Welcome to the May Issue of Keeping In Touch

The big story in relation to employment has been those surrounding the pandemic. WE have had two important publications. The first was the Code of Conduct on the Right to Disconnect. The second was the updated Work Safety Protocol.

In relation to the Code of Practice and the Right to Disconnect in fact the code is one which we have been critical of as it attempts to actually reduce protections which are in the Organisation of Working Time Act. One of these is the right, under the Act, to require 24 hours' notice of a requirement to work outside your normal working hours except in exceptional circumstances. The code proposes that on an infrequent basis an employer can contact an employee to do work outside the normal working hours without having to give 24 hours' notice. We have the situation that the Code, which has no legal standing, can be of course referred to in cases before the WRC and the Labour Court. It will be interesting when issues arise relating to how the Code is applied to the legislation. The legislation is the law and that would have to take precedence over the Code.

The second one is the issue relating to the Work Safety Protocol as businesses attempt to get back working. There was a lot of talk about antigen testing. The Work Safety Protocol now proposes that antigen testing is allowed but provides that it should be voluntary. This raises the issue as to what is the benefit of antigen testing if only some employees in a workplace are tested. Unlike the UK where two free tests per employee are provided to any business which wishes to have this facility no support is coming from the Irish Government. We also have however the issue that the Data Protection Commission has serious concerns about antigen testing and the keeping of records relating to same. There is an issue where that there is little or no joined up thinking as to how this is going to apply in practice.

As regards vaccination the proposal is that it would be voluntary and that if an employee does not wish to be vaccinated that in those circumstances they would be "redeployed". One wonders whether this was thought up by those in the Public Service where redeployment is relatively easy. It is difficult to understand how a business such as a restaurant that has a chef who does not wish to be vaccinated can redeploy that individual. The same would apply to those serving

tables. You equally would have the situation of a warehouse, coffee shop, or, a clothes shop. The discussion in those circumstances is that what happens if redeployment is not an option. The idea being floated is that this would be a redundancy situation then. However, it is difficult to see how under the Redundancy Legislation this could be regarded as a redundancy as the job is still there and would have to be done by somebody else. Where redeployment is not possible then it may well be that in those circumstances it is not a redundancy situation but it is a dismissal similar to that which would apply to a person who was dismissed because of incapacity.

The issues relating to the Right to Disconnect and working safely as businesses return is going to give rise to litigation. There is no doubt about that. The reality of the position is that the Government has been afraid to address difficult issues and as a result of this those difficult issues are going to result in litigation. That is something that is there. It is going to remain and it is going to remain for some time. It is only when the litigation starts that possibly the Government will start dealing with matters in a realistic way.

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Out and About in April 2021

On 1 April Richard Grogan was interviewed on Waterford FM by Damien Tiernan, Dublin Talk on Newstalk FM and Lunchtime Live again on Newstalk with Andrea Gilligan to discuss the new right to disconnect.

On 2 April Richard Grogan was quoted in an article by Arthur Beasley in the Irish Times and in an article by Ingrid Miley on RTE again in relation to the issue of the right to disconnect.

On 2 April Richard was interviewed on Breakfast Business on Newstalk FM on the Gender Pay Gap. Richard was there to discuss new upcoming Legislation and the proposed EU Directive on pay transparency.

In the April issue of our Newsletter this issue was discussed in detail.

On 7th April Richard was quoted in Irish legal News on the Supreme Court Judgement which held part of the Workplace Relations Act 2015 is repugnant to the Constitution.

On 8th April Richard was interviewed on the Claire Byrne Show by Phillip Boucher Hayes, who was standing in for Claire Byrne, answering listener's questions on Employment Law.

On 9 April Richard was on East Coast Radio discussing vaccination in workplaces.

On 12 April Richard was interviewed on Waterford Local Radio.

On 22 April Richard was interviewed on RTE News on the issue of vaccination in workplaces.

On 25 April Richard was quoted in the Sunday Times on the issue of gagging orders in Harassment cases.

