably and paid under the said plan.

The Adjudication Officer held that the complainant had very strong feelings about perceived unfairness concerning how the discretion was
applied regarding sick payment. The Adjudication Officer quoted Section 85A which provides

"Where in any proceedings facts are established by or on behalf of a complainant from which it may be presumed that there has been discrimination in relation to him or her, it is for the respondent to prove to the contrary"

The employee contended that he had been told by two Irish nationals that they had received a discretionary payment.

The Adjudication Officer quoted the case of Valpeters -v- Melbury Developments Limited 2010 21ELR64 where the court stated

"Knowledge of how the complainant’s fellow workers were treated is not exclusively or almost exclusively within the knowledge of the respondent. Nor could it be said that it is peculiarly within the range of respondent’s capacity of proof. It is also plainly within the knowledge of those other workers. The complainant could have sought to ascertain from those workers if they were treated as sub-contractors or as employees. If necessary, those workers could have been required to attend at the hearing and testify as to how they were treated. For these reasons the court cannot accept that the peculiar knowledge principle can avail the complainant so as to relieve him of the obligation to prove the primary facts upon which he relies in accordance with Section 85A of the Act"

The Adjudication Officer held that no evidence to support the claim other than the complainants own account. No witnesses had been requested to attend. The complainant the Adjudication Officer held relied on an assumption that in any calendar year the slate is wiped clean and once a medical certificate if obtained in that calendar year the sick pay benefit is automatically paid. The Adjudication Officer held that the complainant’s evidence had not established that a standard company practice existed.

In these types of cases, it is often difficult for an employee to prove matters. Even employees proposing to contend that some other person has been treated differently then in those circumstances it is very important for the employee to have some evidence. This could be
payslips. It can be calling other employees as witnesses but it is some evidence to back it up.


In this case the Adjudication Officer pointed out that in the Dekker -v- Stichting case being case C-177/88 the European Court of Justice stated that discriminatory acts related to pregnancy or directly discriminatory on the gender ground and that a pregnant woman cannot be compared to either a sick man or a non-pregnant woman.

The Court found that pregnancy is a uniquely female condition, where a woman experiences unfavourable treatment on grounds of pregnancy such treatment constitutes direct discrimination on the gender ground within the meaning of the Equal Treatment Directive 76/2007/EC. In relation to the issue of the burden of proof the Adjudication Officer set out Section 85 and held that firstly the complainant must prove the primary facts upon which he or she relies in alleging discrimination.

Secondly, the Court or Tribunal must evaluate these facts and satisfy itself that they are of sufficient significance in the context of the case as a whole to raise the presumption of discrimination.

Thirdly, if the complainant fails at step one or two, he or she cannot succeed. However, if the complainant succeeds at stage one and two the presumption of discrimination comes into play and the onus shifts to the respondent to prove, on the balance of probabilities, that there is no discrimination.

In this case the Adjudication Officer held it was a common case that the complainant was pregnant and informed the respondent of the fact. The Adjudication Officer stated that the law is quite clear that where pregnancy is concerned that the fact is that the complainant had notified the respondent and that constitutes a prima facia case and that means that the burden of proof shifts to the respondent. The
Adjudication Officer held that there had been discrimination and awarded €20,000.

This is a case where the complainant had registered with the respondent and received three weeks work in late December 2019/early January 2020 and in January 2020 she had been told there was a 23-month contract coming up and if she was interested to let her name go forward. On the 14th January she told the recruiter she was pregnant and on that date the recruiter sent an email to her in relation to the 23-month contract saying that they could put her name forward for shorter roles up until May.

It is very important when offering jobs that an employer is very clear that there should be no discrimination in relation to the issue of giving a woman a contract of employment even if she is pregnant. The fact that she is pregnant is not a ground for not giving her or considering her for a particular position.

