Keeping In Touch

Welcome to the December Issue of Keeping in Touch.

INDEX:

Out and About in December 2021

Richard Grogan was quoted in Breaking News in an article around the lack of legislation around school mask wearing on 3 December.

On 9 December Richard was quoted in RSVP Live magazine on the issue of Public Holiday rights over Christmas.

On 10 December Richard was interviewed on Midlands 103 on the issue of accidents at home in the case of remote workers.

On 11 December Richard was quoted in the Irish Daly Mirror on the issue of annual leave carry-over.

On 13 December Richard was interviewed by Kildare Local Radio.

Richard was on Cork's 96fm on 14 December to discuss employment law rights.
On 15th December Richard was on Ireland AM discussing accidents when working remotely. Also on 15th December Richard was on the Niall Boylan Show in relation to issues concerning holiday rights and the carry-over of holiday entitlements.

On 15th December Richard was also quoted in the Irish Daily Mirror in relation to employment rights around holidays.

On 16th December Richard was interviewed on Highland Radio around holiday rights and Public Holiday rights in the Christmas period.

On 17th December Richard was interviewed on Today FM answering questions by listeners around various aspects of employment law.

On 21 December Richard was interviewed on Galway Bay FM again around holiday and Public Holiday rights.

On 23rd December Richard was interviewed on Today with Claire Byrne with Philip Boucher Hayes answering listeners' questions.

Richard started a TicTok Account in December and it has gone viral. This was commented on by iRadio and also Dublin Live.

In December the Irish Sun published a TicTok video by Richard Grogan of our office relating to the issue of employers advising employees who were close contacts to return to work. The title of the article was "Health Risk Irish Solicitor "Absolutely Raging" some employers are forcing close contacts of Covid to return to work".

Nervous Shock in Ireland

Nervous shock in Ireland has been defined as a legal term used to connote a mental as opposed to physical injury to a person. One of the leading cases in Ireland is Kelly -v- Hennessy wherein Hamilton CJ set out five requirements for a claim to succeed in nervous shock.

- The Plaintiff must establish that he or she suffered a recognisable psychiatric illness;
- That the psychiatric illness was shock induced;
- That the shock (and hence the consequent psychiatric illness) was caused by the negligence of the Defendant;
- The nervous shock must have been by reason of actual or apprehended physical injury to the Plaintiff or person other than the Plaintiff; and
- The Plaintiff must show that the Defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock.

In the recent decision of Lisa Sheehan -v- Bus Eireann [2020] Ms. Sheehan applied to the High Court to seek damages from the psychiatric injury of "nervous shock" that arose from her presence at a road traffic accident. She was driving home when she came across an accident, she did not witness the accident however some debris hit her car and she described witnessing a partial decapitated body at the scene. She claimed that she developed a post-traumatic stress disorder as a result of this.

The Defendants argued that Ms. Sheehan was merely a secondary victim and therefore even if her psychiatric injury was a reasonably

foreseeable consequence of the Defendant's negligence she would not be entitled to damages.

They argued that her claim was void because there is no liability in negligence where the primary victim was the negligent Defendant and the shock to the Plaintiff arose from witnessing the Defendants self-inflicted injury.

The Plaintiff satisfied the first four of the five principles test as set out in Kelly -v- Hennessy which were:

1. She suffered a recognised psychiatric injury
2. The injury was shock induced
3. It was caused by the Defendant's negligence
4. There is an actual or, in this case apprehended physical injury.

The fifth principal was whether or not the Defendant owed the Plaintiff a duty of care not to cause a reasonably foreseeable psychiatric injury. Keane J held that the Defendant's did owe the Plaintiff a duty of care not to cause her a reasonably foreseeable psychiatric injury. Ms. Sheehan was entitled to recover damages to compensate for her psychiatric injury.

The judgement is significant as it affirms the importance in nervous shock cases of satisfying the criteria as set out in the Kelly case. It is also clear from this case that the Irish courts have adopted a more flexible approach to the categorisation of 'Primary' and 'Secondary' victims than that of the English courts. It would appear that there is a marked divergence in the law relating to nervous shock between Ireland and the UK.

