Welcome to the December Issue of Keeping in Touch

November was an extremely busy and interesting month in our firm. Firstly, we were delighted to have been listed as one of the Top 75 Law Firms in Ireland in the Sunday Independent listing of Ireland's Best Law Firms.

Equally we were then delighted to welcome Caoimhe McConnell to head up our litigation practice. Caoimhe joins us with considerable experience in this area of law and has joined the firm for the purposes of continuing to develop our personal injury practice in the area of workplace accidents but also to develop our professional negligence practice which has been an issue which has grown in the last 12 months. We are delighted to welcome Caoimhe to the firm.

We also have to congratulate Sorcha Finnegan who joined the firm earlier this year and who then was effectively head hunted out of the firm to be Group Legal Counsel in Lidl Ireland. When Sorcha told us that this job had been offered to her we said that it was a post that she would have to accept. It is a great opportunity for her and we are delighted that Sorcha remained on not only to work out her contractual notice but an extra period of time to make sure that there was a smooth transition to Caoimhe.

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Out and About in November 2021

On 2 November Richard Grogan of our firm was on the Pat Kenny Show and Newstalk FM discussing Statutory Sick Pay.

On November 8th, the firm was listed as one of the top 75 of Ireland's Best Law Firms. We were absolutely delighted to get this accolade.

On November 12, Richard Grogan of our firm was on Ireland AM discussing the right to disconnect in the Virgin Media studios.

On November 15, Richard Grogan was interviewed on The Tonight Show on Virgin Media dealing with the issue of remote working and antigen testing in workplaces.

On 17 November Richard presented a paper to the German –Irish Lawyers and Business Association on the right to disconnect.

On 19 November Richard presented a course to NUIG which was organised by Deirdre Curran for her students relating to Equality and the workings of the Workplace Relations Commission in practice along with other issues relevant to future HR personnel.

On 20 November, Richard was quoted in an article in the Times Ireland Edition on the issue of Lawyers urging the Government to put in place a State Compensation Scheme for those injured by vaccination.

On 29 November Richard was quoted in the Sunday Independent on the issue of sick pay.

Some issues arising which will lead to claims against employers – all are avoidable.

We thought we would set out just 10 issues which have been raised with us in the last few weeks by either employers or employees where employers are unnecessarily getting themselves into problems which will result in claims against then in many cases.

1. Cancelling approved holidays on short notice.

   In reality before a holiday is approved employers need to check if it is actually feasible for the employee to take those holidays. Once holidays are approved then the employee will have booked their holidays. They may have paid out substantial monies for same and cancelling is just not an option.

2. Holidays being mandated but failing to take account of the circumstances of the employee including family circumstances and the opportunity for rest and relaxation. This is required by the Organisation of Working Time Act. There will be many employers who have contractual provisions which will provide that holidays would be taken at specified times. In the construction Industry, at one stage there were the builder's holidays in the first two weeks of August. Employers who are mandating holidays must also take account of the fact that one months' notice must be given and they must discuss same with the employee before doing so.

3. Telling employees that unless they are vaccinated by a particular date they will be dismissed. This will result in Unfair Dismissal claims.

4. Requiring employees to disclose vaccination status. Again this is a GDPR issue and is completely contrary to the Code relating to returning to workplaces.

5. Requiring antigen tests to be done and if not done then no work will be provided until the test is done. This will result in a Payment of Wages claim and possibly a Dismissal claim. At the time of writing there is no contractual right for an employer to insist on an antigen test. This may change in the future but this is looking at claims that have arisen at this stage and any issues relating to antigen tests cannot be backdated.

6. Disclosing vaccination status to other employees. This is a clear GDPR breach.

7. Saying that sick pay will be amended to exclude Covid related illnesses. This again would be a Payment of Wages claim. If there is a contractual right to sick pay from an employer that cannot be limited without a change in contract which the employee would have to consent to. On a non-legal issue it is incredibly

stupid to do so as it is more likely that an employee may come to work who is ill with Covid if they are not going to get the sick pay.

8. Requiring employees to work seven days a week for a number of weeks. When we heard this we were speechless that any employer would seek to put this into place. This is a clear breach of the Organisation of Working Time Act.

9. Not allowing a person who was on Maternity to return to the job they did prior to going on maternity when that role is still available in the workplace. This will result in a claim under the Maternity Protection Act and that would just be for starters. Employers need to be very conscious of issues relating to those returning from Maternity Leave.

10. Putting in place a salary or wage reduction without written consent. This will result in a Payment of Wages claim as the consent of the employee is required.

As a firm of Solicitors who deal with employment law of course we will get some interesting and unusual questions coming to us. However, the two issues set out above are all ones where an employer can easily avoid a claim by having in place appropriate policies and having a situation where appropriate qualified advice is obtained.

Redundancy Claims

This issue arose in case ADJ-00029726 being a case of Janis Lacey and McEvoy Little Acorns.