**Employment Equality Act – Discrimination on the Gender Ground**

In case ADJ-00007375 being a case of Yvonne O’Rourke and Minister for Defence is one that has received a lot of attention. This is a case where we will be looking at matters simply from the issues of the legal principle set out by the Adjudication Officer. The Adjudication Officer in particular referred to the Recast Gender Directive and Recital 23 which provides

"It is clear from the case law of the Court of Justice that unfavourable treatment of women related to pregnancy or maternity constitutes direct discrimination on grounds of sex"

The Adjudication Officer pointed out that there was three cases which established clearly that an absence of maternity leave and pregnancy related sick leave must not be equated to a man’s absence on sick leave. These are case C-77/88, C-179/88 and C-32/93. In the Webb case which is C-32/93 the CJEU stated

"There can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy... of performing the task for which she was recruited with that of a man similarly incapable for
medical or other reasons. As Mrs Webb rightly argues, pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations which may justify the dismissal of a woman without discriminating on grounds of sex..."

In this case the Adjudication Officer held that the army had treated the absence of the complainant with those of a male officer who would have been absent for sickness and concluded that a male officer would have received the same treatment. The Adjudication Officer pointed out that this was a fundamental error. The Adjudication Officer looked at the issues relating to discrimination and direct and indirect discrimination.

In relation to the issue of the termination and effectively victimisation the Adjudication Officer held that Counsel for the complainant was correct that a complainant does not need to prove intent. Essentially something similar to MENS REA to raise a valid complaint of victimisation.

**Redundancy Claims - Delay in Bringing the Claim**

This issue arose in case ADJ-00025678 where the claim was lodged outside the statutory period. For a Redundancy Payment Act Claim the period is one year. This can be extended to two years. In this case the former employee had been advised by the employer that all matters would be dealt with. It was only when the employee received a letter from the Department of Social Protection informing him of the withdrawal of the claim that he understood that matters had not been dealt with. The case of Alert One Security - Taimoor Khan DWT1572 was quoted. That is a case where the Labour Court held

"In general, ignorance of one’s legal rights, as opposed to the underlying facts giving rise to those rights, cannot be accepted as excusing a failure to comply with a statutory time limit. In the instant case the claimant if not relying on ignorance of the law, per se. Rather, as the court understands it, he is relying on the combined effect of his lack of knowledge of how to process a claim and on the assurances given to him by the respondent that he was either receiving his legal entitlements or that those entitlements would be met by the respondent."
In that regard it is well settled that material misrepresentation by a party which caused or contributed to a delay in initiating a claim can constitute reasonable cause which both explains the delay and provides a justifiable excuse for that delay. In all the circumstances the Court is satisfied that the respondents’ misrepresentations to the claimant constitutes reasonable cause for the delay in presenting the within claim.”

In this case the Adjudication Officer extended the time.

**Appeals to the Labour Court - Extension of Time**

This issue arose in the case of Brian Dunne and Christopher Clifford DWT206. This is an issue which regularly arises and helpfully the court has reset out the law in clear and definitive terms.

The Court in this case stated that it is settled law that in order to consider an appeal the court must first be satisfied that exceptional circumstances were in existence.

The Court in this case stated

“The court addressed the issue of exceptional circumstances in its decision... in Gael Scoil Thulach Na nOg and Joyce Fitzsimons - Markey EET034 as follows

“The court must first consider if the circumstances relied on 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 claim in 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 then importantly went on to state
The burden of proof in establishing the existence of exceptional circumstances rests with the respondent in this case. To discharge that burden the respondent must present clear and cogent evidence to support the contention that exceptional circumstances within the meaning of Section 44 (4) of the Act of 2015 existed and that those circumstances acted so as to prevent the applicant from lodging his appeal in time.

This is an important restatement of the law by the Labour Court.

Maternity Protection Acts 1994 & 2004

In a case of Tesco Ireland Limited and Sajkozdryk MPD2001 the employee claimed that the respondent employer failed to allow her to return to the job she had immediately before she commenced her maternity leave. The Adjudication Officer had directed the employer to reinstate the complainant into a position in the payroll department or alternatively into a position that is similar and acceptable to the complainant but also ordered compensation of €3,631.60. The employer appealed that decision.