Unfair Dismissal – The Issues Which Employers Need to Take Into Account

This arose in the case of O Grady and Heraeus Metal Processing Limited ADJ/00029216. In this case the Adjudication Officer referred to the cases of Looney –v- Looney UD83/1984 where the EAT referred to its role as to consider what a reasonable employer would have done.

Also the case of Bunyan –v- United Dominions Trust 1982 ILRM404 which states;

"The fairness or unfairness of a dismissal is to be judged by the objective standards of the way in which a reasonable employer in those circumstances in that line of business would have behaved".

In Frizelle –v- New Ross Credit Union 1997 IEHC137

"The decision must be proportionate to the gravity and effect of the dismissal on the employee".

In Pacelli –v- Irish Distillers 2004 ELR25 the EAT stated that any investigation should have regard to all the facts issues and circumstances.

The EAT pointed out in Gearon-v- Dunnes Stores Limited UD367/1988 that the complainant in that case had an entitlement to have her

"Submissions listened to and evaluated".

With regards to the question as to what a reasonable employer would have done the Adjudication Officer pointed to the decision of Lord Denning in the case of British Leyland UK Limited –v- Swift 1981 as;

"If a reasonable employer might have dismissed him, then the dismissal was fair".

This concept was expanded upon in Abdullah –v- Tesco Ireland Plc UD1034/2014 in which the EAT stated;

"What is required of the reasonable employer is to show that she/he had a genuine belief based on reasonable grounds, arising from a fair investigation that the employee was guilty of the alleged misconduct and the sanction of dismissal as not disproportionate".

It is useful that the Adjudication Officer has set out the law in such detail.

Unfair Dismissal and Fair Procedures

This arose in a case of a Fitness Instructor and a Gym ADJ-0028843. In this case the Adjudication Officer quoted the Labour Court case of Beachside Company Limited trading as Park Hotel Kenmare –v- A Worker LCR21798 where the Labour Court stated;

"The Court has consistently held the view that it is imperative that an employer in a dismissal case must not only show that there were substantial grounds justifying the dismissal but also that fair and proper procedures were followed before the dismissal takes place".

The requirement of procedural fairness is rooted in the common law concept of natural justice.

In this case also the Adjudication Officer referred to S.I. 146/2000 being the Code of Practice of Grievance and Disciplinary Procedures.

This is a helpful restatement of the law.

It is important for employers to make sure that they follow not only their own procedures but also the Code of Practice as the issue in Unfair Dismissal cases invariably comes down to procedures.

Fair Procedures in Unfair Dismissal Cases

This issue arose in a case of Praxis Care and Hobson UDD2172.

In this case the Labour Court looked at the provisions of Section 6 of the Unfair Dismissal Act 1977, as amended and in particular subsection 4.

The Court noted that there were several facts relating to the process followed which were not disputed being;

1. The fact that the complainant in the case never received the allegation in writing before the investigation as required by the respondent's disciplinary process.

2. The facts that the notes from the meeting which were issued were allegedly raised from the meeting where the issue was allegedly raised or never produced.

3. The participation by HR in terms of appointing the investigator, advising the investigator of the allegation as opposed to providing the investigator with a copy of the allegation, and providing a list of people HR had decided should be interviewed as relevant witnesses.

4. The evidence to the Court that HR decided that the investigator was only to investigate the complainant's role in the incident and not the role of the second care worker.

5. The fact that the investigation report was unsigned and undated and that the complainant was never given a copy of same nor given an opportunity to comment on the witness statements contained in it during the investigation process.

6. That the script for the disciplinary hearing was prepared by HR before the investigator was appointed as the decision maker.

7. That the script was not provided to the complainants in advance of the hearing.

8. The fact that the note taker asked a question that went further than just seeking clarification.

9. The fact that the decision maker confirmed in her evidence to the Court that she had not considered the mitigation put forward by the complainant as she did not believe it was relevant to the incident in question.

