KEEPING IN TOUCH NEWSLETTER – APRIL 2022

Welcome to the April issue of Keeping In Touch.

There has been some significant developments in employment law recently.

The first is the proposed introduction of the new Sick Pay Bill. This will initially provide for three days paid sick leave in 2022, five days in 2023, seven days in 2024, and ten days in 2025. The amount is to be capped at 70% of a normal daily pay or €110, whichever is the lesser amount. One of the issues with the pre-legislation scrutiny was the issue which has been raised from the very start when it was proposed that this new legislation would come in, is the issue of the cost of getting a medical certificate from a doctor, which will be required to back up any claim. As a medical certificate costs between €50 and €60, the issue is that unless an employee is going to be out for a number of days, it may be uneconomic for them to seek to make a claim under this Bill once it becomes law.

The second issue that has come up is the proposal for an auto enrolment into a Pension Scheme. The government has proposed that there will be a contribution by the employer along with employees and that the government will be making a contribution also. This is very progressive. The interesting aspect however is that there is an opt out clause being provided whereby employees can say that they have no wish to enter the Pension Scheme. We see that this will probably create significant disputes particularly if there is an allegation that any form of pressure was put on an employee to opt out. The other issue of course is that younger employees may see little benefit in joining a Pension Scheme. Of course, there are great benefits but this is one of those issues where a considerable amount of publicity and information is going to need to be furnished, if this scheme is to be a significant success.

On the issue of the right to request remote working, the government announced that they are working on the basis that a minimum of 20% of time, being one day a week for remote working would be given to employees who are employed by the State, they are not however proposing 100% of the time. This is an interesting comment in relation to matters. We have yet of course to see the Bill which has been promised by Easter in respect of same. However, the government's

approach would clearly indicate that the issue of full-time remote working is not going to be an option in the Bill when produced.

INDEX

OUT AND ABOUT IN MARCH 2022

On 3 March, Richard Grogan of our firm received from the UCD Law Society an Honorary Life Membership. Richard was delighted to receive such an accolade from the students in UCD for which Richard is extremely honoured and humbled that they would have considered it suitable to award such an accolade to him.

Also, on the 3rd March, Richard was on Today FM with Dermot and Dave discussing employment law issues relating to the return to offices. On 3 March Irish Legal News had a small piece relating to the fact that Richard Grogan of this office was receiving the Honorary Life Membership of the UCD Law Society.

On the 8th March, Richard was asked to take part in Public Affairs Ireland contribution to International Women's Day. Richard was delighted to be asked to take part in that. Richard and this firm have been recognised over the year in bringing a significant number of claims on behalf of women under various pieces of equality legislation in particular.

On the 9th March, Richard was interviewed by the Public Sector Marketing Institute on the use of social media and to give his insight as to how this could be used by government departments for the purposes of providing information on various rights.

On the 12th March, a video which Richard had posted on Instagram was published by the Irish Sun. The issue related to public holidays and part time workers.

On the 16th March, Richard took part in an online seminar in UCD to deal with the issues which in particular students would have relating to employment law rights to cover such issues as the right to disconnect, probation periods, public holidays, holiday and public holiday pay and training and the issues around the National Minimum Wage.

On the 21st March, Richard presented a course at the Southerland Law Building in UCD on general tips for part time workers. This was to be addressed primarily to students and to those who would have recently left university.

On the 23rd March, Richard presented a paper on 'Bullying in the Workplace' at the Public Affairs Ireland Annual HR Conference.

On the 25th March, Richard was interviewed on both 'Today with Claire Byrne' and 'Kildare Local Radio', on the issue of Long Covid after Richard had been quoted in the Irish Examiner on the issue.

On the 30th March, Richard was quoted in the Irish Examiner on the issue of the new Statutory Sick Leave Bill.

On the 31st March, Richard was interviewed on 'Waterford Local Radio' on the issue of Statutory Sick Pay.

RETENTION OF SURGICAL ITEMS – MEDICAL MALPRACTICE

Any case that involves retained surgical instruments falls under the category of medical malpractice and are often times referred to as a "hospital never event".

A "never event" is the kind of mistake that should never happen.
Retained surgical items/bodies are any foreign bodies left inside a patient after an operation for example they might include items such as sponges, needles, instruments, gauze etc.

This can lead to casing infection, pain, perforation to other body parts and damage in general to the overall health of the patient concerned and are generally most commonly detected post procedure by way of an x-ray, follow up examinations or a report from the patient of experienced discomfort or pain.

When discovered it usually results in a further surgical procedure to extract the foreign body.

How do you prevent retained surgical items?

The best way to prevent this from happening involves systematic counting of materials used during the surgical procedure, and better communication between the surgical team.

Many of the mistakes leading to retained objects are due to lack of attention and poor communication.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

DISMISSAL DURING THE PROBATION PERIOD

The issue of dismissal during probation periods is an issue which is consistently coming up.

In the case of senior executives, it is now becoming normal to have a provision that the first six months of their employment will be a probation period with a right to review and extend the probation period up to usually eleven months.

When employers are putting such contracts in place it is vital to avail of certain reliefs to avoid the potential of an injunction case that the Contract of Employment is properly drafted. There are some basic provisions that need to be included.

1. That there is an initial six months' probation period.

2. That there is a right to extend it.

3. That the contracts specifically provides that the disciplinary procedure will not apply to termination of employment during the probationary period or any extension of the probationary period.