There was an issue in relation to this case relating to an extension of time which was one which would be reasonable in the particular case. The Adjudication Officer in this case directed the respondent to cooperate with the complainant in the provision of all necessary paperwork to enable her to claim a statutory redundancy payment.

We have considerable concerns in relation to this.

The issue in relation to a matter like this is for the Adjudication Officer, in the relevant case before them to make a determination as to whether a claim is well founded or not well founded. If it is well founded then in those circumstances it is a matter for the Adjudication Officer to make a determination. The Adjudication Officer in this case would, in our view, have been required to set out a start date, finishing date, the rate of pay and to note any absences due to lay off. It would be beneficial also if it was relevant to set out which of those lay-offs were caused by the pandemic and would be covered by the proposed new scheme. It is then a matter for the employee on the basis of same to seek payment from the employer. If the employer is not in a position to pay then there are procedures within the Department of Social Protection for the employee to be able to be paid by the Department either with the consent of the employer by cooperating with the application or alternatively with the Department paying and seeking repayment from the employer.

The form of the determination which had been issued in this case is one which would not be enforceable in any meaningful way by the District Court.

We are not really criticising the Adjudication Officer in this case. It is clear from the case that the Adjudication Officer took the view that the respondent intended to do this. There is an option for the Adjudication be paid. However, it is important that decisions of an Adjudication Officer are ones which can be enforced. While it is not relevant in this particular case we have seen other decisions from the WRC where an Adjudication Officer has held that a claim for Redundancy was well founded but has not set out a start date, finishing date or a rate of pay. In which case there is no method by which the Department of Social Protection can check the calculation. Equally there is no effective enforcement.

We have been in contact with the Workplace Relations Commission in relation to the format in respect of which decisions under the Redundancy Payment Acts are being set out and have raised our concern. These concerns are not ones in relation to any cases which we have been involved in. If we had been involved in any of the ones that we had a concern about we would simply have appealed it to the Labour Court.

As a firm we were involved in the last recession in dealing with redundancy decisions where redundancy was awarded which set out all the relevant information to enable the calculation to be done.

We say this because at times we have also seen decisions where an Adjudication Officer has effectively calculated the Redundancy amount but again without setting out the information necessary to arrive at that calculation. Again this causes problems in the Department of Social Protection in getting payment under the Insolvency Fund.

It is not strictly necessary that this information must be set out at the end of any decision. It is sufficient if in the decision it is what the start date is, the finishing date, what period of time were lay-off and the rate of pay. However, it is always easier that this is set out at the end so as to facilitate any calculation.

In the case in question which was referred to here it is clear that there was a good relationship between the employer and the employee and that the employee had been a valued employee. This however does not detract from the requirement that decisions are set out in a way which will enable the employee to claim under the Insolvency Fund if there is any difficulty in the employee receiving the payment.

In relation to this particular decision if there were other parties involved other than the ones named and the employer did not cooperate with the employee or the Department of Social Protection did not pay up then while the employee would have a right to bring matters back to the WRC where the Department cannot pay up a decision in the format as issued would mean that there is no sustainable case as there is no basis under which an Adjudication Officer in such circumstances can direct the Department to comply with the previous decision. When those type of cases come to the WRC the Adjudication Officer in those cases if the decision is upheld to start setting out start date, finishing dates or rates of pay as the employer in those cases is not party to the proceedings but rather the Department of Social Protection.

Redundancy – Suitable Alternative Role

This issue arose in case ADJ-00032597 being a case of Ryan and Tesco Ireland Retailers.

The complainant referred to the case of Hudson –v- George Harrisson Limited EAT0571-02 which considered almost identical provisions in British Law where it is held that in determining the reasonableness of an offer this "*involves taking into account the personal circumstances of the employee*"

The case of Cambridge and District Cooperative Society Limited –v- Ruse 1993 IRLR156 is one where the English EAT when considering the similarly worded provisions of the British Legislation, said, that the questions of the "*suitability of the employment is an objective matter, whereas the reasonableness of the employees refusal depends on factors personal to him and is a subjective matter to be considered from the employees point*".

The case of Cozy Tots and Co. Limited and Bernadette Conn RPD219 was quoted which considered the question of suitability of alternative roles where the Labour Court noted that the issue of location has to be taken into account and the Court noted that it had to have regard to the particular circumstances of each case. In that case, the Court considered the fact that the alternative role was located in the city while the physical distance between the two locations might be argued not to be excessive, there is the reality of a difficult commute between the locations and that the city issue is less about the physical distance and more about the length of time it would take to cover that distance.

In Summeridge Limited and Derek Byrne RPD211 the Labour Court found that there was no job available for the complainant in his established place of work. The alternative offer to him would have necessitated an unreasonable additional daily commute and cost to him and in the circumstances the Court therefore found that the complainant was entitled to the Statutory Redundancy payment.