On 30 April Richard was quoted in the Irish Independent about interns.

Unfair Dismissals The Importance of Fair Procedures

This issue was very much highlighted in a case of the Revenue Commissioners and Colm Keane UDD2125. The Labour Court in this case looked at the issue of fair procedures in significant depth. The Labour Court referred to the right to fair procedures in the case of Ian Re Haughey 1973 1IR271 and the application of that right in an

employment context was considered as the Court pointed out in Glover -v- BLN Limited 1973 IR388. In that case the question arose as to whether the dismissal was rendered wrongful by the Defendant's failure to afford Mr Glover a fair opportunity to defend himself against charges of gross misconduct. It was submitted on behalf of the Defendant that since the evidence of wrongdoing on the part of Mr Glover was so overwhelming the absence of a fair hearing and charges against him made no practical difference to the result. The Labour Court pointed out that that submission was emphatically rejected by the Supreme Court where Mr Justice Walsh stated:
"The obligation to give a fair hearing to the guilty is just as great as the obligation to give a fair hearing to the innocent."

The court then also pointed out the often-quoted statement of law on the importance of observing the rules of natural justice being that of Mr Justice Megarry in John -v- Reees 1962 2WLR1298 where in that case it was stated:

"As everybody who has anything to do with the law knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not, of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change"

The Labour Court pointed out that it is clear from these authorities that, in law, there is no such thing as an open and shut case. No matter how hopeless it may seem the Court pointed out a person accused of wrongdoing is entitled to a fair hearing in accordance with the rules of natural justice.

This case is extremely important in restating the law on this issue. The Court has set matters out in a very clear and precise way and has taken the time to set out the authorities in a very clear and precise way which is of help to anybody in identifying, particularly for employers, the importance in all cases of applying fair procedures. In this case the Labour Court held that the employee had been unfairly dismissed but did not award compensation. Despite this it is vital that employers make sure that fair procedures are applied.

Unfair Dismissals Act – The Dangers of Repeated Final Written Warnings.

This case arose in a case of *SeeTec Employment and Skills Ireland DAC and Stephen Redmond UDD 2122.*

The facts of the case in themselves are interesting but what is particularly interesting is the approach taken by the Labour Court in this particular case.

The Labour Court pointed out that the history of the matter included extensive engagement between the parties as regards absenteeism both authorised and unauthorised of the Appellant throughout his employment. The Court noted in particular that the Respondent repeatedly issued warnings to the Appellant which were described as final written warnings. The Court pointed out that each of those warnings were related to concerns as regards the absence pattern and at times the Court pointed out the Employee was issued with a final written warning during the lifetime of a previous final written warning. The Court pointed out that it could find no basis in the written Disciplinary Policy of the Respondent for the repeated issuance of overlapping final written warnings.

The Court stated that it was self-evident that a coherent application of the comprehensive Disciplinary Policy of the Respondent required the execution of the disciplinary steps in the manner described in the Policy.

The Court concluded that the fact of the issuances of overlapping final written warnings for the same offence, removed from the disciplinary procedure employed by the Respondent any foundation of coherence. Additionally, the Court pointed out the practice of repeated issuance of final stage penalties had the effect of creating uncertainty as regards the significants of the disciplinary penalties imposed.

In this case the Court found that the Employee was substantially responsible for the dismissal but still awarded compensation which

they reduced to 10% of the value of the award holding the Employee 90% responsible.

This case is helpful in reminding employers of the importance of following their own procedures and where they don't this can result in an employee winning an Unfair Dismissal case because of the non-compliance with their own procedures.

Unfair Dismissal – Normal Retirement Age

This issue arose in the case of Revenue Commissioners and McDermott UDD2120.

The Appellant was employed by the respondent from August 2002 until 16 November 2018.

In August 2017 the Appellant made an application for an extension of service beyond what was referred to in his application date as "date of normal retirement".

