KEEPING IN TOUCH NEWSLETTER - FEBRUARY/MARCH 2022

Welcome to the February/March issue of Keeping in Touch.

As we are now in 2022, the significant issues which are going to be coming up in the area of Employment Law in particular, will be those relating to:

1. Statutory sick leave.
2. The right to request remote working.
3. The legislation due in relation to probation periods.
4. Amending the GDPR legislation.

We are still awaiting the legislation being finalised in relation to claiming Redundancy during the period of lay-off which will be met by the government.

2022 is going to be a challenging time for employment lawyers and HR professionals along with those in Unions, as there is a lot of new legislation due. In addition, the practical issues particularly around remote working, and how they are going to operate, is going to be a particular challenge for both employers and employees.

One of the interesting aspects of Employment Law in which we are seeing an increasing number of cases arising, is in relation to those who are on maternity leave or who are returning from maternity leave. There are a significant increase in the number of individuals who have been dismissed while on maternity leave or who on returning to work find that they are not being returned to the position that they were in prior to going on maternity leave. In addition, we are seeing employers putting in place redundancy proposals to employees who are on maternity leave. There are significant Employment Law issues around this arising from European Law and the right of individuals who are on maternity leave not to be considered for redundancy except in the case of Collective Agreements.

We will be seeing the return of face-to-face hearings in the WRC in the coming months. This will be a significant change in how matters have operated to date. It is probably a financial issue that the WRC would rather have face-to-face meetings. However, for both employers and

employees and representatives, remote hearings have worked extremely well and have the advantage of reducing costs, particularly travel costs and the time out of offices and businesses for both employers, employees and their representatives.

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Out and About in January and February 2022

On January 4th Richard was on Midlands 103 to discuss sick pay on the Ronan Berry Show.

On January 5th Richard was on Lunchtime Live with Andrea Gilligan to discuss issues about remote working and the return to the workplace.

On January 5th Richard was interviewed by Dublin Live in relation to his Social Media account.

On January 6th Richard was on Ireland Am relating to returning to the workplace.

On January 6th Richard was on WLR FM on the Desie Today Show again discussing the issue about returning to work.

On January 9th Richard was interviewed by the Business Post on his social media account.

On January 10th the firm was reviewed by the Irish Daily Mirror in relation to the advices we were giving out on our Social Media.

On January 10th Issues which we had been raising on social media were covered in the Irish Mirror, in particular relating to issues where employees are sent home by employers. In addition the issue of minimum temperatures in offices was also covered by them following on our social media information.

On January 11th Richard was on the Pat Kenny Show on Newstalk FM dealing with the issue of close contacts, sick pay and returning to the workplace.

On January 12th Richard was on East Coast FM discussing returning to the workplace.

On January 12th Richard was on Shannon Side FM answering Employment Law questions.

On January 13th Richard was on Shannon Side FM on the JF Show answering employment law questions.

On January 14th Richard was covered in Breaking News.ie on the issue of close contacts and the employment issues around same.

On January 14th Richard was quoted in an article by James Cox in relation to returning to the workplace and the issue of close contacts.

On January 20th Richard was quoted in the Journal.ie on the issue of the new Public Holiday and what it means for employers and employees.

On January 23rd Richard was on Virgin media News Tonight on their 5.30pm news discussing issues around returning to work.

On January 24th Richard was on Newstalk FM on the Pat Kenny Show discussing the issues about returning to the workplace and in particular returning to the office.

On January 25th Richard was on Ireland FM discussing the right to remote working.

On January 25th Richard was on Prime Time on RTE to discuss the new legislation relating to the right to request remote working.

On January 27th Richard was quoted in the Irish Times on the issue of remote working and the Safety Health and Welfare at Work Act issues around same.

On January 27th Richard was on Today FM discussing employment Law issues around returning to the workplace.

On January 31st Richard was on the Hard shoulder on Newstalk FM discussing issues relating to salary scales and the proposals that employers would have to disclose salary scales when advertising jobs.

On February 4th Richard was quoted in the Independent.ie in relation to the regular column in the Independent relating to employment rights discussing the issues of again remaining working from home.

