Welcome to the November issue of Keeping in Touch

This year we were delighted to be nominated for 10 awards at the Irish Law Awards being;

- Employment Law Firm of the Year
- Regional Law Firm of the Year
- Excellence & Innovation in Client Service
- Law Firm Website of the Year
- Lawyer of the Year
- Personal Injury/Medical Negligence Law Firm of the Year
- Excellence in Marketing and Communications
- Sole Principal of the Year
- Law Firm Innovation Award
- Pro Bono Law Firm of the Year

We were absolutely delighted to be nominated as finalists in 10 categories.

As a boutique law firm we regard this as a significant achievement.

In 2021 we did sign up for the Pro Bono Pledge whereby each solicitor in this firm undertook to take on 20 hours of pro bono work per annum.

As a firm we have surpassed this requirement.

We were then thrilled to win the Excellence & Innovation in Client Service Award.

On 6 November we were listed as one of the Top 75 in Irelands Best Law Firms in the Sunday Independent.

INDEX

Out and About in October 2021

On 10 October Richard was interviewed by Breakingnews.ie on the issue of long covid and the employment law issues for employers and employees.

On 15 October Richard was interviewed by Sarah McInerney on reopening businesses.

On 20 October Richard was interviewed by Breakingnews.ie on the issue of vaccinations in hospitals.

On 20 October Richard Grogan of our Firm was interviewed by Vanessa Tierney on hybrid and remote working and the legal obligations for HR.

On 25 October Richard was asked to write an opinion piece in the Irish Examiner on the issue of the law around sick pay in Ireland.

Constructive Dismissal

The case of Oak Lodge Fostering Limited and Lareina Kirwan UDD2161 is an interesting case in that it is one where the employee won. The Labour Court in this case stated that the law on this is whether it was reasonable for the complainant to terminate her employment because of the actions of the respondent. It was not disputed that there was a unilateral decision to cut the salary in half by reducing the working hours by 50%. The witnesses for the respondent suggested that this was done contrary to advice they received from HR advisors and was not aligned with their own disciplinary procedure. It was submitted that reducing the wages in this manner was a significant breach going to the root of the contract and that it was reasonable for the complainant to terminate her employment. The Court found that the decision to cut the salary in half without any justification of doing so was a significant breach going to the root of the contract and on that basis the employee was entitled to terminate the contract.

The Court pointed out that in normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. The Court took the view that the witnesses supported the complainant's contention that there was a complete failure by the respondent to carry out a fair and impartial investigation or to follow their own procedures. The Court determined that this failure constituted unreasonable behaviour and accepted the evidence that based on the behaviour she could not have confidence in her grievance being addressed in a fair manner. The Court pointed out that this belief was supported by the fact there was no appeal available to her in respect of the outcome of the disciplinary process or the sanction imposed therefore she did not engage with the respondent's grievance procedure. The Court overturned the decision of the Adjudication Officer and awarded €13,346.

The interesting aspect of this case is that this is one of a few cases where an employee has won without going through the grievance process.

Contracts of indefinite duration

This issue arose in the case of Marley and Entry Point North Ireland Designated Activity Company Entry Point North Ireland ADJ-00031647.

The Adjudication Officer in this case set out the Labour Court decision in Irish Museum of Modern Art -v- Stanley FTD146 2014 where it was stated that;

"The defining characteristic of fixed term contract or fixed term employment is that it is determined by an objective condition which is identifiable without reference to the view or perception or intervention of either party to the contract"

The Adjudication Officer also pointed out that they noted the case of Adeneler and Others -v- Ellinikos Organismos Galaktos 2006 IRL716 where the statement that;

"the concept of objective reasons…must be understood as referring to precise and concrete circumstances characterising a given activity, which are therefore capable of that particular context of justifying the use of successive fixed term employment contracts"

The Adjudication Officer in this case held that there was no clearly defined objective grounds.

The Adjudication Officer pointed out that when determining whether the renewal of a fixed term contact comes within the scope of Section 9 (4) of the Act it is necessary to consider whether it has a purpose of achieving a legitimate objective of the employer.