The Appellant reached the age of 65 on 16th November 2007. An extension of 12 months was granted up to 16th November 2018.

The issue in this case concerned the provisions of Section 2 (1) (b) of the Unfair Dismissal Legislation. That relevant subsection provides that the Act shall not apply where:

"(*b) An employee who is dismissed and who, on or before the date of his dismissal, has reached the normal retiring age for employees of the same employer in similar employment or who on that date had not attained the age of 16 years".*

The Labour Court held that the matter was one where there was a normal retirement age and in those circumstances a claim could not proceed under the Unfair Dismissal Legislation.

What is interesting in this case is that no claim was brought under the Employment Equality Legislation where different considerations would apply.

Constructive Dismissal – the duty of an employee in such cases

The Adjudication Officer set out that constructive dismissal cases are based on the entitlement test and the reasonableness test. Under the entitlement test the Adjudication Officer pointed out that the claimant must succeed in arguing that they are entitled to terminate the contract on the grounds that the respondent had breached a fundamental condition that goes to the root of the contract. The Adjudication Officer quoted the case of Western Excavating (ECC) Limited -v- Sharp which was applied in Murray -v- Rockabill Shellfish Limited 2012 ELR331 being that it must be a significant breach of the contract. The Adjudication Officer then pointed out that the criteria regarding the behaviour of the employer is taken to mean something that is so intolerable as to justify the complainant's resignation on something that represents a repudiation of the contract of employment. The Adjudication Officer referred to the case of Berber -v- Dunnes Stores 2009 ELR61. The Adjudication Officer referred to the case of Flynn -v- Tusla UDD1810 where it was stated that in normal circumstances a complainant who seeks to involve the reasonable test in a constructive dismissal must also act reasonably by providing the employer with an opportunity to address whatever grievances they may have. They must demonstrate that they had pursued the grievance through the procedures laid down in the contract of employment before taking steps to resign and referred to the case of Conway -v- Ulster Bank Limited. The Adjudication Officer pointed out that an employer cannot be expected to address grievances in circumstances where the employee has failed to notify them to the employer. In this case the case was lost. This is a further reminder of the importance of employees in constructive dismissal cases using the internal grievance procedures.

Pregnancy Dismissal

This issue arose in a case of Knapczyk and Aveo Foods Limited ADJ-00026176.

The complainant relied on Section 6 (2A) of the Employment Equality Acts 1998 and Article 10 of the Pregnancy Directive which provides that;

"Pregnant workers cannot be dismissed during the period from the beginning of their pregnancy to the end of Maternity Leave, save in exceptional circumstances, not connected with their condition which is permitted under national legislation and/or practice. If a worker is dismissed during that period, the employer must cite dually substantiated grounds for her dismissal in writing".

The complainant referred to a case of a Director of Marketing –v- a Telecom and Electronic Communications Infrastructure Support Company ADJ00019765 which determined that;

"The fact of being pregnant is sufficient grounds for a prima facie case to be made".

The Adjudication Officer pointed out that the Labour Court has held in a number of key decisions that no employee can be dismissed while pregnant unless there are exceptional circumstances unconnected with the pregnancy and those exceptional circumstances are noted to the employee in writing.

The case of Corcoran –v- Assico Assembly Limited EED033/2003 is a case where the Labour Court found that the case law of the European Court of Justice and Directive 92/85 requires an employer to set out "Duly substantiated grounds in writing, when a pregnant employee is dismissed in holding that;

"*Where the employee is dismissed while pregnant or on Maternity Leave, both legislation and case law states that the employer must show that the dismissal was on exceptional grounds not associated with her pregnancy and such grounds in the case of dismissal, as a matter of law and in the case of discrimination as a matter of good practice should be set out in writing".*

The case of Healy –v- Trailer Careholdings Limited EDA128 is one where the Labour Court held;

"Where a pregnant woman is dismissed during the period of special protection the employer bears the burden of proving on cogent and credible evidence that the dismissal was in no sense whatsoever related to her pregnancy".