On February 6th Richard took part in the NUIG ELSA student interview competition where Richard acted as one of the Judges.

On February 7th Richard presented a lecture to the Diploma in Employment Law highlighting the issues likely to arise in the next twelve months.

On 22nd February Richard was interviewed on Newstalk FM for Lunchtime Live on the issue of Phil Hogan seeking compensation for the loss of his EU job.

On 25th February Richard was interviewed on KFM on the challenges of remote working.

On 26th February Richard was quoted in an article by Deirdre Falvey in the Irish Times on the topic of the Ivy Restaurant case.

On 27th February Richard was quoted in Breaking News in an article by James Cox on mask wearing going forward.

On 28th February Richard was interviewed for Morning Ireland, Cork's Red FM and Hyland Radio about mask wearing in workplaces.

Constructive Dismissal – Using Internal Procedures

This issue was addressed by an Adjudication Officer in the case of ADJ-00029282 being a case of Siobhan Cornish and Cucullen Limited.

The Adjudication Officer referred to the case of *Beatty –v- Bayside Supermarket UD142/1987* as an example where the Employment Appeals Tribunal held'

"The Tribunal considers that it is reasonable to expect that the procedures laid down in such agreements to be substantially followed in appropriate cases by employers and employees as the case may be. This is the view

expressed and followed by the Tribunal in Conway –v- Ulster Bank Limited UD474/1981.

In this case the Tribunal considers that the procedure was not followed by the claimant and that it was unreasonable of him not to do so. Accordingly, we consider that applying the test of reasonableness to the claimant's resignation he was not constructively dismissed".

The Adjudication Officer also referred in relation to the reasonableness test that it is usually necessary for the complainant to display that they have exhausted all internal procedures for dealing with complaints before resigning from their employment. The Adjudication Officer referred to the EAT case of Travers –v- MBNA Limited UD720/2006 that it is incumbent for the appellant to utilise all internal remedies something that was clearly set out in the earlier case of Conway –v- Ulster Bank UD474/1981. The Adjudication Officer pointed out that ordinarily therefore an employee who has not exhausted all internal procedures is unlikely to find acceptance that they have been constructively dismissed.

The Adjudication Officer however in this case pointed out that the use of the Grievance Procedure in this particular case would probably have been futile so it rendered moot the issue in this particular case.

The Adjudication Officer set out that it is clear that the behaviour of the respondent in not dealing with the complainant by not providing clarity of information, discussing her situation with a client before informing the complainant that she would no longer be working with the client, lack of clarity of any work related issues and seeking the complainants resignation amounted to unreasonable behaviour such that it was reasonable for the complainant to resign from employment. In this case an award of €10,000 was made.

This is one of those unusual cases where an employee has won the constructive dismissal case without going through the full grievance procedure. Normally an employee does need to go through the full grievance procedures.

Constructive Dismissal – Using the Internal Grievance Procedures

This issue came up in a case ADJ00021866. The Adjudication Officer quoted the case of Zabiello –v- Ashgrove Facility Management Limited UD1106/2008 where the Employment Appeals Tribunal stated;

"For a claim of constructive dismissal to succeed the claimant needs to satisfy the Tribunal that her working conditions were such that she had no choice but to resign. The Tribunal is satisfied that the claimant had difficulty with her line manager. However, for a period of six months she did not attempt to resolve the issue".

The Adjudication Officer also pointed out that case of Kirwan –v- Primark UD270/2003 where the EAT held that the claimant was only going through the motions and there was no genuine attempt to utilise the grievance procedures.

In this particular case the Adjudication Officer held that the complainant never raised a grievance and therefore never gave the employer the opportunity to investigate let alone resolve matters. The Adjudication Officer held that the complainant's failure to avail of internal grievance procedures rendered the complaint devoid of merit and it was dismissed.

This is an issue which regularly arises. We have referred to it previously on a number of occasions. There appears to be a real issue with employees resigning without using the Internal Grievance Procedures.