In this case the Adjudication Officer found that the employee was entitled to redundancy. We do have some concern again about this particular decision. In this case the Adjudication Officer held that the

date of redundancy should be the date of her final salary payment. The Decision set out that this was not clearly evident at the hearing.

We mention this again as it relates to how enforceable a Decision in a case like this will be where there is no determination as to what the final date is. On that basis there is no basis for setting out the calculation on the basis of the Decision itself but only from external factors independent of the Decision. We have serious concerns that that is actually allowed if a claim went to the District Court.

Redundancy Payment Acts 1967-2014 – Offer of re-engagement by another employer

This issue arose in a case of Hartway Tradings Limited and Joseph McGrath RPD2119.

This arose where an Adjudication Officer had rejected Mr McGrath's claim that he was entitled to Redundancy Payments where he had received an offer of employment that amounted to Suitable Alternative Employment within the meaning of Section 15 of the Act.

The Labour Court set out the provisions of Section 9 of the Act which relates to the dismissal by an employer. The Court also set out the provisions of Section 15 which sets out the disentitlement to a redundancy payment for refusal to accept alternative employment.

The Court also set out the provisions of Section 16 which relates to associated companies. The Court set out that it was agreed that the employee had been employed from 1985 and that his service is terminated by reason of Redundancy in 2020.

The Respondent submitted that the employee was not entitled to redundancy in circumstances where he had been offered a suitable alternative role on the same site by Butlers Grovestone Limited on the same terms and conditions of employment and the work involved was comparable. The employee submitted that the work was not comparable.

The Court set out that Section 15 of the Act disentitles an employee to a Redundancy payment in circumstances;

"*Where the employer offers to renew the Employment Contract or re-engage the employee under a new contract of employment on terms suitable to the employee. Section 16 of the Act provides that where the employer is a company, re-engagement can be by the company itself or by an associated company. It goes on to define an associate company is one which is a subsidiary of the other, or where both are subsidies of a third company, as defined, in the companies Act 1963, now Section 7 of the Companies Act 2014*".

The Court looked at whether Butlers Grovestone Limited was an associated company. The respondent confirmed that the company was not a subsidiary but rather a separate legal entity. At the hearing the respondent had accepted that the new company was not an associated company for the purposes of Section 16 of the Act.

The Court pointed out;

"*Applying the law to the fact of this case, the Court has to find that the offer of employment made to the complainant was an offer of employment with a completely separate entity and not with an associated company for the purpose of the Act. As a result, that offer cannot amount to an offer of suitable alternative employment within the meaning of Section 15 the Act".*

The Court importantly pointed out that Section 9 covers a situation where an employee is to be engaged by another employer immediately on the termination of employment where that re-engagement takes place with the agreement of the employee, the previous employer and the new employer.

In this case the Court pointed out that the complainant did not agree to the respondent's proposal.

The Court pointed out that the refusal by the complainant of this office did not disentitle him to a redundancy payment from the respondent.

This is a very important decision from the Court as it is one which sets out the Legislation in some considerable detail and is one that those dealing with issues of redundancy and the offer of alternative roles need to be fully aware of.

We would anticipate that this type of issue is going to arise more and more.

It is helpful that the Court have set out the law in such detail.

Redundancy Payment Acts – A Decision which is absolutely clear when it comes to calculating the Redundancy due

In the case of ADJ-00029290 being a case of Claire Dalton and Mr. Michael McMee is one where the Adjudication Officer in this case has set out the date the employment commenced, the date the employment ended and the gross weekly pay. This then can be put into the Redundancy Calculator so that there is absolutely no doubt as to what monies are due. If for any reason the monies were not paid then the employee would have a situation where they can apply to the Department of Social Protection for payment under the Insolvency Directive with absolute ease and in the event that the Department, for some reason did not pay the employee would have a straight forward claim to the Workplace Relations Commission to get an order for payment.

The manner in which this decision is set out is very clear and precise.

A further case that can be mentioned is the case of ADJ-00030712 being a case of Ian McCann and WHW Brothers Focus Limited. This is one where the employee was laid off during a time when the employee would have been entitled to the PUP. The employee was laid off on 14th March 2020 and the termination occurred on 24th June 2020. The Adjudication Officer in this case gave a start date, the date of notice of termination and set out the weekly wage but also importantly the period of lay-off. Again, this is one which can be clearly calculated and one where the employee also because of the new Scheme being introduced in relation to covering periods of lay-off during the pandemic when an employee could not claim redundancy is clearly set out and covered by the decision.

Selection for Redundancy

This issue was dealt with in some depth by the WRC in the case of Szlvia Bota and Fifth Avenue Nail Boutique Limited ADJ-00029157.