The Adjudication Officer quoted the Labour Court case of Namara -v- Teagasc FTD138 where it was stated that;

"There are many forms of economic activity in which the viability of employment is dependent on funding generated by individual contracts or projects. This is the case in practically all employment providing professional services and in such industries as construction and civil engineering. That type of activity is dependent on a continuing supply of separate once off's contracts or projects in order to maintain employment. If it were to be held that the use and success of fixed term contracts can be used indefinitely in such employments so as to protect the employer against the possibility of an insufficient supply of work at some point in the future the effectiveness of the directive and the Act would be seriously subverted. It, due to economic circumstances or fall offs in demand, there is no longer sufficient work in order to maintain a worker in employment the employer's remedy lies in making surplus staff redundant. It follows that while the requirement to balance staff levels with available funding is a legitimate objective the continual use of fixed term contracts is not always a proportionate and necessary means of achieving that object"

The Adjudication Officer held that while they were aware that the respondent was in dire financial situations common to any business operating the airline industry the Adjudication Officer found in line with the Labour Court decision that the use of fixed term contracts was not necessary means of achieving that objective. In that case an award of €15,000 was made.

Redundancy – How cases must run

This issue arose in case ADJ-00030873 being the case of Sylvia McCann and Irish Whiskey Museum Limited. The Adjudication Officer in this case set out;

"In the case before me the employer seeks to establish that the dismissal is not an unfair dismissal as the dismissal results wholly and mainly on the redundancy of the employee (as provided for in Section 6 (4) of the 1977 Act aforesaid). In making this assertion, the respondent will have to establish that the redundancy is a genuine one (and not a sham or ruse to get rid of the employee). Under Section 7 (2) of the Redundancy Payment Act of 1967 the employer will have to demonstrate (in general terms) that the dismissal (by reason of redundancy) is attributable wholly or mainly to the fact that the employer is ceasing to trade, or propose trading with fewer employees or that the work is to be done differently and the employee hasn't got the requisite training or qualifications to continue"

It is useful that the Adjudication Officer has set the matters out in this way.

The case is interesting as regards the facts but ultimately an award of €25,000 was made under the Unfair Dismissal legislation.

This is clearly a reminder to employers of the importance of having issues relating to redundancy fully and absolutely set out.

Redundancy and Reckonable Service

This issue arose in case ADJ-0030847 in the case of Daniel Duggan and Suntask Solar Ireland. The claim was under the provisions of Section 39 of the Redundancy Payment Acts. The employee was employed as a sales representative with the respondent from 28th August 2018 until late august 2020 when he was made redundant.

The claim was submitted on 2nd December 2020.

The issue was around the provision of 15.5 weeks spent on lay-off and in receipt of the PUP whether that should be included for reckonable service.

The provisions of Section 4 of the Act provide;

"*Subject to this Section and to Section 47 this Act shall apply to employees employed in employment which is insurable for all benefits under the Social Welfare Acts 1952 -1966 and to employees who are so employed in such employment in the period of two years ending on the date of termination of employment".*

The Adjudication Officer set out that in Schedule 3 of the Acts Section 8 of Schedule 3 sets out that absences are not reckonable which includes;

"*d" absence by reason of lay off by the employer".*

In this case the Adjudication Officer held that the non-reckonability of lay off periods meant that the service amounted to 85 weeks only.

This we actually have to disagree with as a conclusion. The Adjudication Officer was looking at the issue of reckonable service under Regulation 8. However, for continuous employment this is dealt with under Regulation 5 whereby periods of lay off do not break the continuity of employment.

There is a difference between continuous employment and reckonable service. Reckonable service is for the purposes of determining the amount of compensation by way of redundancy whereas continuous employment is there to determine whether the individual obtains the relevant service being 104 weeks service. By this we mean that if an employee had been employed for five years, which is not the position in this case, but the last year the employee was on lay off then in those situations the continuous employment would be a period of five years. The reckonable service for the purposes of calculating the redundancy payment would be four years.

Redundancy Payment Decisions

When reviewing matters in the WRC website there are some decisions which are coming out from the WRC which in effect even though they find in favour of the employee in relation to redundancy would require that the matter goes on appeal to the Labour Court.

In the case of an employee who has to seek implementation the employee has to have a decision similar to that which was put in place by the Employment Appeals Tribunal which sets out;

1. Start date
2. Finish date
3. Any periods of lay off
4. The employee's weekly wage

For an employee to be able to make a claim to the department or to implement the decision in the District Court it has to be possible to calculate the amount of the redundancy due and it is therefore necessary that the decisions should set this out.

It would be hoped that the WRC going forward will apply a standard form of decision so as to avoid any issue of a matter going on appeal to the Labour Court for the purposes of setting out the information that needs to be there for an employee to implement a decision.