The reality of matters is where an employee does not use the internal grievance procedures or does not use them in a proper manner that in the case of a constructive dismissal case their complaint will be dismissed. There are limited exceptions but they are extremely limited.

Constructive Dismissal – The Tests

This issue arose in case ADJ-00032870 being a case of Wayne Harrison and O Neill & Brennan. The Adjudication Officer referred to Dismissal

Law in Ireland by the late Doctor Mary Redmond at page 340 where it is stated;

"There is something of a mirror image between constructive dismissal and ordinary dismissal. Just as an employer for reasons of fairness and natural justice must go through disciplinary procedures before dismissing, so too an employee should invoke the employers grievance procedure in an effort to resolve his grievance. The duty is an imperative in employee resignations. Where Grievance procedures exist they should be followed."

In Conway –v- Ulster Bank Limited the EAT considered that the claimant did not act reasonably in resigning and without first having substantially utilised the grievance procedure to attempt to remedy her complaints.

The Supreme Court had said that;

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it". [This is as per the decision of Mr. Justice Finnegan and Berber –v- Dunnes Stores 2009 ELR61].

The Adjudication Officer pointed out that the conduct of the employer must be such as to represent a repudiation of the contract of employment. In this case the Adjudication Officer held that there was no evidence that any grievance had ever been submitted. This case highlights the importance of employees before resigning going through the full grievance procedure.

Unfair Dismissal – The Importance of Seeking Work

This issue arose in the case of ADJ-0029134 being a case of McGuire and Trim Home Heating Oil Limited.

The Adjudication Officer helpfully restated the law on this matter in the case of Sheehan –v- Continental Administration Co. Limited UD858/199 where it was held;

"Time a claimant finds on his hands is not his own, unless he chooses it to be, but rather to be profitably employed in seeking to mitigate his loss".

The Adjudication Officer in this case held that the complainant had fallen short of what is required.

Effectively, this restates the law that if there is a requirement on an employee who is dismissed to be seeking alternate work and to mitigate their loss. This is an issue which sometimes employees fail to understand.

Gross Misconduct

This issue arose for consideration in the case of *Sarah Clancy & Nespresso UK Limited being ADJ00027887.*

In this case the Adjudication Officer referred to the case of *Lennon –v- Breddin M160/ 1978* which referenced the issue of serious misconduct on the following terms;

"This exemption only applies to a case of very bad behaviour of such kind that no reasonable employer would be expected to tolerate the continuous employment relationship for a minute longer; we believe that the legislator had in mind such things as violent assault and behaviour in the same serious category".

The Adjudication Officer had pointed out that case law has established that any disciplinary sanction imposed on an employee that they must be proportionate to the complaint against them and an employer must consider alternative sanctions to dismissal where appropriate. The Adjudication Officer referred to the case *of DHL Express (Ireland) Limited –v- Michael Coughlan Labour Court Determination UDD1738* where an employee was summarily dismissed and the Labour Court found in favour of the employee and ruled that the respondent employer did not give consideration to imposing an alternative sanction or a more proportionate sanction on the employee.

In this particular case the Adjudication Officer pointed out that the respondent disciplinary procedures provided that where a worker is alleged to have committed an act of gross misconduct he or she would

normally be suspended on contractual pay while the company investigated the allegations. The Adjudication Officer pointed out that this did not happen in this particular case.

The Adjudication Officer again pointed out in the case of *Lennon –v- Breddin M160/1978* that the EAT had stated at Section 8 of the Minimum Notice and Terms of Employment Act saves an employer from liability for minimum notice for misconduct but had always held that the exemption applied only to cases of vary bad behaviour such a kind that no reasonable employer would be expected to tolerate the continuation of the relationship for a minute longer.

Unfair Dismissal and the issue of self-employed contractors

This issue arose in the case of Speed king Couriers Limited trading as Fastway Couriers Midlands and John Read UDD225.

The respondent contended that the complainant was at all times an independent contractor and was engaged to provide services under a contract for services.

It was contended that the burden of establishing that the complainant was in reality engaged under a contract of service as an employee was one that rests on the complainant to prove.