4. That there is a short notice period for termination during the probation period. This can be as short as one week.

5. That there is a right to dismiss without cause or reason during the probation period.

6. That there is a right to pay salary in lieu of notice.

Prior to the Unfair Dismissals Act 1977, the only remedy available to an employee who was unreasonably dismissed or was dismissed in an arbitrary fashion was to bring a claim for Wrongful Dismissal. The common law position was that if an employer breached the Contract of Employment could be sued where the contract was terminated prior to the expiry of the term for which the employee had been engaged.

The importance of having a properly drafted Contract of Employment in place by the employer arises because of the decision of the Supreme

Court in Sheehy -v- Ryan 2008 4 I.R. 258 where Mr. Justice Geoghegan stated

"the trial Judge then said the position at common law is that an employer is entitled to dismiss an employee for any reason or no reason and giving reasonable notice. I would slightly qualify that by saying that it does depend on the contract but in the absence of clear terms to the contrary which are unambiguous and unequivocal that is clearly the position".

A similar approach was taken in Carroll -v- Bus Atha Cliath 2005 4 I.R. 184 where Mr. Justice Clarke as he was then stated

"*an employer may still if he is contractually free to do so, dismiss an employee for no reason".*

These principles particularly apply in relation to probationary periods.

In O'Donovan -v- Over - C Technology Limited [2021] IECA 37 this issue of dismissal during probation periods came before the Court of Appeal. In the High Court, Mr. Justice Keane, had granted Mr. O'Donovan an injunction restraining the defendant from dismissing him during the probationary period. The employer had dismissed him on the basis of poor performance during the probationary period. It was alleged in that case that these issues were highlighted to Mr. O'Donovan but no performance improvement plan or similar procedures were put in place.

In the High Court Mr. Justice Keane referred to the case of Naujoks -v- Institute of Bioprocessing Research & Training Ltd 2007 IEHC 358 as authority for the proposition that fair procedures had to be followed before an employee could be dismissed as a result of poor performance. The Court of Appeal disagreed where Ms. Justice Costello stated the following at paragraph 56 of her judgement:

"if an employer has a contractual right – in this case a clear express right – to dismiss an employee on notice without giving any reason the Court cannot imply a term that the dismissal may only take place if fair procedures had been afforded to the employee, save where the employee is dismissed for misconduct".

Where an employer is intending to dismiss during the probation period it would now appear to be the best practise to avoid an injunction claim that the issue of poor performance is not raised and that simply the employee is dismissed on a 'no fault basis'. Once the issue of 'fault' is

raised then there is the potential of the issue of an injunction being granted for the purposed of protecting the good name of the relevant employee. Where there is simply a dismissal on a no-fault basis the employee, even in a senior position, is in a more difficult position to try and obtain an injunction.

Where Contracts of Employment are being put in place for senior executives clearly the employer will want to have a provision in, which will allow dismissal during the probation period on very short notice. In the case of a senior executive in particular, then it is important in negotiating any contract that the provision to allow dismissal during the probation period may be one that the executive cannot oppose but it is important for the executive to negotiate an appropriate termination package in the event that the employer decides to terminate during the probation period.

The reality of matters is that when employers and senior executive are putting in place an agreement for a senior executive to join a company the idea of dismissing the executive is the furthest issue from the minds of both the parties. There can be substantial salaries being paid and substantial planning and research having gone into obtaining the individual whom the employer believes is best suited for the business. At the same time, certainly issues are arising where senior executives are being dismissed and therefore it is important for senior executives to be aware that even though negotiations may be going great and there may be great discussions as to where they will be leading the business or their role within the business and the development of it, there is always the potential that during the initial period matters do not work out. It is for that reason that employees who are senior executives need to negotiate a start and exit package, if matters do not work out during the probation period.

Once the employee has obtained twelve months service then of course the provisions of the Unfair Dismissal Acts are there and fair procedures must always be applied.

CROSS EXAMINATION IN DISMISSAL HEARINGS

This issue arose in the case of Narvydas and XPO Transport Solutions Ireland Limited ADJ-00033444.

In this case the Adjudication Officer dealt with a number of issues relating to disciplinary procedures including cross examination.

The first issue that the Adjudication Officer dealt with was in relation to the issue of suspension and quoted the case of Bank of Ireland -v- Reilly 2015 IEHC 241. The Adjudication Officer pointed out that in its decision the High Court was particularly critical of the manner in which an employee was suspended and held that an employee was entitled to an explanation of the reasons for the suspension. In that case also the High Court found that the suspension was not put in place to facilitate an investigation but that it was an expression by the bank of the seriousness of the matter and its resolve to punish those involved. The Court in that case held that this indicated a pre-determination. In this case the Adjudication Officer noted that similar circumstances pertained and that the decision to suspend was made at the end of the investigation because of a breach of trust asserted by the operations manager. The Adjudication Officer found that this is indicative of a pre-determination.