The case of UD-1003/2007 being a case of Dymnicka –v – Cylemore Foods Group Limited was quoted where the Employment Appeals Tribunal considered whether an employee was dismissed wholly or mainly because of her pregnancy held that the onus was the employer to demonstrate their decision to dismiss the employee was fair and the employee's pregnancy was not relevant.

In this case the Adjudication Officer quoted Section 85A (1) of the Act and also the case of Rotunda Hospital –v- Gleeson DDE003/2000 to be;

"Evidence which in the absence of any contradictory evidence by the employer would lead to any reasonable person to conclude that discrimination has probably occurred".

The Adjudication Officer pointed out that the case of Wrights Howth Sea Food Bars Limited –v- Murat EDA1728 was not quoted. That was a case where the respondent argued that the complainant had been dismissed because of her incompetence and not because she was pregnant.

The Labour Court in that case found that the complainant who had been on probation when she was dismissed was not provided with adequate training when she began the work. The Labour Court in that case found that prior to notifying the respondent of her pregnancy no performance issues had been brought to her attention. Furthermore the Labour Court in that case determined that the decision to dismiss and the manner of its implementation were found by the Court to have been seriously lacking in adherence to its own disciplinary procedures. Also the Court noted that contrary to Article 10 of the Directive being 92/85/EEC on the introduction of measures to encourage improvement in the Safety and Health of Pregnant Workers no substantial grounds for the dismissal were provided by the respondent in writing.

This is a case where the Adjudication Officer awarded €10,000 in compensation.

It is important that employers when dealing with an issue of a pregnant worker, where they are aware that the employee is pregnant

are extremely careful if there is a dismissal and that dismissal must be shown to be unrelated to their pregnancy.

Employment Equality Acts 1998-2015 – Equal Pay Claims

The case of Doctor Oliver Lynn and Dr Katherine O Reilly being case EDA217 is interesting in that it raised the issue of equal pay.

In this case the comparators were two Doctors who joined the practice in September 2015. All were qualified GP's and performed like work within the meaning of Section 7 of the Act. It was contended that any differences in work were infrequent and of little importance following the principles applied in Dowdall –v- Nine Female Employees and O Leary –v- Minister for Transport 1998 ELR113. The respondent argued that different market conditions applied when the comparators were engaged compared with those that applied when the complainant was engaged and that the defence was subject to the principles of proportionality as per Enderby –v- Frenchay Health Authority. Further the case of Brierton –v- Calor Teoranta EDA1510 is one where the Labour Court noted that in the absence of a transparent system of pay determination the burden of proving compliance with the principle of Equal Treatment shifted to the employer and noted the Courts earlier observations in the case of Nevins Murphy Flood –v- Portroe Stevedores Limited 2005 16ELR282 that mere denials of discriminatory motive must be approached with caution.

The respondents relied on the case of Kenny –v- Minister for Justice Equality and Law Reform Case C-427/11 which set out in considered detail the factors that need to be considered in determining like work including training requirements and working conditions. The Respondent denied that the complainant met these requirements and referred to the case of Enderby –v- Frenchay Health Authority C-127-92 in which the Court accepted that market forces can be a factor to explain a pay difference. In this case the Court attention was drawn also to the Danfos Case C-109/88.

The Court set out the Legislation in some detail. The Court also pointed out that in Margetts –v- Graham Anthony & Co. Limited EDA1038 in addition to the fact that the complainant falls into one of the discriminatory grounds that this was required before it can be determined that discrimination had occurred. The Court noted that both parties quoted the Enderby Case and in particular the argument on behalf of the respondent of:

"*The state of the employment market, which may lead an employer to increase the pay of a particular job in order to attract canditates, may constitute an objectively justified ground…".*

In this case taking all the factors and evidence into account the Court was satisfied that the respondent was entitled to pay different rates of pay to the complainant compared with those paid to the comparators because as per Section 28 (5) of the Act the grounds for doing so were outside the discriminatory grounds as set out in the Acts.