The case is interesting in setting out the submissions that were put on both sides.

The Court looked at the law relating to this. The Court pointed out that the case of Henry Denny & Sons –v- The Minister for Social Welfare continues to be the leading authority on the issue in this jurisdiction. The Court pointed out that in that case the Supreme Court adopted what is sometimes referred to as the “Mixed Test” or “Reality Test”. The Court pointed out that this approach reflects the complex and varied nature of contemporary employment relationships and require the decision maker to consider a variety of factors including but not limited to the degree of control exercised by the party to whom work is done over the party doing the work. The level of integration of the latter into the formers business, whether or not the party was doing to the work,

has the marks of an entrepreneur in the way he carries out the work in question such as he can be said to be a business on his own account.

The Court pointed out that while the Court will have regard to the terms of any written agreement in place between the parties to an employment arrangement the terms of such agreement cannot be regarded as determinative of the true nature of the relationships.

The Court referred to the case of Karshan (Midlands) Limited Trading as Domino's Pizza –v- The Revenue Commissioners 2019 IEHC894 [2020] 31 RLR142. In that case the Court pointed out that the Tax Appeals Commissioners determined that the drivers subject to a degree of control consistent with a contract of service they were intimately integrated into the employers business and did not exhibit any significant entrepreneurial characteristics that would mark them out as being in business on their own account and they were not per se in a position to make a profit by carrying out the work in a more efficient manner.

In this case there was a document in writing but the Court held there was no evidence that the complainant had ever received a signed copy of the written terms of engagement.

The Court looked at the issue of control and integration. The Court in this case held that the individual had been engaged under a contract of service as an employee and upheld the unfair dismissal claim.

This case is interesting and important in confirming that this whole issue of who is and who is not a contractor is one that is extremely complex.

There will be more cases involved in this area as the position of self-employed contractors has become more prevalent in Irish Law and business.

What are wages for the purposes of the Unfair Dismissal Legislation?

This issue arose in the case of Peter Brennan and B.c. McGettigan Limited ADJ/00031817. In this case the Adjudication Officer looked at

the definition of Wages in the Payment of Wages Act. The Adjudication Officer pointed out that the definition excludes any payments by way of a pension, allowance or gratuity in connection with the death or retirement or resignation of an employment.

Therefore, the Adjudication Officer held that in calculating a person's salary any contribution towards a pension is not taken into account.

Test in Unfair Dismissal Cases for Dismissal

This issue regularly arises but recently arose in the case of Bryan Power and Integer ADJ-00027282.

In this case the Adjudication Officer reviewed the law on case law in some detail.

The Adjudication Officer referred to Section 6 (3) of the Unfair Dismissal Act which provides that in determining if a dismissal is an unfair dismissal regard may be had to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to the dismissal.

The Adjudication Officer then looked at the issue of the role of the Adjudication Officer and quoted the case of Looney & Co –v- Looney UD843/1984 where the EAT summarised matters as follows;

"It is not for the EAT to establish the guilt or innocence of the claimant nor is it for the EAT to indicate or consider whether we in the employers position would have acted as it did in its investigation or concluded as it did or decided as it did, as to do so would be to substitute our own mind and decisions for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in his position and circumstances at the time would have done and decided and to set this up as a standard against which the employer's actions and decisions are to be judged".

The Adjudication Officer also referred to the case of Bigaignon –v- Power Team Electrical Services Limited UD939/2010 where the EAT stated when considering whether a disciplinary sanction was proportionate;

"*Does the punishment fit the crime?*

In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanctions the Tribunal might impose but rather whether the reaction of the respondent and the sanctions imposed lay within the reasonable responses. The Adjudication Officer also referred to the case of Bank of Ireland –v- Reilly 2015 IEHC241 where the High Court highlighted that a Court may have regard to the reasonableness of the employers conduct in relation to a dismissal but stated;

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

The reason for mentioning this case is that it highlights an issue which regularly comes up. There is a view by some employers that there role in an unfair dismissal case is to prove that the employee did something wrong. Equally there is a view by some employees that their role in an Unfair Dismissal case is to prove that they did nothing wrong. That is not the position in relation to an Unfair Dismissal case. The question in an Unfair Dismissal case is not to determine right and wrong but rather to determine whether after a fair investigation whether any sanction which was imposed was one which a reasonable employer in the circumstances of that employer might reasonable have imposed.