10. The fact that the second carer on the day of the incident was not investigated nor did that person receive any sanction for the same error of judgement.

11. The fact that the decision maker coming to the decision that dismissal was the appropriate sanction did not consider the fact that a second person had also been involved who was equally culpable and had not been subject to any investigation or received any sanction.

The Court found that these undisputed facts of themselves indicated a lack of independence of the process in a situation where HR are determining how the investigation is framed, who should be investigated, what questions should be asked at the disciplinary hearing and exonerating one of the parties to the incident without any plausible explanation.

The Court in its deliberations noted that the test of reasonableness was set out in the case of Noritake (Ireland) Limited –v- Kenna UD88/1983 as follows;

"

1. Did the company believe that the employee misconducted himself as alleged?
2. If so, did the company have a reasonable ground to sustain that belief?
3. If so, was the penalty of dismissal proportionate to the alleged misconduct?"

The Court pointed out that this issue was further considered in the case of Bank of Ireland –v- Reilly 2015 IEHC241 where Noonan J noted that Section 6 (7) of the Act made it clear that a Court may have regard to the reasonableness of the employers conduct. The Court quoted paragraph 38 of the Judgement where Mr. Justice Noonan stated;

"This is not however to say that the Court or other relevant Body may substitute its own judgement as to whether the dismissal was reasonable for the employer. The question rather is whether the decision to dismiss is within the range of reasonable responses of a reasonable employer to the conduct concerned".

The Court also quoted paragraph 56 where Mr. Justice Noonan stated;

"In assessing the reasonableness of the employers conduct in relation to dismissal herein, it seems to me that such an assessment must have regard to the surrounding circumstances, including the impact of the conduct of the employer as against the impact of the dismissal on the employee to determine the proportionality of the employer's response.

The Court in this case held that the decision to treat the two workers involved in the incident in such a disparate manner would not be the actions of a reasonable employer.

This is a case where an award of over €31,000 was awarded.

This is an important decision of the Labour Court in setting out the legislation and the relevant case law in considerable detail.

The decision of the Labour Court also importantly sets out the issues which an employer should be making sure they cover as part of any process so as to ensure that it is deemed to be a fair process.

Redundancy – Suitable Alternative Employment

This issue arose in the case of Jocinaite and Ryanair DAC ADJ-00029723. The Adjudication Officer in this case looked at the provisions of Section 15 of the Act.

In making the decision to award redundancy the Adjudication Officer noted the case of Cinders Limited –b- Byrne RPD1811 where the Labour Court held that the issues to be considered were;

"(i) The suitability of the offer of alternative employment made… on behalf of the respondent to the complainant; and

(ii) Whether the complainant's decision to refuse each of those offers was reasonable in all the circumstances".

The Adjudication Officer pointed out that this decision of the Labour Court relied on the case of Cambridhe and District Cooperative Society Limited –v- Ruse 1993 IRLR156 where the Labour Court stated;

"The suitability of the employment is an objective matter, whereas the reasonableness of the employee's refusal depends on factors personal to him and is a subjective matter to be considered from the employee's point of view".

The Adjudication Officer pointed out that specifically the Labour Court held it was reasonable for an employee to refuse to move from a standalone store in the Merrion Centre Dublin 4 to a concession within a Department Store in Blanchardstown or St. Stephens Green but unreasonable to refuse to move to stand alone store in Wicklow Street Dublin 2 a distance of about 6 km from the Merrion centre. The Adjudication Officer pointed out that the Court in that case held that "There was no significant difference between the working environment she would have enjoyed in Wicklow Street and that she had experienced from her previous 20 or so years of her working relationship with the respondent.

The Adjudication Officer pointed out the legal test set out in Cinders Limited referred to above is therefore that the suitability that the alternative offer of employment should be assessed objectively as well as from the subjective perspective of the employee.

In this case a number of authorities had been opened by the employer to argue that the offer of alternative employment in an alternative location as suitable.