The Adjudication Officer in this case and, we are not dealing with the facts per se, set out the law in some detail. The Adjudication Officer pointed to the case of Kohinoor Limited and Hussain Ali UDD1629 where the Labour Court held the following were important determinants in reaching a decision that a redundancy was justified in the case being:

1. Respondent decided to carry on with fewer employees.
2. Qualitative changes 34 reduced to 21 employees.
3. Matrix developed for external advice to include essential elements required to meet the future needs of the business.
4. Consultation and giving an opportunity to have input into the scoring.
5. Availability of an appeal.
6. No knowledge of prior grievances 2008 – 2014.
7. Selection criteria applied equally.

In that case the Adjudication Officer held the Court denied the claim but left a definitive blueprint on what might constitute a bona fide redundancy. The Adjudication Officer also quoted the case of Gerard Mulqueen -v- Prometric Ireland Limited UD1259/2012 where it stated;

"The Tribunal carefully considered the oral and documentary evidence produced at the hearing. The Tribunal considers that the procedures used to effect the claimant's dismissal by way of redundancy were flawed. In particular the Tribunal noted that on the 17th May 2012 the claimant was requested to attend a meeting where the gravity of the company's financial position was outlined. The company then informed the claimant that his position along with two other employees was to be made redundant and in so doing produced a matrix that was adopted by the company to effect the redundancies. The claimant had no previous knowledge of the content of the matrix, its significance or its implication for his continuing employment. He was given no opportunity to examine, query or object to the matrix."

The Adjudication Officer pointed out that in that case the EAT emphasised how the procedural framework deviated from best practice.

It is interesting in this case which the Adjudication Officer also as part of the decision encouraged the respondent to formulate a redundancy policy and to circulate this within the workforce. Compensation in this case was awarded.

Letter to Minister

Minister Leo Varadkar
Department of Enterprise Trade and Employment
23 Kildare Street
Dublin 2
29th November 2021

RE: Additional Redundancy Payments for those on the PUP

Dear Minister,

I note that on 21st September you announced an additional Redundancy payment of up to €8,600 to cover periods of time when an individual would have been on the PUP and would now be entitled to claim the PUP period as part of Reckonable Service if made redundant when claiming redundancy. This was a very progressive move.

However, there is a problem. We do not see any basis under which those additional monies can be claimed under the Insolvency Fund from the Department of Social Protection as the Redundancy Payment Acts specifically exclude periods of lay off in the redundancy calculation.

This means that appropriate Legislation has to be put in place. On the list of Legislation I have seen no provision for this to be included. This does need to be addressed and addressed as a matter of urgency.

Issues are now coming up where individuals are being made redundant. The employer prepares the calculation in accordance with the redundancy calculator which of course excludes the period of lay-off.

This is where the disputes then can arise.

At the present time there is no Legislation for the Workplace Relations Commission to accept claims other than against an employer. So if an employer does decide to pay up on the reduced amount the employee still has to bring the employer to the Workplace Relations Commission to get a decision that sets out effectively their start and finishing date and the period of time that which was covered by the PUP. To an extent this sounds ridiculous. If there is any dispute in relation to the entitlements to the additional payment where an employer has paid then this of course should be one that can be dealt with by a claim against the Department of Social Protection of your own Department rather than against the employer.

Where the employer has not paid up then there needs to be specific provision in Legislation to provide that the period covered by the PUP payment will be paid by the Department of Social Protection.

Claims are already going into the Workplace Relations Commission. This issue is going to arise and arise more often. I am asking that you would make sure than appropriate amending Legislation is put in place as a matter of urgency to cover off the Scheme announced by you.

To be fair the Scheme as announced by you was progressive and fair. However, how it is to be implemented is going to become a nightmare unless appropriate Legislation is put in place as a matter of urgency. Of course that Legislation is now going to have to be backdated and the question is what date it will be backdated to. It would be my view that that should be backdated to any redundancy taking place after 20th March 2020 and in addition that there would be an extension of time for claiming any PUP payment element of redundancy where redundancies occurred prior to the Legislation being put in place.

Yours sincerely,

Richard Grogan

Lay off – Right to be paid

This issue arose in the case of Michael Caufield and Hickey Fabrication Services Limited ADJ-00033066.

The Adjudication Officer in this case quoted the provisions of Section 5 (1) of the Payment of Wages Act. The Adjudication Officer also referred to the provisions of Section 11(1).

The case of John McDonagh and Shoreline Taverns Limited 2014 25RLR98 was quoted where the EAT stated;

"The Tribunal finds that when Section 11 is genuinely invoked, and the employer satisfied Section 11 (1) (a) and (b) then the contract of employment is temporarily suspended and there is no right to payment during that period. Furthermore, the Tribunal finds that there is a notorious custom and practice in this jurisdiction that employees will not be paid during a period of lay off. Lay off of itself is an instrument of statute."

In this particular case the employee did not have the benefit of a contract of employment.

This issue arose relating to the issue of Covid tests being required by the employer because of an outbreak.

The Adjudication Officer found in favour of the employee.