The role of the WRC in Unfair Dismissal Cases

This issue regularly comes up but again came up in the case of Bryan Power and Integer ADJ-00027282.

The Adjudication Officer referred to Section 6 (3) of the Unfair Dismissal Act which provides that an Adjudication Officer can have regard to the reasonableness or otherwise of the conduct, (whether by act or omission) of the employer in relation to dismissal.

However, the Adjudication Officer also referred to the case of Looney & Co. –v- Looney UD843/1984 where the Employment Appeals Tribunal stated;

"*It is not for the EAT to establish the guilt or innocence of the claimant nor is it for the EAT to indicate or consider whether we in the employers position would have acted as it did in its investigation or concluded as it did or decided as it did as to do so would be to substitute our own mind and decision for that of the employer. Our responsibility is to consider against the facts what a reasonable employer in the position and circumstances at that time would have done and decided and to set this up as a standard against which the employer's action and decision are to be judged."*

In the case of Bigaignon –v- Power String Electrical Services Limited UD939/2010 was also referred to where the EAT stated the following when considering whether a disciplinary sanction was proportionate;

"Does the punishment fit the crime? In considering this question the fact that the Tribunal itself would have taken a different view in a particular case is not relevant. The task of the Tribunal is not to consider what sanction the Tribunal might impose but rather whether the reaction of the respondent and the sanction imposed lay within the range of reasonable responses. Also the case of Frank Shortt –v- Royal Liver Assurance 2009 ELR240 was quoted by the Adjudication Officer as once an employer can show that they adopted a diligent, fair and reasonable approach to both disciplinary procedures and sanctions it is not the role of the Courts or Tribunal to conclude that the employer should have acted differently.

Also the case of Bank of Ireland –v- Reilly 2015 IEHC241 is one where the High Court highlighted that a Court may have regard to the reasonableness of the employers conduct in relation to a dismissal but stated;

"*That is however not to say that the Court or other relevant body may substitute its own judgement as to whether the dismissal was reasonable for that of 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*".

This is a helpful overview of the legislation by the Adjudication Officer.

In Unfair Dismissal cases there is a misconception by both employers and employees that it is for the employer to show that the employee did something wrong and for the employee to show that they did nothing wrong. In Unfair Dismissal cases they are not about guilt or innocence despite what the parties might think. It is a question as to whether the sanction of dismissal in circumstances was one which a reasonable employer in the circumstances of the particular employer might have imposed.

Payment of Wages Claims – Time Limits

This arose in the case of ADJ00033446 being a case of Siobhan McEneaney and Zerox Europe Limited. This case turned on the time limit for bringing claims. In this case the respondent submitted that the complainant became aware of the breach in January 2021 and therefore could have lodged the complaint within the six months of the final contravention.

Further the respondent submitted that engaging with internal procedures does not constitute "Reasonable Cause" in these circumstances for an extension of time and quoted the case of *Brother of Charity Services Galway –v- O Toole EDA177.*

The Adjudication Officer referred to Section 6 (6) of the Workplace Relations Act which refers to matters being lodged within 6 months and to Section 6 (8) which allows for a further 6-month period. The Adjudication Officer referred to the case of Health Service Executive –v- McDermott 2014 IEHC331 where Hogan J stated;

"…the words "contravention to which the complaint relates" which are critical. It may be accepted that every distinct and separate breach of the 1991 Act amounts to a contravention of that Act. If, for example, an employee is paid monthly and the employer makes unlawful deductions in respect of salary for every month in a two year period it might be said in the abstract that there have been 24 separate "contraventions" of the 1991 Act in that period".