In relation to the issue of cross examination the Adjudication Officer stated the site manager had stated that he gave significant weight to the evidence of employee A whom the complainant was not allowed to challenge because this individual was apparently protected by the respondent's whistleblowing policy. The Adjudication Officer set out that the provisions of such a policy cannot be allowed to trump the complainants right to fair procedures where the potential sanction could warrant dismissal and the right to cross examination should not have been ignored by the respondent. The Adjudication Officer pointed out the case of Borges -v- The Fitness to Practice Committee 2001 1IR103 that cross examination is a vital safe guard to ensure fair procedures. The Adjudication Officer pointed out in that case that Mr Justice Keane Chief Justice stated:

"It is beyond argument that, where a Tribunal such as first respondent is inquiring into an allegation of conduct which reflects on a person's good name or reputation, basic fairness of procedures requires that he or she should be allowed to cross examine, by counsel, his accuser or accusers"

The Adjudication Officer pointed out that in addition to the right to cross examine his or her accuser there is a further right to be told of this right. If an employee fails to ask for cross examination they cannot be faulted for failure to ask.

UNFAIR DISMISSAL AND REDUNDANCY

This issue arose in the case of Eileen Walsh and Sue Ryder Foundation (Ireland) CLG ADJ-00032559.

The Adjudication Officer set out the provisions of Section 6 of the Unfair Dismissal Act 1977 and Section 7 of the Redundancy Payment Act 1969.

In this case the Adjudication Officer noted that the respondent outlined its financial position, the advancement of technology and the regulatory changes that were being introduced in the sector and the Adjudication Officer was satisfied that a genuine reason to effect redundancies existed in accordance with the legislation.

You might think that, that would be the end of matters but as the Adjudication Officer rightly pointed out Section 6(7) of the Unfair Dismissal Act requires an Adjudication Officer to look at the reasonableness or otherwise of the conduct whether by act or omission of the employer in relation to the dismissal and, to the extent, (if any), of the compliance or failure to comply by the employer in relation to the employee with the procedures referred to in Section 14(1) of the Act or under the provisions of any Code of Practice referred to in paragraph (d) of Section 7(2) of the Act. The Adjudication Officer pointed out that to this extent it is appropriate to consider that if the steps taken by the respondent were reasonable in all the circumstances. In this case the respondent confirmed that they did not explore options in relation to making other persons redundant to any great degree but rather concentrated upon the three post holders as their only options from the outset. The Adjudication Officer referred to a case of Employee -v- Employer UD206/2011, where the Employment Appeal Tribunal stated:

"*having considered the totality of the evidence, the Tribunal is not satisfied that the respondent acted fairly and reasonably when addressing the need to reduce the number of employees. When an employer is making an employee redundant, while retaining other employees, the selection criteria being used should 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. The employer must follow the agreed procedures when making the selection. Where there is no agreed*

procedures in relation to the selection for redundancy, as in this case, then the employer must act fairly and reasonably"

The Adjudication Officer referred to the case of Production Line Lead -v- Employee ADJ-00024721 where the Adjudication Officer in that case held:

"the questions to be decided are, did a genuine redundancy situation exist, did the circumstances constituting the redundancy apply equally to one or more other employees and if so, was there a fair selection for redundancy and did the respondent act fairly and reasonably".

In this case the Adjudication Officer awarded compensation equal to 45 weeks salary but reduced by the amount of compensation already paid.

This is again an important restatement of the law by the Adjudication Officer. There have been a number of these type of cases in both the WRC and the Labour Court. Even when there is a genuine redundancy it is imperative for employers to go through fair procedures. Where employers do not go through fair procedures then in those circumstances employers run the significant risk that in those cases they will end up, in a situation that they can be held liable for Unfair Dismissal.

UNFAIR DISMISSAL AND REDUNDANCY – FAIR PROCEDURES

This issue arose in a case of Forrestal and Core College Company Limited ADJ-00032357. The Adjudication Officer pointed out the case of Boucher -v- Irish Productivity Centre 1994 ELR205, which made two key statements being:

"the onus of proof is on an employer to establish that he acted fairly in the selection of an employee for redundancy"

Where selection for Redundancy involves consideration of employee's contribution and versatility to the respondent, those in the group likely to be dismissed should be made aware that such assessment was being made and they should be given an opportunity to give their views which should be considered. To be considered fair the assessment should have the characteristics of an enquiry".

The above cases were ones quoted by the respondent but referred to by the Adjudication Officer. The Adjudication Officer in the decision referred to the case of Tolerance Technologies Limited -v- Joe Foran UDD 1638, where the Labour Court found

"the Court while finding the respondent's position was redundant also found that the manner of the dismissal as a result was procedurally unfair. The respondent was not consulted adequately. He was not afforded representation and he was denied the opportunity to engage with the company board when he requested the facility in a situation when he was not satisfied with the termination of the employment which had been communicated to him at a meeting on the 27th and 28th October 2015".

The Adjudication Officer also referred to the case of Bunyan -v- United Dominion Trust (Ireland) Limited 1982 ILRM 404, where the EAT stated

"the fairness or unfairness of 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. The Tribunal therefore, does not decide the question of whether, on the evidence before it, the employee should be dismissed. The decision to be dismissed has been taken, and our function is to test such decision against what we consider a reasonable employer would have done and/or concluded"
In this case compensation was awarded. This is a case which highlights the importance of an employer going through a redundancy process, making sure they have fair procedures in place. If they are not in place, the employer runs the significant risk of having the dismissal being declared not a valid Redundancy but an Unfair Dismissal.