The case is useful in that the Adjudication Officer in this case was critical of the fact the word "lay off" was not used in the notification to the employee.

This type of issue is arising more and more.

It is important for employers to have a contract of employment in place which specifically covers the issue of lay off and the right to lay an employee off without pay. Because that provision is one where consent is required under Section 5 of the Payment of Wages Act it is then vitally important that the employer makes sure that that employment contract is actually signed by the employee.

Deduction for training

This arose in case ADJ-00033499 being a case of Ailish Browne and Kells Grange Residential Services Limited. This is a case where there was no appearance by the respondent.

The employee contented that when she gave her notice she was told that she would have to repay the cost of a training course in the amount of €705 which was deducted from her final wages.

The Adjudication Officer referred to Section 5 (1) of the Act in relation to deductions.

The Section is important in that it sets out for a deduction from wages of an employee this cannot occur unless

"(a) the deduction (or payment) is required or authorised to be made by virtue of any statute or any instrument made under statute.
(b) the deduction (or payment) is required or authorised to be made by a virtue of a term of the employee's contract of employment included in the contract before, and in force at the time of, the deduction or payment, or
(c) in the case of a deduction, the employee has given his prior consent in writing to it"

The Adjudication Officer held that in this particular case these steps were not followed.

For employers who are considering providing training courses to staff it is important that this is covered off by way of a contractual term. It can be an additional contractual term agreed between the parties at any stage which will provide when a deduction would be repayable.
While it is not relevant in this particular case, an issue sometimes comes up in relation to the issue of onsite training given by an employer. The Labour Court has been very clear in relation to such cases that it is the actual cost to the employer and this is always something which employers need to be aware of.

TWSS and Payment of Wages Act

This issue arose in ADJ-00031306 between Denis Babic and Reginald's Tower Bar and Restaurant Limited. This case is interesting in that the Adjudication Officer in this case found that there had been no deduction in pay under Section 5 of the Payment of Wages Act on the basis that the employee had received his normal net pay.

Transfer of Undertakings – Protection of Employment Rights

This issue arose in the case of Bernard Meehan and Secureway at Risk Security Group Limited Trading as SAR Security.

The Adjudication Officer in this case set out the legal framework being Council Directive 2001/23/EEC often referred to as the Acquired Rights Directive which was included in Irish Legislation in Statutory Instrument 131/2003. The Adjudication Officer pointed out that Article 3 makes the objective clear.

"*It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded*".

The Adjudication Officer quoted Article 3 (1) of the Statutory Instrument which provides;

"These Regulations shall apply to any transfer of an undertaking, business, or part of an undertaking or business from one employer to another employer as a result of a legal transfer (Including the assignment or forfeiture of a lease) or merger".

Article 3 (2) a Transfer is defined as the transfer of an economic entity which retains its identity. The Adjudication Officer set out then the Legislation in full in relation to Article 4.

The Adjudication Officer pointed out that the Employment Appeals Tribunal in Top Security Limited –v- Thomas Sadlier & Others TU31/35/2014 is one where the Chairman referred to the "diverse,

varied, unwieldly and at times contradictory case law". The Adjudication Officer held that the employment was covered by TUPE.

The Adjudication Officer noted that the main provisions of the Regulations reproduced in the Employment Regulation Order for the Security Industry in Statutory Instrument 213/2007 which indicates that there is a general acceptance in the Industry that the Regulations apply when a contract to provide a security service changes from one employer to another. Compensation of €2,500 was awarded for breach of the TUPE Regulations, which was equivalent to approximately 4 weeks' pay inclusive of the disputed training allowance with some consideration for his entitlement to a premium for working on Sundays and an unsocial hour's payment.

Appeals to the Labour Court

This issue arose in the case of Jaguar Land Rover Ireland and Maja Stanislawska.

This is a case where the Labour Court took some considerable time to set out the law relating to the time limit to put in an appeal to the Labour Court. This time limit is 42 days from the date of the Decision.

The Labour Court set out that Section 83 of the 1998 Act provides that Section 44 of the Workplace Relations Act 2015 shall apply to a decision of the Director General of the WRC under Section 79 as it applies to a decision of an Adjudication Officer under Section 41 of the Act of 2015.

The Court set out that Section 44(4) and (4) of the Act of 2015 provides that;

"(3) Subject to subsection (4) a notice under subsection (2) shall be given to the Labour Court not later than 42 days from the date of the Decision concerned.

(4) The Labour Court may direct that a notice under subsection (2) may be given after the expiration of the period specified in subsection (3) if it is satisfied that the notice was not so given before such expiration due to the existence of exceptional circumstances".