In that case Mr. Justice Hogan further stated;

"For the purposes of this limitation period, everything turns, accordingly, on the manner in which the complaint is framed by the employee. If for example, the employer has been unlawfully making deductions for a three-year period, then provided that the complaint which has been presented relates to a period of 6 months beginning "On the date of the contravention to which the complaint relates the complaint will nonetheless be in time".

The Adjudication Officer pointed out that case of *Elsatrans Limited –v- Joseph Tom Murray PWD1917* where the Labour Court found that when part of a complaint in relation to the non-payment of wages is referred outside of the relevant time limit this serves to render the entity of the complaint out of time.

The Adjudication Officer in this case held that the breach complained of fell outside the relevant time limit and held that the complaint was not well founded.

This is a helpful decision in again stating the importance of getting the complaint right and limiting the complaint to a relevant six-month period of time. It is our view that where the issue of an extension of time is required to be considered then in those circumstances that it is probably best to put in two payments of wages claims. One for the six month period of time and one for the additional six months.

Payment of Wages Claims

This issue arose in the case of PWD2211 involving the HSE and Di Marzio.

This issue concerned the question as to whether a decision under Section 13 of the Industrial Relations Acts can be used to ground a claim under the Payment of Wages Act. The Court clearly set out that a Section 13 complaint cannot subsequently form the basis for a complaint under the Payment of Wages Act 1991 and such compensation is not comprehended by the definition of Wages in the 1991 Act and referred to the case of *O'Keeffe –v- Food Court Event Catering PW21/44.*

It is helpful that this decision has issued as there is a misconception by some employees that in some way that a Section 13 Industrial Relations Act claim can be enforced.

Section 13 claims are under the Industrial Relations Act and they are recommendations only which are a voluntary system but are not binding on either party.

Absenteeism

This issue often arises and it is important to note that an employer is permitted to terminate an employee's employment where there are unacceptable levels of absenteeism. This was referred to in Redmond on Dismissal Law referring to the case of Flood –v- Bus Atha Cliath UD91/1993 which notes that;

"*Even if there are genuine reasons or explanations for absences there is a band of reasonableness which an employer can invoke to justify dismissal; an employer cannot reasonably be expected to employ someone with an unacceptable level of absences, notwithstanding that the reason for his absences are genuine*".

Annual Leave Due on Termination

This issue arose in case DWT2212 being a case of Bothar Company Limited by Guarantee and Olivia Cumiskey DWT2212. This was an appeal by the employer to the Labour Court.

The complainant in this case provided the Court with the decision of the Labour Court in Kennedy's Bar and Café Bar Limited and a Worker DWT26/2000 and Skanska –v- Carroll DWT38/2003 in which the complainant contended that the Court recognised that where the right to annual leave is infringed the redress provided should not only compensate for economic loss sustained but must provide a real deterrent against future infractions.

The respondents submit that the claim for annual leave carried over from previous years is almost entirely statute barred and referred to Section 20 of the Act in support of that contention and also to the case

of Royal Liver Assurance Limited –v- Macken 2002 IR427 to establish that a worker's consent is required in order for an annual leave to be extended.

The Court looked at the relevant law in relation to this and looked at Sections 19 and Section 20. The Court also referred to Section 23 of the Act which provides that where an employee ceases to be employed and the whole or any portion of annual leave in respect of the relevant period remains to be granted to the employee that in that section the relevant period means the first 6 months of the current leave year, the current leave year, and the leave year immediately preceding the current leave year.

The Court in this case held that Section 23 of the Act applied only to the annual leave year beginning on 1st April 2020 and the 1st April 2021. The Court rejected any contention that it could apply to any other leave years.

This is an important decision of the Labour Court. Firstly because it sets out clearly those agreements between an employer and an employee if a claim has been made under the Organisation of Working Time Act can only apply to the leave years set out in the Act being the current leave year and the preceding leave year. Secondly, it importantly confirms that the entitlement to annual leave when an employment ceases is the current leave year and any leave due for the preceding leave year.

Settlement Agreements and Waivers

This issue arose in the case of Philomena Hennessy and Ladbrooks Payments (Ireland) Limited and Ladbrooks (Ireland), 2022 IEHC 60 being a Decision of Ms Justice Bolger delivered on the 3rd February 2022.