FAIR PROCEDURES AND REDUNDANCY

This arose in the case of Gerry Kavanagh and Autocare Motor Parts and Accessories Limited ADJ-00030928. In that case the Adjudication Officer while referring to various case law importantly set out the case of Allied Irish Banks -v- Purcell 2012 23ELR189 where it was held that an Adjudication Officer is not required to re-run or second guess redundancy or unfair dismissal once fair procedures and the rules of natural justice are seen to be observed. In unfair dismissal cases and particularly those relating to selection for redundancy it is absolutely

imperative that employers have in place the appropriate procedures. Once the appropriate procedures are in place and fairly applied then in those circumstances it is unlikely that an Adjudication Officer is going to find against the employer. The cases which employers are losing are where fair procedures are not applied.

REDRESS IN UNFAIR DISMISSAL CASES

This issue arose in ADJ-29126 being a case of Reid and Gammell Glazing Limited. In that case the Adjudication Officer set out the relevant case law being

In Sheehan -v- Continental Administration Co Limited UD858/1999 the Employment Appeals Tribunal found the onus of proof lay on the respondent to show that the complainant did not act reasonably in all the circumstances. The Tribunal ruled that it was not reasonable to merely place oneself upon a list with various recruitment agencies. A more proactive approach was required. In that case the Tribunal continued

"A Claimant who finds himself out of work should employ a reasonable amount of time each weekday in seeking work. It is not enough to inform agencies that you are available for work nor merely to post an application to various companies seeking work… The time that 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 also referred to the case of Smith -v- Leddy UDD74/2009 where the Labour Court stated it expected to see:

"Evidence that employees who are dismissed spend a considerable portion of each normal working day, while they are out of work, engaged actively in the pursuit of alternative employment"

This is a helpful restatement of the legislation.

This case highlights the importance of employees who are dismissed actively seeking work. It is also necessary for them to have the evidence of actively seeking work.

UNFAIR DISMISSAL AND FAIR PROCEDURES

This issue arose in the case of ***Ray Walsh and Econocom Digital Finance Limited ADJ-00029093.***

The Adjudication Officer pointed out that the Complainant had argued that he was dismissed unfairly. The Adjudication Officer pointed out that irrespective of whether the Redundancy of the job was a valid Redundancy the Complainant had contended that the manner in which it was effected was entirely at odds with the right to fair procedures as provided under the Unfair Dismissals (Amended) Act 1993. The Adjudication Officer pointed out that while the Redundancy Payment Act does not prescribe a set procedure for an employer to follow in a Redundancy situation the Unfair Dismissal Acts specifically in Section 6(7)(b) provides that an Adjudicator may have regard to the process followed by the employer to implement the Redundancy.

The Adjudication Officer referred to the case of ***Barton -v- Newsfast Freight Limited UD1269-2005*** where it was pointed out:

"The crucial thing is then is to follow a reasonable procedure, including consulting the affected employees, applying a fair selection process and considering alternative employment".

The Adjudication Officer pointed out that this was accept in the case of ***Gillian Free -v- Oxygen Environmental*** where the EAT stated:

"While there are no hard and fast rules as to what constitutes the criteria to be adopted, nevertheless, the criteria will come under close scrutiny if an employee claims they were unfairly selected for Redundancy. The employer must follow the agreed procedures when making the Redundancy. Where there are no agreed procedures in relation to selection for Redundancy, as is in this case, then the employer must act fairly and reasonably".

It was pointed out in the case of ***Mulligan -v- J2 Global (Ireland) Limited*** it was held:

"In cases of Redundancy, best practice is to carry out a genuine consultation process prior to reaching a decision as to Redundancy. While in some cases there may be no viable alternative to the making of one or more jobs redundant, whatever consultation process is carried out, the

employer who fails to carry out a consultation process risks being found in breach of the Unfair Dismissals Act as such lack of procedure may lead to the conclusion that an unfair selection for Redundancy has taken place".

The Adjudication Officer pointed out in this case that no process for an appeal was given and referred to three cases being A Worker -v- A Construction Company, Hotel Manager -v- Hotel and Spa Resort and A Researcher -v- A University. The decision sets out the relevant case references. In this case the Adjudication Officer found there was an Unfair Dismissal and ordered a sum of €120,000 to be paid. Also, in the case of ***Hibner and Joelle's Dressmaking ADJ-00029369*** is one where the Adjudication Officer pointed out that the WRC and the Labour Court have consistently emphasised that an employer is required to follow fair procedures before it decides to dismiss an employee. The Adjudication Officer in that case referred to the Code of Practise on Grievance and Disciplinary Procedures which promotes best practice in the conduct of grievances and disciplinary procedures and emphasises the importance of procedures to ensure fairness and natural justice.

SUSPENSION

Before an employee is suspended it is always useful to consider the judgement of Kearns J. in Morgan -v- Trinity College Dublin 2003 3 I.R 157, where it was held that a person suspended as a penalty or sanction was entitled to be afforded natural justice and fair procedures before that decision to suspend was taken.

There will be times where an employer instead of dismissing will simply suspend an employee without pay. In those cases, the normal rules relating to fair procedures relating to disciplinary processes must be applied.

CONSTRUCTIVE DISMISSAL

The issue of Constructive Dismissal arose in a case of ***Scholts and Sneem House Hotel Limited ADJ-00029071.***

The Adjudication Officer in this case set out the law in considerable detail.