This is a helpful Decision of the Labour Court in confirming the issue that differences can apply as regards pay because of financial circumstances and the difficulties in attracting staff at particular times.

While it is not part of this case it may well be, as a result of the pandemic in certain sectors, that there will be excessive individuals looking for jobs and the converse may well apply in the future, at least for a period of time, that individuals joining an organisation, rather than being paid more, will in fact be paid less.

It is likely that this particular case of the Labour Court is going to be quoted quite regularly into the future.

Disability and the importance of an employee engaging with an employer

This issue arose in the case of the Department of Employment Affairs and Social Protection and Neary EDA218. The Labour Court helpfully dealt with the issue of the contention that the complainant suffered from a disability. The employee relied on the case of a Government

Department and A Worker EDA094 where the issue of disability was dealt with including the issue at

"(e) A condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour".

The Court in that case stated;

"It is noteworthy that the definition 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 to be ascribed thereto. Further, the definition does not refer to the extent to which the manifestations or symptoms must be present. However, a De Minimis Rule must apply and effects or 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 sufferer".

In this case the Court found that the complainant had a disability in line with the definition. However, the Court found that the failure to engage with the employer around a return to work date was such that the Court was satisfied that the responded did not discriminate against the complainant due to her disability.

The Court found that the respondent was prepared to make reasonable accommodation in accordance with a medical report in respect of the return to work. On that basis the case was lost.

This is an important case for employers and employees. It is important for employers to look at the issue of disability and the issue around making reasonable accommodation. For employees it is important to cooperate with the employer.

Payment of Wages Act – Time to Pay

This issue arose in ADJ-00026356. The Adjudication Officer in this case held in favour of the employee but stated that allowing for the extreme pressure of Covid on the business of the owner the Adjudication Officer was allowing for this fact and that it was

reasonable; that the employer be afforded time to pay the balance. The Adjudication Officer issued the decision on 9th March and ordered the money to be paid no later than June 2021.

While we fully can understand the approach of the Adjudication Officer in this case the Legislation underpinning matters is the Workplace Relations Act.

The Act enables an Adjudication Officer to find a case either well founded or not well founded. There is no provision in the legislation to allow for a deferral of payment and this is outside the Jurisdiction of the Adjudication Officer.

While we perfectly understand the approach of the Adjudication Officer in dealing with these matters, at the same time we have to be cognisant of the fact that the Legislation has to be applied as it is actually written. It might be beneficial if there was such an allowance given to Adjudication Officers.

Deduction for Training

This issue arose in case ADJ-00027190. In this case the respondent submitted that its training fee is accumulated based on a number of costs and is dependent on the salary bracket of the employee, the costs included, accrued fees for recruitment and induction fees, senior management time, onsite training with senior staff, onsite training with internal training managers and onsite training with external trainers.

The employer contended that this is only applicable to be paid where the employee leaves the company within six months of the start date and the complainant resigned her post in less than three months.

The Adjudication Officer found based on the documentation provided that the respondent had a policy whereby if an employee leaves the company within six months the company recoups the amount of the training cost provided to the said employee.

This decision would appear to be contrary to the decision in Coyne Tyres Ballina Limited and Alan Sweeney PW-19-86. In that case the

Labour Court referred to Statutory Instrument 99 of 2000 being the prescribed course of study and training regulations 2000. The Court in that case referred to same and importantly stated;

"*The Statutory Provisions also include workplace training, which means planned and structured training, carried out under normal operations job pressures and can be delivered inside or outside of the workplace, the course must be the subject of a pre-existing written document or documents detailing interalia, its objectives outlined plan of duration and approach, a record system and assessment and certification procedures".*

The Court in that case held that there was no documentation or evidence of a training programme as described which was presented to the Court. The Court held that the employee was entitled to the amount claimed.