The defendant in this case contended that the waiver agreement precluded the plaintiff from issuing or pursuing proceedings.

The plaintiff in her replying Affidavit stated that she did not take legal advice on the terms or effect of the agreement and was not advised to do so. The plaintiff described the agreement as having been put to her

on a 'take it or leave it' basis and stated that she was informed that if she did not sign the document that another employee would be offered redundancy instead of her.

Her Honour in paragraph 7, stated that the defendant sought to excuse what seemed to be an untrue statement in the waiver agreement on the basis that any obligation that they may have had to advise their employee to take legal advice fell away when the employee signed a document saying that she had done so. The defendant contended that she had not done so. The defendant contended that the plaintiff must take responsibility to read and have some understanding of the document, and that she is bound by what she signed. The defendant relied on the case of ACC -v- Kelly (2011) IEHC 7 and Quinn -v- IRBC (2011) IEHC 470.

In paragraph 8, her Honour stated that had the plaintiff taken legal advice, as the agreement claims she did, then the defendant may have been entitled to rely on the waiver contained in the agreement. Her Honour pointed out that absent such advice, the question arises whether the defendant was required to take proactive steps to advise its employee of the benefit of such advice and/or to ensure that she did take it or if she chose note to, that she understood any compromise of her entitlements that may be included in that agreement.

In paragraph 9, her Honour referred to the case of Board of Management of Malahide Community School -v- Conaty, 2019 IEHC 486.

At paragraph 10 of the Decision, her Honour points out that the defendant sought to distinguish the judgement of Mr. Justice Simons given that the case before him involved a statutory claim. Her Honour pointed out that nevertheless she found his comments persuasive, particularly as his conclusions were premised on an implied contractual entitlement located in the implied obligation of mutual trust and confidence between an employer and employee. Her Honour pointed out that she did not accept the defendant's contention that the case law on mortgage agreements (such as Kelly and Quinn) in which the courts have confirmed that a borrower is bound by what they signed, whether they took or were advised to take independent legal advice, can necessarily be applied to an agreement between an employer and an employee to waive the employee's legal rights and

causes of action that would otherwise be available to them, whether in statute or in tort.

Her Honour pointed out that in these circumstances she did not consider the bare existence of a waiver agreement on which the defendant seeks to rely, means that the plaintiff's claim is bound to fail. Ms. Justice Bolger held that this is a matter for preliminary application at the hearing of the case.

This is an extremely important decision following on from the case of the Board of Management of Malahide Community School.

Our comments in relation to matters is that it is always advisable that an employer when having an employee sign any waiver ensures that they do get independent legal advice or clearly sets out to the employee the effect of the agreement and what the effect of signing that agreement is, whether they obtained legal advice or not.

Unfair Dismissal – Redundancy Accrued

This issue arose in case ADJ-00024648 being a case of Luke Sutton and Dualway Group.

In this case the Adjudication Officer pointed out that the employee had suffered very limited financial loss as the employee had obtained alternative employment very quickly. The Adjudication Officer pointed to section 7 where there is no financial loss the Adjudication Officer can award 4 weeks' pay.

In looking at the definition of financial loss in section 7 (3) the Adjudication Officer held that given that the complainants service with the company he had accrued redundancy entitlements which he lost as a result of his dismissal that this should be taken into account.

This is an aspect of the judgement which we would have some concerns about. An entitlement to redundancy or redundancy rights do not accrue on an ongoing basis. Redundancy rights only arise if a person is made redundant. In reality there will be many employees who will never be made redundant. In fact the majority of employees will normally not be made redundant. An employee will go through their employment and

get to retirement age and retire in which case there will be no redundancy or they may leave and find alternative employment having resigned themselves in which case no redundancy entitlements accrue.

From a financial accounting point of view employers do not set aside as regards accrued liabilities any liability for any potential redundancy unless redundancies are actually being contemplated.

This is an interesting point as put forward by the Adjudication Officer.