We would expect to see a considerable number of these types of cases arising where the issue of suitable alternative employment is offered in the cases which will be coming forward in due course.

Selection for Redundancy

This arose in a case of Keohane and McCarthy ADJ/0030170. The decision is interesting in that the Adjudication Officer looked at the cases of JBC Europe Limited and Panisi 2011 IEHC279 and the case

of B Mhindurwa –v- Loving Angel Care Limited being a UK Employment Tribunal Case Number 3311636/2020 where the UK Tribunal held;

"Failure to give consideration to the possibility of furlough and the failure to offer the claimant a proper appeal renders the claimants dismissal unfair.

In this case the Adjudication Officer pointed out the Respondent presided over a genuine redundancy when the complainant was dismissed. However, the Respondent had not succeeded in the remaining two legs of the test of fair selection and reasonable treatment and on that basis the Adjudication Officer ordered reengagement of the employee and the repayment of the Redundancy Lump sum.

What is interesting about this case is that the Adjudication Officer has confirmed that there can be a genuine redundancy but that still means that the fair procedures must be gone through.

When may Reinstatement be Awarded?

This issue arose in a case of Forum Connemara Co. and Walsh UDD2173.

In this case the Labour Court reviewed the Legislation and addressed the issue of reinstatement.

The Court stated;

"The effect of reinstatement is to put a successful complainant back in the position he or she would have been in but for the disputed dismissal. It has the effect of nullifying the disputed dismissal.

As a remedy, it is rarely awarded in Unfair Dismissal cases by the Workplace Relations Commission or the Labour Court as it is deemed appropriate only when the Commission or the Court is of the view that the bond of trust and confidence necessary to maintain an employment relationship between a complainant and respondent remains sufficiently intact.

Furthermore, it amounts to a clear statement that the complainant had not contributed by their conduct or otherwise to their dismissal.

This is an important decision by the Labour Court.
While it is not relevant in the circumstances of this particular case this particular issue is likely to arise more often in the case of a senior executive or senior manager who is dismissed on a "no fault dismissal".

Because of the way a no fault dismissal must be put in place to avoid an injunction it would be our view that it would be very difficult for an employer to argue that the bond of trust and confidence necessary to maintain the employment relationship is other than intact and equally of course that the employee has not contributed to their own dismissal.

It may well be that in these types of cases this is going to be an area of jurisprudence which will develop.

Holiday Pay and Holidays

There was a considerable amount of confusion in relation to the issue of holiday pay coming up to Christmas. Holiday pay is the average of the pay over a 13 week period prior to a person going on holidays. That therefore includes the basic pay, commission and any bonus payment which must be included in the calculation. Holiday pay is supposed to be paid in advance and in accordance with the provisions of the Organisation of Working Time Act.

Non-taxable payments such as non-cash gifts or subsistence are not included in calculating holiday pay. This is an issue which a number of employees believe they should be entitled to but which they are not entitled to. The other issue relating to the annual leave year. The annual leave year is set out in Section 2 of the Organisation of Working Time Act 1997. It is a period from the 1st April to the following 31 March.

There has been a view by some employers that they can set a different annual leave year other than that of 1 April to the following 31 March.

We have tracked down the source of this information. It is actually from the Department of Enterprise Trade and Employment. Unfortunately the Guide from the Department which is wrong was also reproduced on the Workplace Relations Commission website and is actually referred to in one of their publications which has a link to this document produced by the Department which is legally incorrect.

The offending Section states;

"…There is no restriction on employers using a different 123 month periods provided the same leave year is used consistently". This is of course factually incorrect.

The law as regards the correct annual leave year set out in Section 2 of the Organisation of Working Time Act 1997 was confirmed in a decision by the late Mr. Justice Lavin in Royal Liver Assurance Limited –v- Macken 2002 4I.R.427. We would mention that the Guide from the Department issued in 2011. This is some 9 years after the High Court had ruled in relation to what the annual leave year is.

