

**Take care in signing a Settlement Agreement or you may find as a Director, Executive or Employee you are bound by its terms and cannot bring a claim at a later date.\***

This issue arose in case ADJ-00029236. The case involved a Director of Client Services and a Provider of Merchant Services. The employee was paid a little over €76,000 per annum. The employment was terminated in April 2020 on the basis of it being a redundancy. The director, being a senior executive, claimed he was unfairly dismissed. The issue in this case turned on the settlement agreement which he signed.

The Adjudication Officer in this case reviewed the law in detail.

The Adjudication Officer pointed out that Section 13 of the Unfair Dismissal Act renders void any provision in an agreement which purports to exclude or limit the application of any provision of the Unfair Dismissal Legislation.

Section 13 sets out

*“A provision in an agreement (whether a contract of employment or not and whether made before or after the commencement of this Act) shall be void insofar as it purports to exclude or limit the application of, or is inconsistent with, any provisions of this Act”*

In *Herlihy -v- Royal Yacht Club 1997 ELR225* Judge Buckley in the Circuit Court considered

*“Under what circumstances can claims be legitimately compromised”*

Judge Buckley held that claims may be legitimately compromised when he stated:

*“In several areas of the law the Supreme Court has held that any consent by a person to waive a legal right which that person has, must be an informed consent. This doctrine must surely apply to contracting out provisions and to Section 13 in particular”*

Effectively Judge Buckley was saying that a compromise agreement can limit the provisions of the Unfair Dismissal Act to restrict an employee bringing a claim.

The Adjudication Officer pointed out that the Labour Court in Sunday Newspaper Limited -v- Kinsella and Bradley 2006 17ELR325 held that a provision in a Statute prohibiting contracting out does not prevent the parties from lawfully agreeing to settle or compromise claims based on the Statute. The Adjudication Officer however pointed out that the Labour Court noted there was a difference between a genuine bargain to settle which is lawful and enforceable and an attempt to exclude or limit the Act.

The Labour Court in Keeling's Retail Unlimited Company -v- Wasim Haskiya UDD2033 approved the conclusions as regards relevant legal authorities including the Sunday Newspaper Limited case when they stated:

*“It is clear from the authorities that a provision in a Statute prohibiting contracting out does not prevent parties from lawfully agreeing to settle or compromise claims based on the Statute. There is, however, often a subtle but substantial difference between a genuine bargain to settle or dispose of a claim which is lawful and enforceable and an attempt to exclude or limit the Act which is void and have no effect. The case law indicates that the following considerations are relevant in distinguishing the former from the latter*

- 1. The terms of any waiver must be construed strictly against the party from whom it emanated. Where there is doubt the course of negotiations between the parties should be examined so as to ascertain what was intended.*
- 2. An agreement to waive statutory rights must be supported by adequate consideration.*
- 3. The waiver should normally arise from an agreement reached as a result of meaningful negotiations and professional advice having been sought and given.*
- 4. The waiver should list the various Acts being taken into account.*
- 5. The waiver is only valid if it is based on a free and informed consent given by a person with full knowledge of their legal rights.*
- 6. It is for the employer to ensure that the worker is capable of giving an informed consent and the employer should normally advise the worker in writing to obtain professional advice before inviting him or her to sign a waiver”*

In this case the respondent employer had also quoted the case of Herlihy -v- Royal Yacht Club 1977 ELR225 and also had relied on the Labour Court decision in Eircom Limited -v- A Worker AD0720 where the Labour Court held that a settlement agreement entered into by the parties, signed by the employee, witnesses by the Solicitor for the employee, constituted a legal agreement between the parties and consequently the Court had no jurisdiction to hear the appeal.

In this case it is clear that the Director who was a senior executive was advised to get legal advice. The Director got legal advice. In fact they, on the basis of legal advice, looked to have a part of the agreement varied. The severance agreement was then signed by the Director and witnessed by a Solicitor. The Adjudication Officer held that the agreement was valid.

There are a number of important lessons which can be learned from this case.

1. An employee before signing any settlement agreement should always get legal advice and be fully aware of what they are signing.
2. Once the employee is strongly advised to get legal advice, and this is made clear to them, and if they refuse, the agreement can still be valid.
3. It is best practice for an employer not only to advise the employee but also to provide a contribution towards their reasonable legal costs in having the agreement reviewed independently by a Solicitor acting for the employee.
4. That the employer seeks to have the agreement witnessed by a Solicitor acting for the employee.
5. If an employee feels under pressure to sign an agreement, they should of course tell their Solicitor.

There is likely to be a significant number of redundancies for senior executives and senior managers arising in 2021, probably as a result of the pandemic, and it is vital that they get appropriate legal advice before signing any agreement. Not getting the legal advice does not mean that the agreement will not be valid. It is therefore important that any exit documentation is very clearly negotiated and that executives get appropriate advice before doing so as regards any final agreement.

**\*Before acting or refraining from acting on anything in this guide, legal advice should be sought from a solicitor.**

**\*In contentious cases a solicitor may not charge fees or expenses as a proportion or percentage of any award or settlement.**