The Court referred to Section 18 (h) of the Interpretation Act 2005 as regards periods of time which provides;

"*Where a period of time is expressed to begin on or be reckoned from a particular day, that day shall be deemed to be included in the period and, where a period of time is expressed to end on or be reckoned to a particular day, that day shall be deemed to be included in that period".*

The wording of Section 18 (h) of the Interpretation Act 2005 is comparable to that of Section 11(h) of the Interpretation Act 1937 which section was considered by the High Court in McGuinness –v- Armstrong Patents Limited 1981 1 IR 289. In that case the Labour Court pointed out Mr Justice McMahon held that in enacting Section 11 (h) the Oireachtas had opted to a different approach to that of the well settled rule of law in England where the period of time prescribed by Statute is defined as the period "from" a particular event…the day of the event being excluded in computing the period.

The Labour Court also looked at Section 21 of the Interpretation Act 2005.

The effect of the decision is that the time limit for an appeal is 42 days from the date of the decision.

This issue is sometimes catching parties out and it is very important that those dealing with the appeals are aware of the very strict time limits and the strict rules which will be applied by the Labour Court in relation to these matters as they will simply be applying the Legislation.

Reasonable Accommodation

This issue arose in the case of MultiRoofing Systems Limited and Boguslaw Magajczyk EDA2140.

This was an appeal from a Decision of the Adjudication Officer.

The complainant was employed. In 2010 he went on sick leave due to pains in his arms neck and back. He was diagnosed as having a spinal cord injury. The issue then related to whether reasonable accommodation had been afforded to him.

The Supreme Court quoted the case of Nano Nagle –v- Marie Daly 2019 ELR221 where Mr. Justice McMenamin noted;

"*Once consultation, or necessary steps to compliance, had been taken, an employee entity may have to ask itself the ultimate question whether having explored the modes of accommodation, and if, prudently having consulted with an employee, the position, as applied in Section 16 (1) is, in fact capable of adaptation so as to accommodate the claim, and whether the claimant would be capable of performing that function thus adapted. But is that "position" or job not another one*".

The Court pointed out that the Judgement sets out clearly that the requirement on an employer when dealing with a situation where an employee has a disability it is to examine if that employees job is capable of an adaptation so that by taking appropriate measures in accordance with the Act the employee can carry out the full function or role.

The Court pointed out that this clearly requires that an employer should examine the job thoroughly and ascertain what accommodation might be capable of being made that do not generate a disproportionate burden or cost. The Court pointed out that the case is on whether the Court was satisfied that this deliberate exercise was carried out at the level required.

The Court pointed out that they had no reason to doubt the competence of qualification of Ms. Farrell or to doubt the sincerity of the conviction that the complainant could not be accommodated by appropriate measures given the nature of the work involved and the nature of the disability. Nor could the Court question her knowledge of the respondents business and the physical demands on its employees so that even to an outsider it might appear to be self-evident to use these skills and insight appropriately when determining if the complainant could ever be facilitated to return to work.

The Court pointed out;

"*However, the extract from the Supreme Court Judgement in Nano Nagle quoted above makes clear that something more is required of an employer*

than simply instinctive judgement. What is required is a transparent, deliberative process".

The Court was concerned that there were no records of any deliberations. The Court stated;

"*While the lack of such possible consultation does not, itself, fatal to the respondent's case, the absence of hard concrete evidence in such deliberation is of concern to the Court*".

The Court pointed out that in Humphreys –v- Westwood Fitness Club 2004 ELR296 there is a requirement on an employer to be in possession of all relevant facts when making such assessments.

The Court quoted the case of A Health and Fitness Club –v- A Worker EED037 where it is noted that a Bona Fide belief that a workers is not capable of undertaking a job is a defence against the claim of discrimination on the grounds of disability. However, the findings in that case went on to note that, before forming this belief, an employer is "normally required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.

The Court quoted the case of A Worker –v- An Employer 2005 ELR159 where it was stated;

"*The duty placed on an employer by Section 16 (3) includes, by implication, a requirement to make a proper and adequate assessment of the situation before decisions are taken which may be to the detriment of a disabled employee. As was pointed out by the EAT for England and Wales in Mid Staffordshire General Hospital NHS Trust –v- Cambridge 2003 IRLR566, this arises because in the absence of such an assessment it will often be impossible for the employer to know what facilities or special treatment may be reasonably, possible or effective".*

In this case the Court held in favour of the employee and compensation of €10,000 was awarded.

Retirement and the Pension Gap

One issue which is coming up is the gap between the pension age that a company may want an individual to retire at and when they can obtain the State Pension. Admittedly individuals will be able to obtain Social Welfare in the interim equal to the amount of the pension but at the same time there are also individuals who need to keep working.

The need to keep working arises from the fact of savings having been reduced in value, the requirement to continue the education of children, and, in many cases simply a desire to keep working.

The majority of employers in Ireland continue to look to have a contractual retirement age.

In selecting a retirement age it is important, and this cannot be over stressed, that any organisation putting in a retirement age to consider the needs of the organisation and have the appropriate documentation in place setting out how this retirement age has been selected.