This office had been involved in a case in the WRC where an Adjudication Officer previously had awarded compensation to take into account accrued redundancy potential entitlements.

That matter went on appeal to the Labour Court and while the Labour Court awarded compensation to the employee the Labour Court in that case dealt with the decision solely on the basis of loss of earnings but did not address in their decision the issue as to the matter of accrued redundancy rights.

Saying this, because the Labour Court, in that case, only dealt with the issue of the financial loss being the actual financial loss rather than a potential redundancy loss it will be interesting to see if this issue again goes to the Labour Court what the Courts approach will be if asked to adjudicate specifically on the issue of lost redundancy entitlements.

We can fully understand where the Adjudication Officer is coming from as the Adjudication Officer is taking into account in Section 7 (3) "any estimated prospective loss of income attributable to the dismissal and the value or any loss or diminution attributable to the dismissal".

This is an interesting decision and it is one that will probably have to be dealt with in detail at some stage by the Labour Court going forward.

Redundancy – Redundancy Selection

This arose in case ADJ-00031817. The Adjudication Officer referred to the case of Keogh –v- Mentroy Limited UD209/2009. In that case the claimant was promoted to his position as sales assistant to that of manager. A downturn in the business prompted the decision to make

the position of manager redundant as it was the most financially costly for the employer. The employer had also received complaints from other staff members about the employee and his management style. That is a case where the employee was not given the option of returning to his former role. In the days immediately following the employees redundancy another staff member resigned and a notice advertising full or part time positions was placed in the employers shop window.

The EAT held that in deciding to make the employee redundant the employer had taken into account factors other than the decline in the business namely the complaint from other staff members. The EAT also found that the employer did not adequately consider other alternatives to redundancy and that the reasons given by him where not in fact a reason for the dismissal. In that case the EAT held that the employee had been unfairly dismissed.

In the case of Sheehan and O Brien –v- Vintners Federation of Ireland Limited 2009 ELR155 was also quoted where the EAT held that the claimant had been unfairly dismissed even though the redundancy was found to be genuine.

The Tribunal in that case was critical of the employer's failure to consider earnestly the claimants proposal regarding the reorganisation of the work which would have realised significant savings. In this case an award of over €27,000 was awarded.

This is case which highlights the importance of employers going through full procedures, limiting all selection issues to those only relating to redundancy and considering alternatives to redundancy.

Redundancy and Fair Procedures

This arose in case ADJ-00029939 being a case of Jacinta Doyle and River Island Clothing Company (Ireland) Limited.

In this case the Adjudication Officer went through the provisions of Section 6 of the Unfair Dismissals Act 1977 and pointed out that all the legal precedents emphasised that any redundancy decision especially where single individuals are concerned have to be scrupulously fair. The Adjudication Officer referred to the case of Gillian Free –v- Oxygen

Environmental UD206/2011 where the Employment Appeals Tribunal noted;

"When an employer is making an employee redundant while retaining other employees, the selection criteria being used to be objectively applied in a fair manner. While there are no hard and fast rules as to what constitutes the criteria to be adopted nevertheless the criteria adopted will come under close scrutiny if an employee claims that he/she was unfairly selected for redundancy… Where there is no agreed procedure in relation to selection for redundancy… then the employer must act fairly and reasonably".

The Adjudication Officer pointed out that this reference was noted with approval by the Labour Court in Kohinoor –v- Ali UDD1629.

The Adjudication Officer did point out however that the overall context has always to be looked at in any particular case. The Adjudication Officer referred to Ryan in Redmond on Dismissal Law 2017 for the case of Farrell –v- Newman's Athboy Limited UD613/1966 where the Labour Court referred to Section 6 (7) of the Act of 1977 which permits the WRC to have regard "if appropriate to do so" to the reasonableness or otherwise of the conduct (whether by act or omission) of the employer in relation to dismissal.

In this case the Adjudication Officer pointed out that the evidence pointed to an interview process where due to a single manager only being involved the question of perceived unfairness can never be satisfactorily answered.

This case highlights the importance of employers in redundancy cases having a robust policy and procedure in place to deal with same.

***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.**