The Adjudication Officer referred to Murdock and Hunt's Encyclopaedia of Irish Law 2016 Edition which defined Constructive Dismissal as:

"A dismissal which is inferred where it is reasonable for the employee to terminate the Contract of Employment because of the employers conduct….. the Employment Appeals Tribunal has recognised two forms of Constructive Dismissal (1) Where the employee is entitled to terminate the contract of employment and does so, this entitlement is not conferred by the 1997 Act but rather recognised by it: and (2) where it is reasonable for the employee to terminate the contract of employment and he does so. ***Fitzgerald -v- Pat The Baker 1999 ELR227****. The type of conduct which can give rise to a Constructive Dismissal cannot be petty or minor but must be something serious or significant which goes to the root of the relationship between the employer and the employee.* ***Joyce -v- Brothers of Charity 2009 EAT UD407/2008 2009 ELR 328".***

The Adjudication Officer referred to a number of cases being;

The resignation of a manager whose position had been undermined may amount to a Constructive Dismissal. ***O'Byrne -v- Carmine Contractors 1990 ELR232***, or because an employer fails to relieve a bad atmosphere in the workplace. ***Smyth -v- Tobin 1992 ELR253***, or, fails to comply with a requirement of the Health and Safety Authority. ***Burke and Others -v- Victor Collins Enterprises 1993 ELR37***, or, deals inadequately with complaints of bullying and harassment***. Alan -v- Independent Newspapers 2002 ELR84***, ***Monaghan -v- Sherry Brothers Limited 2003 ELR293***. The Adjudication Officer pointed out that in the case of ***Burber -v- Dunnes Stores 2009 IESC10*** the Supreme Court stated that it was;

"Implied in a Contract of Employment a mutual obligation that the employer and the employee will not without reasonable and proper cause conduct themselves in a manner likely to destroy or seriously damage the relationship of confidence and trust between them".

The Adjudication Officer then set out the four tests being;

1) The test of the objective.

2) The test requires that the conduct of both employer and employee be considered.

3) The conduct of the parties as a whole and the accumulation effect must be looked at; and

4) 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 an employee cannot be expected to put up with it.

This is a very helpful outline by the Adjudication Officer of the relevant law.

CONSTRUCTIVE DISMISSAL - THE TEST

This issue arose in the case of Moran and McDermott Laboratories Limited trading as Mylan ADJ-00030750. In this case the Adjudication Officer helpfully set out the legislation.

The Adjudication Officer quoted the case of A Maintenance Supervisor -v- A Charity ADJ-00002881 where in order to come within the definition in Section 1 (b)

"The termination by the employee of his contract of employment with his employer whether prior notice of the termination was or was not given to the employer, in circumstances in which because of the conduct of the employer, the employee was or would have been entitled, or it was or would have been reasonable for the employee, to terminate the contract of employment without giving prior notice of the termination to the employer…"

The Adjudication Officer pointed out that in the case of Paris Bakery and Pasty Limited –v- Mryljak DWT1468 the Labour Court endorsed the test as set out in the UK case of Western Excavating (ECC) Limited -v- Sharp 1978 AllER713 where it set out there are two tests in the contract test:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any other performance"

The reasonableness test is whether:

"…conducts himself or his affairs so unreasonably that the employee cannot fairly be expected to put up with it any longer, if so the employee is justified in leaving"

The Adjudication Officer also set out the Supreme Court case of Berber -v- Dunnes Stores 2009 ELR61 where the Supreme Court stated:

"The conduct of the employer complained off 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"

The Adjudication Officer also pointed out that the burden of proof in these cases is of course on the employee.

The Adjudication Officer pointed out that in relation to the issue of breach of employment Western Excavating (ECC) Limited case referred to previously is one where it is that the employer:

"No longer intends to be bound by one or more of the essential terms of contract"

DISCRIMINATORY DISMISSAL

This arose in a case of Solomonoba & Milne Foods Limited.

This is a helpful decision from the Adjudication Officer as the Adjudication Officer set out the relevant legislation and in particular in relation to a disability, quoted the case of a Government Department -v- Worker EDA094, where the Labour Court stated:

"the Court must take the definition of disability as it finds it. Further, as the Act is a remedial social statute it ought to be construed as widely and as liberally as possible consistent with fairness (Bank of Ireland -v-

Purcell 1989 IR327). Nevertheless, no statue can be construed so as to produce an absurd result or one that is repugnant to common sense2.

In that case the Labour Court noted:

"It is expressed in terms of the manifestations or symptoms produced by a particular condition, illness or disease, rather than the taxonomy or label which has been ascribed thereto. Further, the definition does not refer to the extent to which the manifestations or symptoms must be present. However, a de minimus rule must apply and affects or symptoms, which are present to an insignificant degree, would have to be disregarded. Moreover, the classification of a condition, illness or disease as a disability is not limited by its temporal effect on the sufferer, this is clear from the definition which provides that – shall be taken to include a disability which exists at present or which previously existed but no longer exists or which may exist in the future or which is imputed to a person".

The Adjudication Officer in this case noted that the medical reports and their contents were very much in dispute between the parties. In this case the complainant's direct evidence was that she had a lot of headaches, her eyes were burning and her eyes were blurry and her nose was leaking all the time, her nose was dripping on to her food, she was coughing a lot and she could not breathe and she could not sleep. She gave evidence that her symptoms were getting worse over the years. The respondent's evidence that working with onions was unpleasant for all employees working on the line and the HR Manager disputed that the complainant was in the distressed state as set out above and noted that the complainant working on the onion line was sporadic. The HR Manager gave evidence that the complainant refused to work on different lines. The Adjudicator Officer noted that there was evidence where the employee was assessed in 2014 that she should avoid working with onions into the future. The Adjudicator Officer looked at the issue of reasonable accommodation and quoted the Nano Nagle -v- Marie Daly case 2019 E.L.R.221 where Mr. Justice McMenamin noted:

"once consultation, or other necessary steps for compliance have been taken, an employing 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 defined in Section 15(1) is, in fact, capable of adaptation so as to accommodation that claimant, and whether the claimant would be capable of performing that function thus adapted. But it is "that position" or job, not another one".