The difficulties in cases where there is a forced retirement is that often this documentation will not be in place and will be attempted to be justified post the retirement.

The Employment Equality Acts set out that an employer must justify the reason for choosing a particular retirement date. There has to be a legitimate aim.

What Retirement Age Will Apply?

The issue of what retirement age will apply in many organisations may not be as simple as a standard retirement age. There are many organisations which will have different categories of employees. Some will have a sedentary job such as an office based job. Others may have a physically demanding role. Therefore in setting a retirement date in many cases it may well be a different date for different groups of workers. This is not of course just simply picking a date. It may well be that appropriate medical advice should be obtained about the setting of a retirement date for different categories of workers and that should then be documented as to why that date has been fixed.

Employers must also be aware of the Code of Practice on Longer Working being Statutory Instrument No. 600/2017. This is a useful guidance for employers and sets out what needs to be done leading up to the retirement age and how to reply to requests from employees to work beyond contractual retirement age. The Code itself specifically sets out that employers need to consider appropriate policy procedures to cater for diverse workplaces and encouraging the retention of older workers and longer working.

The Issues Which Employers Need To Take Into Account.

In providing for a retirement age employers may well need to take into account issues such as income protection policies, deaths in service policies, the provision of health care and pension contributions. It may well be in setting out a retirement age and catering for older workers and longer working that some of these benefits will cease at a particular date. It is important again to be able to justify this. For example, it may well be that due to the cost of keeping in place insurance such as for Death in Service Benefits that this may be a cost that has to cease on a particular date. It is important then to document fully in policies and contractual documents that an employee who continues to work on past a set retirement date either on their existing contract or on a fixed term contract may no longer be able to access these benefits.

Employers also need to consider how longer working may impact on the organisation as regards potential for career development by younger workers. This can be a reason for having a compulsory retirement age for certain categories of workers for example having a compulsory retirement age for a Chief Financial Officer may well be able to be justified on the grounds of providing for career opportunities for younger employees. However a similar argument is unlikely to be successful when it comes to a person who may be doing a lower level job in the Finance department such as a clerk.

One issue which is yet to be addressed is going to be the issue of individual drawing down their pension from the company and continuing to work at the same time. This is one which employers need to address. Of course there is no difficulty with an employee drawing down the State Pension and continuing to work.

The issue of forced retirement is a regular feature which is coming up. There are significant numbers of claims which are going against employers at the present time. Many of these are settled but equally many of them run for hearing. In reality a lot of these cases are won by employees because employers do not have appropriate policies and procedures in place.

Penalisation under the Organisation of Working Time Act

This arose in case ADJ-00031033 being a case of Jennifer Mackey and Skycrest Limited. In this case the Adjudication Officer held that there was a conflict of evidence but noted that the complainant was given no work for the first two weeks of December 2020. On the 13th December of that year a complaint issued to the WRC. On the 7th December she was contacted by the respondent to come back to work. The complainant alleged that she had complained about being required to work 7 days a week. This was contested by the employer. The Adjudication Officer concluded that by telling the complainant to take December off therefore depriving her of her livelihood immediately after she objected to working excessive hours the respondent did penalise the complainant.

Settlement Agreements – Bar on Bringing Further Claims

This issue was addressed again by the WRC in case ADJ-00029754 being the case of Gabriel McCabe and AB Group Packaging Ireland Limited. In this case the Adjudication Officer referred in their Decision to the case of Hurley –v- The Royal Yacht Club 1997 ELR225 where Buckley J set out the principles of a Settlement Agreement stating;

"*I am satisfied that the applicant was entitled to be advised of his entitlements under the Employment Protection Legislation and that any agreement or compromise should have listed the various Acts which were applicable or at least made it clear that they had been taken into account by the employee. I am also satisfied that the applicant should have been advised in writing that he should take appropriate advice as to his rights, which presumably in this case, would have been legal advice. In the absence of such advice I find the agreement to be void".*

The Adjudication Officer in applying these principles was satisfied that the agreement specifically precluded the complainant from commencing any further complaints against the respondent under a wide ambit of Acts including the Payment of Wages Act. Secondly, the Adjudication Officer was satisfied the complainants obtained legal advice from a Solicitor.

The Adjudication Officer found that as the Severance Agreement was signed by the parties it compromised any claims and that the Adjudication Officer did not have jurisdiction to hear the case.

This case is important for restating the requirement for employers to have a valid Settlement Agreement that it is properly drawn up, clearly sets out the Acts or a right which the employee cannot bring a further claim under and is one where the employee has been given the opportunity to obtain legal advice. In this particular case above the employer had made a contribution towards the cost of the employee getting legal advice. It is always as well in these cases for an employer to actually insist upon getting a document witnessed by a Solicitor. In practice it will mean that the employer will provide that a sum of money will be paid to the Solicitor together with VAT on receipt of an invoice addressed to the relevant employee but marked payable by the company.