The employee contented that she was working in payroll when she went on maternity but did not return to work in payroll. The employee relied on Section 26 (1) (B) of the Acts. The employee returned to work with no assigned department.

The union representing the employee relied on the case of Tighe -v- Travenol Laboratories (Ireland) Limited 1989 8JISLL where the EAT held that a woman who had previously been employed as an office worker and returned following maternity leave to be given production work was constructively dismissed. The EAT held that the nature of the work involved in production was so different to office work that it did not consider it appropriate from the employee’s stand point. The employer contented that the employee was a general sales assistant/customer assistant and was assigned into the training department on her return as it was not possible to assign her to payroll colleagues have been moved around. The employer contended it was standard practice that individuals would move around.
The Court in this case set out Section 26 in full. The Court pointed out that the section being Section 26 of the Acts provides a general right to return to work on expiry of maternity leave to the job which the employee held immediately before the start of her leave. The Court pointed out that Section 26 (3) of the Act defines "job" in relation to an employee and refers to the nature of the work which she is employed to do in accordance with her contract of employment and the capacity in place in which she is so employed.

The Court in reviewing the law on this stated it was satisfied that the reference to "nature of work" meant the job as described in her contract of employment.

The court looked at the definition of what the word "capacity" was and referred to the Oxford Dictionary as being "a specified role or position"

The Court therefore held it was satisfied that "capacity" in which the employee was employed is graded as a general sales assistant/customer assistant prior to taking maternity leave was in the payroll department a position she had held for three and a half years. The court found that the complainant should have been returned to that role/position which she held immediately before the start of her maternity leave. The court pointed out that her contract of employment required flexibility.

The Court referred to the case of Holland -v- Athlone Institute of Technology 2012 23E.L.R.1 which was a claim under the Protection of Employees (Fixed-Term Work) Act 2003 where Mr Justice Hogan had pointed out that an employee who acquired a contract of indefinite duration by operation of law is not placed in a superior position to that of other employees. The court pointed out that it follows on the same basis that an employee returns to her job on the completion of maternity leave is not placed in a superior position. The Court found that the employee should have been returned to the payroll department.

The Court then looked at the provisions of the right of redress. The Court pointed out that this complainant had sought reinstatement to the role in the payroll department which she occupied prior to her maternity leave and an award of compensation. The Court pointed out that the complainant was currently on sick leave and therefore the
Court in exercising its discretion as provided for under Section 32 (2) made no direction regarding the return to work. The Court held that the appropriate redress in this case was an award of compensation and the compensation was increased to a little over €7,000 being 20 weeks wages.

**Safety Health and Welfare at Work Act, 2005**

The issue of bringing a complaint under the Act for suffering a detriment arose in case ADJ-00024736. The relevant legislation is Section 27 which refers to penalisation which includes an act or omission by an employer or person acting on behalf of the employer that affects to his or her detriment an employee with respect to any term or condition of his or her employment.

The Adjudication Officer in this case referred to the case of O’Neill -v- Tony & Guy Blackrock Limited 2010 21ELR1 (being a case where this office represented the employee) where the Labour Court set out that the requirement in this regard is that

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

The Adjudication Officer pointed out that the second requirement is that the worker must have suffered a detriment for having raised a concern protected by the Act. It was pointed out that this requires that the complainant must show that there was a detriment.

It is useful that the law has been restated on this point.

**Banded Hours Claim**

In the case of Aer Lingus and O’Leary DWT207 the issue of how a banded hours contract is calculated was dealt with by the Labour Court in great detail.

The relevant section that the employee was claiming under is Section 18A. The argument from the employer was that in calculating the average hours of work it is a period of 52 weeks and that the hours
worked are then divided by 52. However, the employer argued that the period of time while on annual leave would not be taken into account. The Court went through the provisions of Section 2, 18A and Section 19 of the Act in great detail. The Court in its decision pointed out that the argument by the respondent was that the hours actually worked would be divided by 52 weeks not withstanding that the employee would only work for 48 weeks only while they were on holidays. The employee contented that excluding the time spent on annual leave would provide an average of hours worked less than the normal working hours.