The Adjudicator Officer pointed out that it is well accepted that there is no requirement upon an employer to find another distinct and separate job for the employee with a disability. There is a requirement on employers to explore alternative modes of accommodation to establish if the position held by the employee with a disability is capable of adaptation to accommodate that employee.

The Adjudicator Officer pointed out that there were no attendance notes on the HR File that the employee had refused a different line. In this case, an award of €30,000 was made.

This is a helpful case in setting out the law by the Adjudicator Officer. It does highlight the importance of an employer in these situations exploring the potential for the employee to undertake an adapted role. It also highlights the importance that if proposals are put forward by employers, to avoid difficulties into the future, that these are documented. It would be our view that rather than these being documented by way of a note on a file, it would be by way of correspondence by email or letter to the employee.

CLAIMS UNDER THE EMPLOYMENT EQUALITY ACT 1998

An interesting issue arose in case ADJ-00017470. In this case while the Adjudication Officer found that Discriminatory Dismissal had taken place and awarded compensation, the Adjudication Officer also ordered that within three months that the respondent must provide training to everybody involved in their business in employment Equality with special emphasis on harassment and sexual harassment and also ordered training modules on customer service. The Adjudication Officer also ordered that the respondent also introduce a report system with retrievable records for the business.

This is an interesting approach by the Adjudication Officer. It does come within the grounds, in our opinion as to putting in place procedures to be persuasive of an employer going forward, being compliant with the legislation

EQUAL PAY CLAIMS – BURDEN OF PROOF

The recent Code of Practice on equal pay has helpfully set out an overview of the legislation on this.

The onus of proof is on the person making the complaint to show the basic facts. They must identify a comparator or group of comparators if indirect discrimination is alleged, with whom s/he is performing like work. This requirement does not apply if the discrimination relates to Maternity Leave or Pregnancy Leave. They must also establish the discriminatory grounds and the pay differential. In indirect discrimination claims the indirectly discriminatory practice or systems which results in the pay differential must be identified. If an employee can establish these facts, then the onus of proof shifts to the employer to establish a ground other than the prohibited ground for the pay differential or, in indirect discrimination claims, objective justification for the system or practice in place.

The Code points out that Section 85A EEA reflects the approach in case law where facts are established from which discrimination may be presumed it is for the respondent employer to prove the contrary.

The Code points out that transparency is an important aspect of any pay system and may determine where the Burden of Proof lies. This goes back to case C-109/88 where the CJU found that where a pay system lacked transparency and the average pay of women is less than that of men in a relatively large number of employees, it is for the employer to prove that the system is not discriminatory.

Complainants may seek information from the employer using the Freedom of Information Act 2014, the GDPR Rules, or the Statutory Questionnaire under the Act of 2015. Where an employer fails to respond the Statutory Questionnaire or gives answers which are false or misleading inferences may be drawn from this and this may operate to shift the Burden of Proof from the complainant to the Employer.

BURDEN OF PROOF IN CASES UNDER THE SAFETY HEALTH & WELFARE AT WORK ACT 2005 - 2014

This issue was addressed by the Labour Court in the case of Health Service Executive and Jennings HSD222. The Labour Court in that case quoted the case of O'Neill -v- Toni & Guy Blackrock Ltd 2010 21ELR1, where the Labour Court stated:

"It is clear from the language of this section that in order to make out a case for penalisation it is necessary for the claimant to establish that the detriment to which he or she complains was imposed "for having committed one of the acts protected by sub-section" thus the detriment giving rise to the complaint must have been incurred because of, or in retaliation for, the claimant having committed a protected act".

The Court then went on to consider the issue of the shifting of the burden of proof and referred to the same case where it was stated by the Labour Court in that case:

"having regard to these considerations, it seems to the Court that a form of shifting burden of proof, similar to that in Employment Equality Law, should be applied in the instant case. Thus the claimant must establish, on the balance of probabilities, that he made complaints concerning Health & Safety. It is then necessary for him to show that, having regard to the circumstances of the case, it is apt to infer from subsequent events that his complaints were an operative consideration leading to his dismissal. If those two limbs of the test are satisfied it is for the respondent to satisfy the Court, on credible evidence and on the normal civil standard, that the complaints relied upon did not influence the claimant's dismissal".

It is helpful that the Court has restated the law.

In this case the complainant submitted that the respondent's decision to relocate him elsewhere within the hospital, following receipt of his complaint amounted to penalisation within the provisions of Section 27(2)(c) of the Act, he contended that his mental wellbeing was affected because of his belief that the decision to move him and to allow the alleged perpetrator to remain in situ created the impression that he had been guilty of misconduct towards Nurse A.

The Labour Court found that the Occupational Health Report commissioned by the respondent and opened to the Court confirmed that in the period following the relocation the complainant's mental health deteriorated significantly and he experienced considerable workplace stress. An award of €20,000 was made.