The Labour Court has been very consistent in setting out the correct annual leave year. On example of this is the case of DWT1727 being a case of Meade's Bar Limited and Smalli. In that case the Labour Court clearly set out the law including the decision of Mr. Justice Lafon namely that there is only one annual leave year being the period from 1st April to the following 31st March.

It is quite disgraceful that the Department of Enterprise Trade and Employment would be producing Guides which are factually incorrect especially when they issue nine years after a decision from the High Court and after numerous Labour Court decisions. It is also very questionable as to why this Guide was ever placed on the WRC website.

What is interesting is of course is that the Guide from the Department has a very nice legal exemption from any liability. The same applies to WRC Guides. However decisions from the High Court and from the Labour Court do not include disclaimers of liability unlike what the Department issued.

2021 was a year in particular where the issue of carry-over of annul leave came to the forefront.

Employers who wrote off annual leave entitlements or made a payment for outstanding holidays run the risk of having a claim against them issue after 1st April 2022 for breach of the Organisation of Working Time Act. No claim can issue until the 1st April in respect of any claim for not receiving the full holiday entitlement because the employer is entitled to give those holidays up to 31st March. There are numerous Labour Court rulings on that point also.

Where an employee had been paid instead of taking their holidays then there is a view that the proceedings should issue within six months of that date but the better course of action would be to issue proceedings as soon as possible within that six month period and a further set of proceedings to issue after 1st April. Any claim for not having received the full holiday entitlement of course can issue up until the last day of September. Any claim for not having received the full holiday entitlement of course can issue up until the last day of September 2022.

It would be hoped that the Department and the Workplace Relations Commission will take down the incorrect Guide.

There is of course an argument that employers should be entitled to set a different annual leave year. That is the position under UK Legislation. That is not the position under Irish Legislation. It is our belief that what happened in the Department is that they copied a UK Guide which has a different Legislative basis. As we said, in the UK the employer has the choice of setting their own annual leave year with a default annual leave year if they do not do so. If that is the position then it goes down to plain stupidity on the part of the Department in not actually having checked the Legislation. This is not at all surprising. The position in relation to the Department is that when Legislation is being drafted the Legislation goes to the Draftsman's Office to draft the Legislation with the Department only having an input in relation to the principles to be applied.

A lot of the confusion which arose this year is solely down to the actions of the Department. Of course the Department will never take any responsibility for such action.

Penalisation under the Safety Health and Welfare at Work Act, 2005

This issue arose in the case of Keenan and An Post ADJ/00030607. In that case the Adjudication Officer quoted a case of O Neill –v- Toni & Guy Blackrock 2010 EWLR21 being HSD095 where the Labour Court stated;

"The detriment giving rise to the complaint must have been incurred because of or in relation for the claimant having committed a protected act. This suggests that where there is more than one causal factor in the chain of events leading to the detriment complained of, the commission of a protected act must be an operative cause in the sense that "but for" the claimant having committed the protected act he/she would not have suffered the detriment. This involves a consideration of the motive or reason which influence the decision maker in imposing the impugned detriment".

While in this case the claim was not upheld it is helpful that the Adjudication Officer has again set out the law in relation to this matter as regards what the test is.

Discrimination Claims

This issue arose in a case of Bidvest Noonan (ROI) Ltd and Ivanova EDA2145.

In this case the Court pointed out as was noted in Margetts –v- Graham Anthony Limited EDA038.

The mere fact that the complainant falls within one of the discriminatory grounds laid down under the Act is not sufficient in itself to establish a claim of discrimination. The complainant must adduce other facts from which it may be inferred on the balance of probabilities "that an act of discrimination had occurred".

In this case the claim was dismissed on the basis that the employee would have needed to ground her case on one of the nine grounds and

that she would have needed to produce evidence to show that the act of discrimination had occurred.

It is therefore important in bringing claims that an employee is able to set out the specific ground under which they come and to set out facts on the basis of same as to how they were discriminated against.