What is an interesting aspect in relation to this is that this case was taken under the Payment of Wages Act and not the Minimum Wage Act. An employee of course cannot be paid less than the National Minimum Wage Act. Therefore if an employee is being paid less, they can in certain circumstances, rather than bringing a National Minimum Wage Claim may bring a claim under the Payment of Wages Act.

These Regulations were effectively issued in relation to Section 16 of the National Minimum Wage Act 2000 which was repealed by the Employment (Miscellaneous) Provisions Act 2018. However, even looking at that Act Section 18 specifically provides that an employee shall be remunerated by his/her employer in respect of the employees working hours in any pay reference period at an hourly rate of pay that on average is not less than the National Minimum rate of pay.

In this particular case the Adjudication Officer has not set out if there was any planned training programme. In addition, there is always then the issue as to whether the employee has been paid for those training hours and that those training hours or time would at a minimum have to be paid at the National Minimum Wage rate.

This is a case where neither the employer nor the employee was represented. It is a case that we would have certain concerns as there

is regularly an argument that an amount has to be deducted for training and this is an issue which we would have serious concerns about.

Deduction from Wages

This issue arose in case ADJ-00026875 involving an industrial manager and a cleaning contractor. Neither side were represented.

The Adjudication Officer in this case has helpfully set out the law in some detail. The first related to the issue of alleged under payment of wages. The Adjudication Officer pointed out that the burden of proof is on a complainant to show that wages were properly payable. The Adjudication Officer held that that was not shown in respect of one part of the case. In relation to the second part of the case the respondent accepted that a sum of €1,352 was to be paid to the complainant in wages. It did not pay these as the respondent claimed that it was entitled to deduct this amount from monies it said were owed by the employee. The Adjudication Officer pointed out that Section 5 (2) of the Act applies and this requires that:

1. *The deduction shall be required or authorised by the contract;*
2. *That is must be fair and reasonable and;*
3. *That the employee has been furnished at least one week before the making of the deduction with particulars in writing of the act or omission and the amount of the deduction.*

The Adjudication Officer pointed out that this is a mandatory requirement in the Act. In this case the respondent did not furnish the complainant with particulars of the deduction before making the deduction and on that basis the Adjudication Officer awarded the employee the sum of €1,352.

This case is a reminder to employers of the importance of compliance with the Act before making a deduction.

Your Quick Guide to Leave Rights of Parents

- Maternity Leave - 26 weeks. There is the right to additional maternity leave also.
- Adoptive Leave - 26 weeks.
- Paternity Leave - 2 weeks.
- Parents Leave – 5 weeks
- Parental Leave – 26 weeks

In relation to Maternity Leave, Adoptive Leave and, Paternity Leave and Parents Leave those taking this leave are eligible for benefit payments from the Department of Social Protection.

In respect of Parental Leave there is no entitlement to any payment from the Department of Social Protection.

For Maternity Leave and adoptive leave those entitled to take this leave may take an additional 16 weeks unpaid Maternity or Adoptive Leave.

Family Leave and Miscellaneous Provisions Act 2021

The Act provides for three additional weeks of paid Parents Leave and benefit to each parent in Ireland. Before the Act was introduced the benefit was two weeks. This now extends to five weeks. The leave must be taken in the first two years after the birth or adoption of a child.

In addition all adoption couples will be able to choose which parent may take advantage of the Adoptive Leave. This will include male same sex couples who were previously excluded from this. On top of these Paternity Leave and benefits will be made available to the parent who is not availing of Adoptive Leave.

The Parent's Benefit provides for five weeks payment to each parent of a child aged under 2 years or in the two years following an adoption. Parents can take five weeks together or take separate weeks of leave.