Suitable alternative employment under Section 15 of the Redundancy Payment Acts

This issue arose in case ADJ-00029643 being a case of Egilja Fersta and Cosy Tots & Co Limited Tots & Co. The claim related to the issue of alternative employment.

The employee was made an offer of alternative employment. The offer of alternative employment involved a demotion from a manager's role to that of a Montessori teacher.

The complainant relied on the case of Cosy Tots & Co. Limited trading as Tots & Co. and Nora Boggan RPD2110 where the Labour Court in that case stated;

"An diminution its status and a reversion to the duties of a childcare assistant is, in the view of the court, a reasonable basis for the complainant to conclude that the offer is not one of suitable alternative employment. It follows, therefore, that the court is satisfied that there was a redundancy and that a payment in respect of same is payable."

The respondent in this case argued that they were forced to make a commercial and business decision to close the premises in Dublin 14 and to continue to operate in two other locations in Dublin 4 and in Beaumont. The respondent relied on Section 15 (2) of the Redundancy Payment Acts 1967-2014 in relation to the issue that a redundancy does not apply where the offer constitutes an offer of suitable alternative employment. The respondent argued that the offer was suitable alternative employment and that that offer was still open.

The Adjudication Officer looked at the provisions of Section 7(2) (a) of the Act and of Section 15 (2). The Adjudication Officer pointed out that they were guided by the Labour Courts determination in RPD2110. The Adjudication Officer also dealt with the issue of the increased travel to the new location that was proposed that the employee which was also covered in the case of Cosy Tots & Co. Limited -v- Bernadette Conn RPD219 where the Labour Court in that case reviewing the issue of time involving cross city travel held;

"Leads the Court to the view that it was reasonable for the complainant to decide that the offer made was not one that constituted suitable alternative employment."

The Adjudication Officer therefore held in favour of the employee and granted redundancy.

Fixed Term Contracts and Redundancy

This issue arose in the case of Michael Murphy and Fastnet Recruitment Limited. The Adjudication Officer in this case quoted the case of Smorgs ROI Management Limited -v- Buckley RPD12/2008

where the Labour Court confirmed that it was "settled law" that the combined effects of Section 7 (2) (b) and 9 (1) (a) made it clear that termination of a fixed term contract of employment constituted a redundancy that entitled the complainant to receive a redundancy payment.

Use of CCTV in disciplinary matters

This issue arose in the case of Frank Berman and Go-Ahead Transport Services (Dublin) Limited.

The Adjudication Officer in this case stated that the most obvious and welcome question was whether the employer had a legitimate reason for viewing it in the first place.

The Adjudication Officer set out whether it should be used or not and the circumstances in which it may be used should be clearly set out in a CCTV policy. The Adjudication Officer pointed that out the policy while extensive made no reference in the scope section to employee discipline. The Adjudication Officer set out that it seems reasonable to assume that if the authors of the document had intended the possible use for disciplinary purposes, they would have stated this clearly.

It was pointed out by the Adjudication Officer that while the WRC had no jurisdiction in relation to breaches of Data Protection law the operation of fair procedures has as one of its central principles that the employer will follow and respect its own policies and procedures and that this forms part of the basis of the contractual relationship with the employee. The Adjudication Officer held that it clearly did not do so in this case.

The Adjudication Officer pointed out in the case of Dublin Bus -v- MBRU and SIPTI LCR21293 of 2016 where the Labour Court stated;

"The Company must when investigating any incidence of alleged breach of the impugned policy to comply fully with the terms of its procedural and disciplinary procedures and the terms of all relevant employment legislation. Furthermore, any sanction it decides to take against anyone found to have infringed that policy must be informed by the facts and

circumstances of the case, be measured and proportionate and satisfy the test set out in all relevant employment legislation"

In this case the Adjudication Officer directed reinstatement.

While there are other issues relating to this case it is a reminder that employers need to be very careful using CCTV without an appropriate policy in place.

Payment of Wages Claims for Individuals on the TWSS Scheme

This arose in the case of Conor Simpson and Auto Claim Services Limited ADJ-00030784. The case is interesting in that the Adjudication Officer went through and dealt with the Revenue guidelines in relation to the operation of the TWSS and the obligation of the employer to look to increase the payment over and above the TWSS. The Adjudication Officer in this case held that while reference to the guidance from the Revenue that;

"An employer could make an additional payment to the employee. Additional payments when added to the Wage Subsidy could not exceed the employees average net weekly pay."