Continuity of Service for Unfair Dismissal

This issue arose in case ADJ-00029710 being a case of Dowling and Activo (Ireland) Limited.

The respondent submitted that the complainant did not have the required one year's continuous service. The complainant contended that he commenced employment on 2nd July 2019 and that one year and 26 days later on 28th July 2020 the employment was terminated. The complainant contended that the employment commenced when he signed the contract of employment rather than when he commenced employment being 5th August 2019. If the commencement date was 5th August 2019 then the employee had 11 months and 26 days service only.

The Adjudication Officer referred to the Section 1 of the Act being the Unfair Dismissal Legislation which defines an employee as one "*who has entered into and works under (or where the employment has ended) worked under a Contract of Employment".*

Section 2 (1) (a) excludes from the protection of the Act an employee who;

"*At the date of his dismissal has less than one year's continuous service with the employer who dismissed him".*

Section 2 (4) of the Act sets out the issue of continuity of service.

The Adjudication Officer pointed out that the Adjudication Officer would find it difficult to accept that providing company documentation to a person whose is appointment is imminent, which is a common place occurrence, would constitute a computable service.

The Adjudication Officer pointed out that the First Schedule of the Minimum Notice and Terms of Employment Act, 1973, excludes service in which;

"An employee is not normally expected to work for at least 21 hours" and it will not count in;

"Computing a period of service".

The Adjudication Officer pointed out that Section 9-13 of the First Schedule set out absences from employment which can or cannot be counted in computing a period of service. The Adjudication Officer pointed out that all such absences are concerned with persons already in employment, performing tasks and stepping off the job temporarily as opposed to waiting for their employment to commence.

The complainant referred to the case of Herrero –v- Instituto Madrilleno De La Salud Case C-294-04 which held that continuity of service for seniority runs from the date on which an employee is hired rather than the date she was able to take up her duties. The Adjudication Officer pointed out that this was decided under Directive 76/207/EEC in relation to the principle of equal treatment. The Adjudication Officer pointed out that they were unable to identify an equivalent statutory

protection for the period between signing a contract and taking up an employment.

The Adjudication Officer held that they did not have jurisdiction to hear the complaint.

Illegal Contracts

This issue arose in case ADJ-00027527.

The Adjudication Officer in this case referred to the case of Hussein –v- The Labour Court and Younis 2012 IEHC364 as being relevant as that case found that the complainant was unable to invoke various protections afforded by Irish Employment Legislation by reason of the illegality of the Contract of Employment. The illegality arose from the employee's failure to hold the required employment permit. It applied potential allegations of gross exploitation and no redress was available against the employer in that case as held by Mr. Justice Hogan. The case of TA Hotels Limited trading as Lynams Hotel –v- Ahoose RPA17/30 RPD1916 was one where the respondent after the Adjudication Officer considered the outcome of this case. This is a case where the Labour Court found that the contract of Employment relied upon by the complainant to ground a claim for certain statutory employment rights was tainted with illegality and therefore unenforceable in law. Consequently the complainant could not maintain a claim under the Employment Equality Act.

The Labour Court pointed to alternative remedies available in the Civil Courts which had been provided for by an amendment to the Employment Permit Act after the Hussein Decision. These reliefs the Labour Court pointed out were not capable of being pursued in the Labour Court.

The Adjudication Officer then referred to the case of Shardha Sobhy –v- The Chief Appeals Officer and the Minister for Employment Affairs and Social Protection 2020-353JR which concerned an entitlement to Maternity Benefit where the working permit had expired. The High Court took time to consider the case of Quinn –v- IRBC 2016 1IR where the Supreme Court had looked at issues concerning contract illegality. The Adjudication Officer pointed out that it seems that the Quinn case

is clear authority for the position that there can be no hard and fast rule and no universally applicable rule to the effect that a contract tainted with illegality is always and of necessity and regardless of the consequences of any other factors void. The Adjudication Officer pointed out that it was clear from the Supreme Court decision in Quinn that the proposition is far from nuanced. In Sobhy the Court found that despite there had been no valid visa in operation the relationship does not automatically cease to be a contract of service for the purposes of the Social Welfare Acts. The Judge in that case did however indicate that when she had applied for Maternity Benefits under the Act the complainant was working under a valid visa allowing her to work in the State. The Adjudication Officer having considered the decision was satisfied that the Sobhy Case did not advance the complainants case and that the law as it was put by the Adjudication Officer at the time of the hearing of this case.

The Adjudication Officer held that the Contract of Employment was rendered void by the expiration of the student visa. The Adjudication Officer held that the complainant was fully aware of the fact that the visa was going to end and the onus rested with her to renew it. The Adjudication Officer held that the contract was void from 6th September 2019 and that the complainants entitlements to employment rights protected under legislation expired at this time too.

This is an important decision of the Adjudication Officer in setting out the law so clearly on this point.

***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.**