Equal Pay Claims under the Employment Equality Acts

This issue arose in the case of Trinity College Dublin and TannerEDA2143. The Court in this case set out the provisions of Section 19 (1) and (2) of the Act.

Section 19 (2) sets out that the relevant time in relation to a particular time is any time during the three years which precedes or the three years which follows the particular time. In this particular case the named comparator had not been employed during the relevant time and on that basis the case was unsuccessful.

This case does highlight the importance of picking the right comparator in the relevant time frame as set out in Section 19 (2) of the Act.

Mandatory Retirement Ages

This issue arose in the case of Gerrity and the office or the Revenue Commissioners ADJ-00000031.

The Adjudication Officer in this case set out Section 6 and Section 34 of the Legislation along with Section 85a.

The Adjudication Officer quoted the case of Seldon -v- Clarkson Wright & Jakes 2012 IRLR 590. The Adjudication Officer quoted paragraph 68 of that decision where it states,

"As to whether the means chosen were proportionate, in the Article 6(1) sense of being both appropriate and reasonably necessary to achieve these aims (intergenerational fairness/manpower planning etc) the case is all ready to go back to the ET on the basis that it had

not been shown that the choice of 65 was an appropriate means of achieving the third aim. The question, therefore, was whether the ET would have regarded the first two aims as sufficient by themselves. In answering that question, I would not rule out their considering whether the choice of a mandatory age of 65 was appropriate means of achieving the first two aims. There is a difference between justifying a retirement age and justifying this retirement age. Taken to extremes, the first two aims might be thought to justify any retirement age. The ET did not unpick the question of the age chosen and discuss it in relation to each of the objectives"

As this case involved individuals who had a different retirement age the Adjudication Officer pointed out that the question has to be where is the objective justification for a condition that was becoming a minority interest in the retirement date of the complainant in April 2015.

The case of Age Concern England C-388/07 was one where the CJU referred to the need for high standard of proof in stating;

"It imposes on member states the burden of establishing to a high standard of proof the legitimacy of the aim relied on for justification". The Adjudication Officer went back to the Seldon case where Lady Hayle stated;

"There is therefore a distinction between justifying the application of the rule to a particular individual which in many cases would negate the purposes of having a rule and justifying the rule in the particular circumstances of the business, all business will now have to give careful consideration as to what if any mandatory retirement rule can be justified".

The Adjudication Officer pointed out as Lady Hale had stated in the case previously;

"There is a difference between justifying a retirement age and justifying this retirement age"

The Adjudication Officer pointed out that there is a question as to where there can be an objective justification for one person having a retirement age of 65 while a colleague would remain to age 70.

The Adjudication Officer held that in keeping with the EU Directive 2000/78/EC and the Boyle case reference C-378/17 which confirmed the primacy of EU Law Section 8 of the particular Civil Service Regulation Act 1956 must be disapplied. In this case redress of €82,000 was awarded being 104 weeks remuneration. The Adjudication Officer pointed out that having regards to the requirements pursued to Article 17 of the Framework Directive that the award must be affective dissuasive and proportionate.

National Minimum Wage from 1 January 2022

The new rates are;

1. Those aged 20 years and over €10.50
2. Those age 19 €9.45
3. Those age 18 €8.40
4. Under 18 €7.35

Since 4 March 2019 the trainee rates have been abolished. Where a person received board or lodging that is food or accommodation from an employer the maximum amounts which can be included are;

- For board only 0.94 per hour worked
- For accommodation only 24.81 per week or €3.55 per day

From 1 January 2022 the following group of employees are excluded from the National Minimum Wage;

- Employees who are a close relative of the employer where the employer is a sole trader; and
- A craft apprentice within the meaning of the Industrial Training Act 1967 or the Labour of Services Act 1987.

New Workplace Relations Commission Procedures for Hearings

We have been very vocal in relation to the issue that ambushing in the WRC has become a feature. This involves information only being submitted very late. Taking account of the recent decision of the

Supreme Court in Zawelski in relation to the issue of fair procedures this has been an issue which we have again raised. It has resulted in a number of cases having to be adjourned to give the party not in receipt of documentation an opportunity to review same.