The Parents Benefit is a payment for employed and self-employed people who are:

- On Parents Leave from work;
- Have paid sufficient PRSI contributions;

If you are an employee then you must have:

- At least 39 weeks PRSI contributions paid in the 12 month period before the first day of your Parents Benefit or;
- At least 39 weeks PRSI contributions paid since first starting work and at least 39 weeks PRSI paid or credited in the relevant tax year or in the tax year immediately following the relevant tax year. For example, if you are going on Parents Leave in 2021 the relevant tax year is 2021 and the year following this is 2022 or;
- At least 26 weeks PRSI paid in the relevant tax year and at least 26 weeks PRSI paid in the tax year immediately before the relevant tax year. For example, if you are going on Parents Leave in 2021 the relevant tax year is 2019 and the year before that is 2018.

If you are self-employed you must be in insurable employment and have:

- 52 PRSI contributions paid at Class S in the relevant tax year or;
- 52 weeks PRSI contributions paid at Class S in the tax year immediately before the relevant tax year or;
- 523 weeks PRSI contributions paid at Class S in the tax year immediately following the relevant tax year.

The rate of payment is €245 a week.

The Parents Benefit can be paid in separate weekly blocks or can be paid over a consecutive 5 week period.

Parents Benefit is paid directly into your current or deposit account at your bank or building society. It cannot be paid into a mortgage account.

An employer may continue to pay an employee in full when they are on Parents Leave. This may require the parent to have the Parents Benefit paid to them and the employee can choose to do so.

Where a person is in receipt of certain Social Welfare payments they may get half rate Parents Benefit.

An employee who has dependents may be able to get a higher rate of Parents Benefit.

In relation to tax the position is that an employee or self-employed person will have to pay tax on Parents Benefit. They will not have to pay USC or PRSI.

Fixed Term Contracts Converting to Contracts of Indefinite Duration

This issue arose in a case of Martial Huet and Universite De Bretagne C-251/11.

In this case the CJEU held that Clause 5 of the Framework Agreement on fixed term work be interpreted as meaning that a member of state which provides in its national Legislation for conversion of fixed term employment contracts into an employment contract of indefinite duration when the fixed term employment contract has reached a certain duration is not obliged to require that the employment contract of indefinite duration reproduces in identical terms the principle clause as set out in the previous contract.
However, in order not to undermine the practical effects of or the objectives pursued by the Directive members must ensure that the conversion of fixed term contracts into an employment contract of indefinite duration is not accompanied by material amendments to the clauses of the previous contract in a way that will be overall unfavourable to the person concerned when the subject matter of that person's tasks and the nature of his functions remain unchanged.
In Ireland the position has been to date that a contract of indefinite duration transfers on exactly the same terms.

National Minimum Wage Act – the importance of issuing a request under Section 23 of the National Minimum Wage Act before starting proceedings

This issue arose in case ADJ-000027963. The Adjudication Officer in this case pointed out the case of Mansion House Limited -v- Izquierdo MWD043 where the Labour Court held that:

"…for the sake of completeness, the Court should point out that where a claimant has failed to request a statement in accordance with Section 23 (1), the appropriate course of action is to decline jurisdiction without prejudice to the claimants right to re-enter the same complaint having complied with the said section…"

In this case because this had not been done the Adjudication Officer had to hold that they did not have Jurisdiction to hear the complaint. This is not a criticism of the Adjudication Officer but it is absolutely crazy that we have a situation under the National Minimum Wage Act where such a statement has to be obtained. It puts an additional burden on non-represented employees being able to access claims to the WRC.

It is a nonsensical provision. It is one that really does need to be got rid of as it has no relevance in a system which is designed or was intended to be designed so that a non-represented person can bring their own claims to the WRC.

Sunday Premium Payments

This issue was raised in the case of ADJ-00020540. The employee relied on the provisions of Section 14 of the Organisation of Working Time Act. In this case the Adjudication Officer heard evidence that the employee worked most of the Sundays in the six month period preceding the claim being lodged. On that basis an award of €2000 was made.

The issue of Sunday Premiums is one which constantly seems to arise.