The Court pointed out that Section 19 sets out the statutory entitlement to annual leave at subsection 5 which provides that an employee shall for the purposes of subsection 1 be regarded as having worked on a day of annual leave the hours he or she would have worked on that day had it not been a day of annual leave. Section 22 provides that time off granted to an employee under that section or section 19 is to be regarded as time worked by the employee.

The Court pointed out that the Act at section 18A sets out protections to be afforded to workers which are unrelated to protections from the Working Time Directive. The Court pointed out that it must therefore look at the Act itself to establish the meaning of the disputed provisions of the section rather than the Working Time Directive. The Court pointed out that this is despite the protections guaranteed therein. The Court pointed out that the plain purpose of the provision is to make sure the number of hours specified in the contract of employment reflects the employees actual working week.

The Court pointed out at Section 18A of the Act does not provide a definition of the term “hours worked”. Section 2 of the Act does not set out the term "work" as to how it should be construed in accordance with the interpretation of the term "working time". The Court stated they were satisfied that the treatment of annual leave required by Section 19 related to the treatment of such leave for the purposes of Subsection 1 of that section only and the court also noted that Section 2 of the Act requires that "in the act" the term "annual leave" shall be construed in accordance with Section 19. The Court pointed out that the term "annual leave" is not used in Section 18A of the Act. The Court therefore was satisfied that there was no provision of the Act which provided a means to interpret Section 18A (4) such
that the meaning of the required resting of an employee to determine the average number of hours by that employee per week during the reference period can be said to be clearly set out. In particular, the Act does not set out how time spent on annual leave is to be treated in the calculation of the average. The court pointed out that it could not simply import the treatment required of annual leave in Section 19 into Section 18A and neither could it apply the meaning of the term annual leave set out in Section 2 of Section 18A which does not use that term.

The Court was of the view that Section 18 (4) of the Act appeared to be ambiguous and that where a literal interpretation of the term "the average number of hours worked by the employee per week" as used in that subsection would fail to reflect the intention of the Oireachtas. The Court pointed out that it was necessary then to interpret the legislation in the manner provided for in Section 5 of the Interpretation Act 2005. The Court concluded that the only reasonable means to ensure that the plain intention of the Oireachtas could be achieved is by interpreting Section 18A (4) so as to mean that the divisor to be used to calculate the average number of hours worked by an employee per week during the referenced period should be determined by excluding the number of weeks spent on annual leave in the period.

This is an important decision by the Labour Court. Employment lawyers had been split as to how the Act was to be interpreted taking into account the wording of the legislation. The Labour Court have taken not only a practical but a legal interpretation as to how this is to be done. It is beneficial that this matter has now been resolved clearly by the Labour Court.

It is unfortunate that this is another example of very poor drafting of legislation by the Oireachtas. However, in this case the Court has been able to interpret the legislation in a way which makes sure that periods spent on holidays will not be excluded in calculating the average. Accordingly, where a person is on holidays for four weeks the divisor will not be 52 but will be 48. This makes absolute common sense.
Salary Reductions

In case ADJ-00027956 the Adjudication Officer helpfully set out the law in relation to Section 5 in some detail. The Adjudication Officer stated it is still the Section 5 outlaws all deductions or reductions except authorised deductions.

The Adjudication Officer also quoted the case of Dunnes Stores (Cornellscourt) Limited -v- Lacey 2005 IEHC417 where it was held that a deduction under the Act occurs where the amount paid is less than the wage properly payable to the employee.

This issue is likely to arise as an issue in relation to those who have been on lay off or short time where contracts may not have provided for a provision to have lay off or short time.

This is an area which there will be a lot of disputes on going forward.

Sunday Premiums

This issue arose in the case of Noonan Services Group Limited and Cecilia Cristina Festeu.