On 23 December the WRC issued new guidelines. There are three important elements in relation to these Guidelines.

1. All documentation a party wishes to rely upon must be submitted 15 days in advance to the WRC.
2. That documentation must be submitted to the other side also.
3. An Adjudication Officer can refuse to accept documentation furnished less than 15 days before the hearing.

These new procedures by the WRC will hopefully avoid a lot of the ambushing which was going on. One issue in the Courts is that there always has to be fair procedures. As now the Zawelski decision has issued clearly fair procedures have to apply in the WRC also and the WRC must be congratulated for bringing in place these new procedures. The argument which may come up in cases is that a representative only got instructions very late in the day. Hopefully that argument is not going to float going forward. Where a party either issues proceedings or proceedings are brought against them they will have the guidelines. Therefore because they have the guidelines they will have been aware of the matters and it will be a matter for both employees and employers bringing claims or defending claims to make sure that if they are getting representation that that representation is instructed in good time. Equally for those representing employers or employees it will be important to make sure that they get their documentation in on time.

Extension of Time

This issue was addressed again by the Labour Court in a case of Boots Retail and Eldin UDD2175.

The Court set out the case of Gaelscoil Thulach Na nOg and Joyce Fitzsimons –v- Markey EET034 where the Court in that case stated;

"The Court must first consider if the circumstances relied upon by the applicant can be regarded as exceptional. If it answers that question in the affirmative the Court must then go on to consider if those circumstances operated so as to prevent the applicant from lodging her claim in time.

The term exceptional is an ordinary familiar English adjective and not a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course or unusual or special or uncommon. To be exceptional a circumstance need to be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered".

In this case the reasons advanced by the appellant for the delay in presenting the appeal was that they had not been made aware of the decision of the Adjudication Officer which was made on 20 March 2020 until 23rd March 2020 and in addition as a pharmacist he was exceptionally busy at work arising from the occurrence of the global health pandemic.

The Court stated they accepted that the global pandemic was an exceptional circumstance but had not been provided with any basis as to how this prevented the appeal being lodged within the statutory time limit. The appeal was dismissed.

This case is important in reaffirming that issues relating to extension of time are ones where there is a very high bar for the person seeking it to succeed.

Frivolous or Vexatious

This issue arose in case ADJ/00011019 where the Adjudication Officer has helpfully set out the Decisions in relation to this.

The Adjudication Officer pointed out that this was carefully considered by the High Court in the case of Patrick Kelly –v- The Information Commissioner 2014 IEHC479 where it was stated;

"As a matter of Irish Law, the term "frivolous or vexatious" does not as noted by Birmingham J in Nowak, necessarily carry any pejorative

connotations but is more concerned with the situation where the Litigation (or, in this instance, application) can be described as futile, misconceived or bound to fail. Where a person engages in a pattern of litigation, or applications as in the present instance) which not only come within those descriptions but can be said to be actuated by ill-will or bad faith. Such conduct may properly be described as vexatious".

The Adjudication Officer referred to the case of Behan –v- McGinley 2011 1I.R.47 and reiterated by Laffoy J in Loughrey –v- Dolan 2012 IEHC578 which set out a useful list which the Adjudication Officer has helpfully set out being;

1. Where the issues in dispute are matters which have already been determined by a Court of competent jurisdiction.
2. Where it is obvious that an action cannot succeed or if the action will lead to no possible good or if no reasonable person can expect to obtain relief.
3. Where the action is brought for an improper purpose including harassment and oppression of other parties as opposed to asserting legitimate legal rights.
4. Where issues sought to be litigated tend to be rolled forward into subsequent actions and repeated and supplemented.
5. Where the person instituting the proceedings has failed to pay the costs of unsuccessful proceedings.
6. Where the Plaintiff persistently takes unsuccessful appeal against judicial decisions.

***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.**