Issuing claims against the wrong employer

This issue arose in case ADJ-00027468 between a retail employee and a retail shop where the Adjudication Officer allowed an employee due to the confusion which existed as regards the correct employer entity and that the new respondent would not suffer any injustice or prejudice if leave was granted the Adjudication Officer gave leave to institute proceedings against the new respondent. The provisions of Section 39

(4) of the Organisation of Working Time Act was relied upon. This is an issue which does come up and it is important when employees are issuing proceedings to avoid the situation arising to check matters with the ROS for the Revenue documentation relating to whom their employer is.

Exceptional circumstances to extend the time to bring an appeal to the Labour Court

This issue arose in a case of Rosemary Crowley and Eoin Swaine and Agnes O'Connor HSD211.

In this case the complainant lodged an appeal of an Adjudication Officer's decision. The decision was dated the 29th April. The appeal was received by the Court on the 10th June 2019 being 43 days after the date of the decision. The complainant argued that the Court was closed on the 8th and 9th June being a Saturday and Sunday with the appeal having being posted on the 6th June. They referred to the Circuit Court rules being Statutory Instrument number 510 of 2001 which states that where the time for any act expires on a weekend day the act should be held to be done on the day when the office is next open.

The complainant contended that the complainant was grieving the death of a friend in April 2019 and was distracted and not focused.

The Labour Court addressed the issue of Section 44 of the Act and pointed out that in the case of Joyce Fitzsimons Markey -v- Gael Scoil Thulach No Nog 2004ELR110 the first requirement of the Court is to establish if there are exceptional circumstances and then if so, whether those circumstances operated to prevent the appeal being made in time.

The Court pointed out that the Court was not satisfied that any exceptional circumstances had been provided to explain or justify the delay in the appeal. The Court pointed out that every week contains a Saturday and a Sunday. They said there is nothing exceptional about the 42nd day after the decision falling on one of those days. The Court pointed out that likewise sadly, bereavement is not unexceptional.

Bereavement the Court stated can render people incapable of undertaking even important tasks. The Court however pointed out as

the Court had noted many times that the Court has no medical expertise and any party before the Court that wishes to rely on medical arguments must support such arguments with clear medical evidence.

The Court pointed out that this was not done in this case.

If a party is seeking to extend time on the basis of a medical issue, then it is clear, from this decision that the party relying on a medical condition that may have delayed an appeal being lodged must actually produce that medical evidence.

Sectorial Employment Order for the Construction Industry

The issue of enrolling an employee in the relevant Pension Scheme for the Construction Industry arose in the case of A Scaffolder and A Scaffolding Company.

In this case the employee's representative requested confirmation that the PRSA referred to in the Contract of Employment contained a Death in Service element plus the obligation to have worker nominees sit on the Board of Trustees of the Pension Scheme administered by the PRSA provider.

The respondent always asserted that the complainant had access to a Pension Scheme which was no less favourable than those set out in SI. 455/2017 but the respondent refused to provide details of the scheme. That was the complainant's case.

It was argued by the respondent that the scheme available during the employment was no less favourable than set out in the relevant Statutory Instrument but that the employee did not seek to enter the scheme until 2019, after he had left the employment.

The employer contended that the complainant was not an employee and that the relevant Statutory Instrument was not enforced when the employee joined the company.

The Adjudication Officer went through matters in some detail and found that the respondent contravened the SEO by failing to provide the specified Pension and Sick Pay Benefit to which the complainant

was entitled and that the matter was covered under Section 23 of the Industrial Relations (Amendment) Act, 2015. The Adjudication Officer required the respondent employer to comply with the pension contributions and to make contributions to the scheme. These amounted to a relatively small sum of €232 but also then directed a sum of €1,500 for failing to provide the employee with his rights.

This is a useful case for reminding employers of the importance of having employees in these schemes. The difficulties would have arisen if the employees got sick, for example, and had sought the sick pay under the relevant scheme.

The Sectorial Employment Order is currently the subject matter of litigation in the Supreme Court and it will be interesting to see how matters develop as regards same but for the present it is being applied.

***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.**