The case is interesting in that the contract, which is an undated contract stated

"Sunday premiums - employees who work on a Sunday and who are not entitled to overtime will receive a Sunday premium at the rate of a time and third for all hours worked on that day...."

The employee in this case referred to the case of Viking Security Limited and Valent DWT1489 in support of her claim. That was a case where the Labour Court had stated

"Where an hourly rate is intended to reflect the requirement for Sunday working that should be identified and clearly and unequivocally specified at the time the contract of employment is concluded either in the contract itself or in the course of negotiations"
The employer submitted that a 20% shift rate referred to in a particular form was an allowance which incorporated a Sunday premium. The employer relied on the case of Trinity Leisure Holding Limited trading as Trinity City Hotel -v- Kolesnik and Other 2019 IEHC654. That was a case which was appealed from the Labour Court to the High Court. That is a case where the High Court stated

"The contract states that the hourly rate of pay "includes your Sunday premium based on you getting every third Sunday off"

The Court pointed out that under Section 14 of the Organisation of Working Time Act an employee who is required to work on a Sunday is entitled to an additional benefit in respect of that requirement. The Court pointed out that what is intended by this provision is that a worker who is obliged to work on a Sunday is entitled to compensation for that obligation in the form of a benefit which he or she would not receive if they were not so obligated. The Court pointed out that this can take the form of an enhanced rate of pay over and above what he or she would have received.

The Court stated that this case was one which can be distinguished from the facts in Trinity Leisure Holding Limited. In that case the High Court had determined that the contract expressly stated that the hourly rate of pay "includes your Sunday premium". The Court pointed out that any ambiguity between the form and the statement should be resolved in the complaints favour. On that basis the employee was entitled to time plus one third.

This is a very helpful decision of the Labour Court in relation to this issue.

In the past the Court even where there was a premium set in the contract the Labour Court would look to see if that was reasonable in all the circumstances. That approach changed after the Trinity Leisure Holding case. Now effectively the position is that if a contract specifies any amount to cover a Sunday premium then in those circumstances provided the contract is clear and precise on the point then that is the only premium which the employee is entitled to receive. If for example a contract provided
"You will receive the national minimum rate of pay applicable at the relevant time. You will receive an additional one cent per hour. This rate of pay shall include any Sunday premium to which you are entitled to”.

**Prevention of Corruption (Amendment) Act 2010**

This Act arose in the case of ADJ-00027189. In relation to penalisation, the employee contended quoting the case of John Clarke and CGI Foods Limited and CGI Holdings Limited 2020 IEHC368 where at paragraph 19 Mr Justice Humphreys stated

"Unfortunatley, it is not difficult to performance manage someone out of a job"

The Adjudication Officer quoted Section 5 of the Protected Disclosure Act 2014 which sets out the definition of a Protected Disclosure.

The Adjudication Officer looked at whether there was protected disclosure. In addition, the Adjudication Officer looked at the issue as to why the complainant had selected the Prevention of Corruption (Amendment) Act 2010. The Adjudication Officer pointed out that no mention was made of having made a protected disclosure but that it was at a later stage where this was stated and the Adjudication Officer was of the view that his decision to do so was in response to the employers submission and the references contained in that submission to the decision of the Labour Court in Boyne Valley Foods and Barry Tyndall PCD201 where the court determined it had no jurisdiction to hear that complaint under the Act 2010 finding instead that the issue complained of were wrongdoings under the Protected Disclosure Act. The Adjudication Officer held that the employee had not made a claim which could be upheld under the Protected Disclosure legislation.

The issue in relation to these cases is that it is imperative that employees choose the correct legislation. It is possible to have matters changed subsequently but this is an issue which it is important that the claim is put in under the right legislation at the right time.
Social Welfare - Those Seeking Work

The Social Welfare (Consolidated Claim, Payment and Control) (Amendment) (No.17) Persons Regarded as Genuinely Seeking Employment) Regulations 2020 SI574/2020 confirm that where due to the ongoing public health restrictions related to Covid-19 a person’s opportunity to work in their normal occupation is temporarily limited and they have a reasonable expectation of returning to that occupation or a person has a reasonable expectation of returning to their formal employment that person will not be required to seek employment outside that occupation or employment for the period of twelve months from first claiming Covid-19 PUP. This Statutory Instrument commenced on the 19th November 2020.