PAYMENT OF PUBLIC HOLIDAY PAY

This issue arose in the case of Top Security Limited/Top Security and Brian Scully DWT2214. This is a case where the Labour Court in an associated case had found that the Complainant's normal working week was 48 hours per week. The Court held that the Complainant was entitled to be paid one fifth of his normal weekly rate of pay when granted a public holiday.

PUBLIC HOLIDAY PAY & PAYMENT

This issue arose in the case of Neville & Accessible Community Transport ADJ-00031888. This is a case where the employee contended that Public Holiday pay was not paid until after he had lodged his complaint to the WRC. The Adjudication Officer in this case held that the respondent had provided evidence of the payment of Public Holidays. It does not appear that it was challenged that these were not paid until after the complaint issued.

This is a case where the employee was not represented.

There is a case in relation to this, being the case of Macklin & Irish Life Assurance Limited, being a judgement of Mr. Justice Lavin. In that case, Mr. Justice Lavin clearly set out that Public Holidays must be paid as and when they arise.

In this case the Adjudication Officer appears to have worked on the basis that as the payment was made, even though paid after the complaint was lodged, then in those circumstances, the claim was not well founded.

We would disagree with this view. The Adjudication Officer in determining matters should, in our view, be determining matters as at the date that the claim was lodged. Yes, we would fully accept that

payment subsequently can be a mitigating factor. However, it does not mean that a breach has not occurred.

In relation to the issue of Public Holidays of course, these are not covered by the Working Time Directive. They are local legislation and therefore the case of Von Colson & Kamann would not need to be applied. If these had related to annual leave, we would take the view that the Adjudication Officer would have had to consider compensation for a breach. In any event, event in relation to Public Holidays, we would take the view that the Adjudication Officer in this case was incorrect in holding that there was no breach and that the claim was not well founded.

COMPENSATION IN CASES INVOLVING NON-PAYMENT OF ANNUAL LEAVE

This issue arose in the case of Solecki and J & D Lithuanian Building Services Ltd ADJ-00028513.

In this case the Adjudication Officer awarded the economic loss in the sum of €420 for Public Holidays and €1,346.80 in respect of Annual Leave entitlements. The Adjudication Officer also directed a sum of €2,000 as compensation for breaches being a total of €3,766.80.

It is very helpful that the Adjudication Officer has set this matter out in this way. By doing so, it means that the monies due in respect of Public Holidays and Annual Leave will be subject to tax. However, the compensation element of €2,000 would be exempted by the provisions of Section 193 Taxes Consolidation Act. If simply an award of €3,766.80 had been awarded that did not break down the award between the economic loss and the compensation then in those circumstances the full sum would be due.

The Adjudication Officers in cases like this of course have the jurisdiction not to award the economic loss and simply to award compensation for the breach, provided that is clearly set out in the Decision, then in those circumstances then the entire award ends up being exempt from Income Tax. However, this does create some difficulties and it is always better that an Adjudication Officer, as in this case, will award the economic loss and then any compensation on top, in a way that any Revenue Official looking at the Decision would be able to determine what element related to loss of income, and what element

was compensation. This is an excellent Decision for setting out matters in line with the Taxes Consolidation Act.

WHAT HAPPENS WHEN AN EMPLOYER DECIDES TO PUT IN PLACE PAY CUTS

This issue arose in the case of Jennifer Healy and Excess Direct Insurance Brokers Ltd, ADJ-00030361.
In that case the respondent stated that they were in a very difficult financial position following the Pandemic and with Brexit sales dropping and the company decided to implement pay cuts rather than redundancies.
The Adjudication Officer in this case referred to Section 5 of the Payment of Wages Act. One of the provisions of Section 5 is that in the case of a deduction, the employee must have given their prior consent in writing to it. The Adjudication Officer stated that the complainant had never agreed to the deduction. An award of over €6,000 was made. This is a reminder to employers of the importance of making sure that if there is to be a salary reduction, that the employee's written consent is obtained before the deduction is put in place.

PAYMENT OF WAGES

This issue arose in the case of ***Galway Clinic Doughiska Limited and Ivanho PWD2215***. This is a case where the Labour Court reviewed the Legislation relating to payments due. The Court referred to the case of ***Marek Balans -v- Tesco Ireland Limited 2020 IHC55*** where Mr Justice McGrath considered Section 5 of the Act as follows:

"Section 5 of the Act of 1991 prohibits the making of deductions from wages save in certain circumstances. Section 5 (6) provides that where the total amount of any wages that are paid on any occasion by an employer to an employee is less than the total amount of wages that is properly payable by him to the employee, then, except insofar as the deficiency or non-payment is attributable to an error of computation, the amount of the deficiency or non-payment should be treated as a deduction made by the employer from the wages of the employee on that occasion. Centre of the Courts analysis must be the concepts of wages properly payable and the circumstances in which, if there is a deficiency in respect of such payments, it arose as a result of an error of computation".

In that case the Court also referred to the decision of Mr Justice Finnigan in ***Dunnes Stores (Cornelscourt) Limited -v- Lacey 2007 1I.R.478*** where it was argued that the Employment Appeals Tribunal should address the question of renumeration properly payable to an employee before considering the question of deduction or whether a deduction was unlawful. In that case at page 482 Mr Justice Finnigan stated:

"I am satisfied upon careful perusal of the documents relied upon by the Respondent that the same cannot represent the agreement or an acknowledgment of the agreement contended for but rather it contains a clear denial of the existence of any such agreement. No such evidence of an agreement was provided. In these circumstances I am satisfied the Employment Appeals Tribunal erred in law in failing to address the question of the renumeration properly payable to the Respondents such a determination being essential to the making of a determination".