The Adjudication Officer held that it was clear that there was no requirement for an employer to top up an employee's wages. The Adjudication Officer held that they could find no basis for the complainants claim that the respondent was in breach of Section 5 of the Payment of Wages Act 1991 and was satisfied there was no illegal deduction from the wages. This is an interesting case and certainly the Adjudication Officers are in a difficult situation. The TWSS legislation when it was brought into being at no stage amended the provisions of Section 5 of the Payment of Wages Act.

An employer in relation to same could have sought the agreement of the employees in which case it would be a reduction which was agreed to. The employer in the alternative could have placed the employees on lay off. However, in the absence of an amendment to Section 5 of the Payment of Wages Act it would be our view that an employer could not unilaterally simply put in place a payment under the TWSS Scheme alone.

It will be interesting to see do any of these type of cases end up going to the Labour Court.

Deduction From Wages

This issue arose in the case of Rabitte and Coris Iompair Eireann Bus -v- Irish Bus. The Adjudication Officer referred to the definition of wages and the Payment of Wages Act which in the definition includes;

"Any fee, bonus or commission, or any holiday, sick or maternity pay or any other emolument, referrable to his employment whether payable under his contract of employment or otherwise"

The Adjudication Officer referred to Section 5 (6) which does refer to monies that are *"properly payable".*

The Adjudication Officer referred to a case of Devlin -v- Electricity Supply Board PW550/2011 where the Tribunal noted that a discretion although it may seem absolute is not unfettered and must be exercised reasonably and in good faith Horkaluk -v- Cantor Fitzgerald 2004 1ICR697 and Lichters & Hass -v- Depfa 2012 IEHC10. The Adjudication Officer pointed out that Mr Justice Hedigan affirmed that the discretion is not unfettered.

In Clarke -v- Nomura International 2000 IRLR766 the Court of Appeal for England and Wales considered this type of situation and observed;

"An employer exercising in discretion which on the face of the contract of employment is unfettered or absolute, will be in breach of contract if no reasonable employer would have exercised discretion in this way. The case is interesting in that while the employee was unsuccessful the Adjudication Officer has set out the law on this issue as to employers exercising their discretion in some detail and is an important decision."

Mediation in the Workplace Relations Commission

An issue is currently coming up in relation to mediation in the WRC.

We have raised recently and previously the issue of the qualification of mediators in the WRC. We recently advised that we would require in relation to mediation that the mediator would have a professional qualification having been trained to be a Mediator by one of the recognised bodies.

We received a letter recently advising that it is a matter for the Director General to decide who is or who is not to be a Mediator. On the basis that we were looking to have a properly qualified mediator in place we were advised that on that basis the offer of mediation was withdrawn and it would proceed for hearing. We are in favour of mediation. However, the concept that the Director General could appoint or, more properly anoint, a person to be a Mediator who will have had no formal training by a recognised body just beggars belief.

While we are not saying that the Director General would do this, effectively they are saying that the Director General could appoint anybody with no experience whatsoever of mediation to act as a Mediator.

The role of an Adjudication Officer is entirely different than that of a Mediator. The role of a Mediator is effectively to mediate. It is not there to act as an Adjudicator, to give opinions, to deal with matters other than in accordance with the relevant codes as to how Mediators should operate.

It is interesting that the Workplace Relations Act, 2015, specifically excludes the Workplace Relations Commission from the provisions of the Mediation Act.

On the basis that the WRC is not going to have properly qualified mediators we have had to take the view that we advise our clients, at the outset, that they should not get involved in the Mediation process in the WRC unless there is a properly qualified Mediator and that the normal rules relating to a mediation document being furnished in advance and signed up by both sides relating to how the mediation will work and the issue of confidentiality is put in place. It is quite disturbing that the issue of Mediation, which has been pushed by the Workplace Relations Commission, is effectively operating completely outside the provisions of the Mediation Act with unqualified Mediators.

We will of course continue to strongly recommend to our clients that they take part in Mediation where there is a properly qualified Mediator.

There is an interesting aspect in relation to Mediation in the WRC. Because the WRC is excluded from the provisions of the Mediation Act there is no obligation on a Solicitor to actually advise their client on the benefits of mediation or what mediation involves.

It is a great pity that the Mediation Act does not apply to the Workplace Relations Commission in which case there would be properly qualified Mediators.

***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.**