These Regulations provide for ancillary matters arising from the insertion by the Social Welfare (Covid-19) (Amendment) Act 2020 of provisions dealing with the Covid-19 PUP into the Social Welfare Consolidation Act 2005. The Regulations provide that as respect the prescribed time for making a claim for Covid-19 Pandemic Unemployment Payment and the circumstances under which late claims may be accepted, the same provisions will apply to job seekers benefits. The Regulations also provide that where a decision made by a Deciding Officer relates to the non-approval of a claim for Covid-19 PUP or the rate at which the Covid-19 PUP is paid is less than the maximum rate the claimant must be advised of the decision in writing and the reasons for that decision. The Regulations specify the social welfare payments which may be paid concurrently with Covid-19 PUP. These Regulations commenced on the 5th August 2020.

Remote Working - The Danger of Personal Injury Claims

It is now clear that an increasing number of people are attending physiotherapists with back and neck pain directly as a result of the
recent changes in work practices where people are now working remotely either fulltime or part of the time.

Physiotherapists are reporting an increase in the number of back and neck complaints coming to them. The top reasons for this appear to be prolonged immobility, a lack of exercise and sitting incorrectly. For many they will not miss the daily commute to and from work. There are the efficiencies of home working. It means better work life balances. Technology is helping in relation to remote working.

However, because people no longer have to travel to work, they are not walking around as much while they are working at home a sedentary lifestyle can creep into daily work. Now people are spending more and more time sitting.

Some 20% or 1 in 5 of office workers are now starting to complain about back injuries.

Sitting for a long time has an impact on a person’s back. Because the lower and middle spine is tilted forward the neck has to work harder to keep the head upright and this can result in neck pain.

In addition, bad posture or slouching actually are not proven to cause back pain. However, a lack of exercise is linked to back pain and other health problems.

It is important that home offices must be optimised to promote a healthy workplace. This applies to those who spend long hours at a desk, on video call, typing or using a mouse.

Even a small support cushion placed behind the lower back helps. For others a standing desk which has an adjustable height to allow work while standing up can equally stop back injuries.

What is emerging is that there is now a lack of movement for workers. This means that injuries which could be avoided are unfortunately happening.

As Workplace Accident Claims Solicitors and Personal Injury Solicitors we are seeing this issue of back pain arising more and more often. As Employment Law Solicitors we are constantly advising employers to
make sure that work stations are properly set up. A work station in a person’s home is for the law treated as if it is in the workplace itself. Just because a person is working from home does not mean that their workstation should be any less standard than they would have if in the office or workplace.

There will be, unfortunately, an increase in claims relating to back pains due to ineffective and inefficient home workstations.

Remote working has huge advantages for businesses and for employees. It creates a work life balance that many are looking for. However, not putting in place proper workstations is going to have a negative impact.

The first of course is a claim against an employer. That is expensive. It impacts on their insurance. For employees bringing such a claim this will often be the last resort. For both employers and employees, the issue of an incorrect workstation may mean that that employee ends up out of work for a time. This has a negative impact on productivity but also there is the potential loss of earnings for the employee if the employer does not pay sick pay.

In our practice as we combine employment law, accident claims and personal injury claims we are seeing the potential for a significant rise in personal injury claims against employers, by employees, because proper workstations have not been set up for remote working. Many have been working remotely for the last nine months. Now is the time to make sure that proper workstations if not already in place in employee’s homes are put in place to minimise the risk to both the employer in having a claim against them and the cost of an employee being sick with the lack of productivity as a result thereof and in the case of employees that they do not suffer an injury and have a situation where they feel that they need to bring a claim against the employer because of the pain and suffering that they are suffering which could have been avoided by simply putting in a proper workstation in their home.

*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.**