The Courts set out that the decision makes clear that the Labour Court when considering a complaint under the Act must first determine the wages which were properly payable to the employee on the occasion. It is only when that is determined can the Court proceed to examine whether the amount differs from what was actually paid on the occasion of whether any difference amounted to a deduction within the meaning of the Act.

This is a very helpful overview of the Legislation on this issue.

DEDUCTIONS FROM PAY

This issue arose in the case of Kostal Ireland Gmbh & Delee, PWD 2212.

The complainant in this case referred to the case of Valans -v- Tesco Ireland Limited 2020 ELR 12 and Dunnes Stores (Cornelscourt) Limited -v- Lacey 2007, 1 I.R.478 which set out that any consideration of a complaint under the Act must first consider whether the wages which were properly payable on that occasion.

In UCC-v-Finbarr Waldron, PWD 212, the complainant pointed out that the Court in that case confirmed that:

"the Act does not make provision for the determination of what wages are properly payable on an occasion on the basis of what the Court might think reasonable. Rather, the Act requires the Court, having investigated the matter, to make a determination as regards what wages were properly payable on a given date by reference to objective criteria".

The case of Stefan Chmiel & Others -v- Concast Precast Limited PWD 75/20, is one where the Labour Court held that:

"in common law there is no general right to lay-off/short-time without pay and while there are limited circumstances wherein there will be such a right, the employer must demonstrate that it has been a custom and practice of the workplace and the custom must be reasonable, certain and notorious"

The complainant contended that the short-time did not come within the definition as set out in the Redundancy Payment Acts 1967 or the definition of lay-off as defined in that Act. The precedent case that they referred to was the case of Industrial Yarns -v- Greene 1984 IRLM 15, in which case the Court stated:

"if there is no contractual power (expressed or implied) in the Contract of Employment to suspend the operation of the contract for a limited period, then by ceasing to employ an employee or refusing to pay him wages, the employer is guilty of a serious breach amounting to repudiation of it"

In this case the employer argued:

"*there is a reasonable, certain and notorious custom and practice, that lay-off in Ireland is without pay since the coming into force of the 1967 Act. In all the recent EAT cases, the EAT found that general custom and practice that temporary lay-off (duly notified under the Redundancy Payment Act, 1967 to 2014 is generally, by notorious custom and practice unpaid)"*

The Court in this case pointed out that the case of Balans -v- Tesco Ireland Limited is one where it is established that a deduction within the meaning of the Act has been made from the wages properly payable on the occasion and that the Court would then consider whether the deduction was lawful. The Court found that the difference between what was properly payable and what was actually paid was either €1,325.61 or €1,348.26. The complainant was in receipt of Social Welfare in the sum of €243.60. The Court pointed out that in essence

the appellant contended that the use of the word 'lay-off' in the contract should be interpreted as having a wider meaning than the term 'lay-off' as used in the Act of 1967 and that wider meaning should be understood as over-riding any contractual commitment to provide the working hours set out in the contract and on such an occasion where those hours are not provided to undermine the requirement resting on the appellant to pay wages agreed in the Contract of Employment. The Court pointed out that in the view of the Court, any such contractual provision would require to be explicitly expressed and clear in meaning and intent in order for it to be taken as removing from the complainant the protection afforded by the Act in Section 5(1). In this case the Court awarded the sum of €650 which the Court considered reasonable. This however is an important case in setting out the law in relation to this matter.

SERVICE OF DOCUMENTATION ON AN EMPLOYER

This issue arose in a case of ADJ-00031708.
The Adjudication Officer in this case had to deal with Section 14(6) of the Workplace Relations Act 2015 -2021 which provides that an Adjudication Officer shall not entertain a complaint referred to him or her if it is presented after a period of six months beginning on the date of the contravention to which the complaint relates. As regards service of documentation by post the Adjudication Officer in this matter set out that it is a matter of settled law that when correspondence is sent by post its date of delivery is deemed to be the following working day. The Adjudication Officer pointed out that this is known as the "postal rule". The Adjudication Officer helpfully quoted Section 25 of the Interpretation Act, 2005 which states:

"Where an enactment authorises or requires a document to be served by post by using the word "serve", "give", "deliver", "send", or any other word or expression the service of the document may be effected by properly addressing, prepaying (where required) and posting a letter containing the document, and in that case the service of the document is deemed, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post".

CONTRACTS OF EMPLOYMENT

An interesting issue arose in a case ADJ-00027463.

One of the claims related to the issue of not receiving a Contract of Employment or more properly a statement under Section 3 of the Terms of Employment (Information) Act.

The approach of the Adjudication Officer in dealing with the defence of the employer was precise and accurate.

In that case, the Adjudication Officer stated;

"The respondent's suggestion that because the complainant was a manager, she should have drafted her own terms and conditions of employment is a nonsense. The legislation is clear and unambiguous. The obligation to give a written statement of terms to an employee is on the employer and nobody else".

This is a very helpful statement.

What is does however indicate is that there is a significant misconception by some employers as to their role in providing a Contract of Employment.