MIDLANDS GENERAL PRACTICE UPDATE 2022

A PRACTICAL GUIDE ON EMPLOYMENT LAW ISSUES ARISING POST PANDEMIC

Paper presented by Richard Grogan on 19 May 2022
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When I was contacted to be asked to speak, I of course said, "*yes, I would be delighted*". When I got the topic, I thought that I was being asked to speak on approximately 800 plus pieces of legislation, so I've had to tie it down a little bit as to what the main issues are.

Today I would like to discuss;

1. **Pregnancy Dismissal and returning to work after Maternity.**
2. **Redundancy.**
3. **Remote Working and Flexible Working.**

1. Pregnancy Dismissal and Right to Return to Work after Maternity

For many years I thought that possibly we were getting on top of this. Yes of course, we still had the cases coming up but they are coming up now with frightening regularity.

I could go through this in significant detail but I think for the purposes of today it is sufficient that I set out some basic issues.

(1) Pregnancy and Maternity periods are specially protected periods under EU Law and are effectively dealt with under the Employment Equality legislation.

(2) Where a pregnant employee is dismissed, she does not need one year's service.

(3) The burden of proof is on the employer to show that the dismissal had nothing to do with her pregnancy.

(4) The closer the dismissal is to the date the employee advised the employer that she was pregnant, the greater is the chance that the WRC or the Labour Court on appeal will hold that the dismissal was directly related or partly related to her pregnancy and therefore the employee will obtain the benefit in the Employment Equality legislation for up to two years' salary being awarded.

(5) During Maternity Leave a woman cannot be made redundant, except in the case of a Collective Redundancy. This is covered under EU Law.

(6) A woman is entitled to return to the same job which she had prior to going on Maternity Leave. Failure to do so, can mean a claim under the Maternity Protection Act, for up to six months' salary being awarded.

In addition, it is probable that an Unfair Dismissal claim or an Employment Equality claim will be brought.

The Unfair Dismissal claim can be on the grounds of Constructive Dismissal. However, it is always better to bring a claim under the Employment Equality legislation as the burden of proof is on the employer. It might be claimed that you cannot bring two claims at the same time, that is correct, but a claim can be properly structured to cover both a claim under the Employment Equality legislation and the Maternity Protection legislation.

(7) There are some common misconceptions that employers fall into. The most common is that an individual has advised them that they are pregnant. That individual is on a probation period. The employer simply waits until the probation period is over and then gives a simple letter stating "*you did not pass your probation*". The position is that this is unlikely to get the employer out of a claim that the pregnancy was the main reason for the dismissal.

There have been claims in the WRC and the Labour Court where an employee has very early on mentioned that they are pregnant. The employer has then put them through a Disciplinary Procedure relating to issues unrelated to the pregnancy.

In other cases, the employee when put on a Disciplinary has advised the employer, at that stage, that they are pregnant.

In either of those situations, it is incumbent on the employer to investigate whether the pregnancy could be the cause of poor performance. The burden of proof will be very much on the employer to show that this was properly and fully investigated.

Conclusion

This is an issue which is arising regularly. It is very easy for an employer to be advised as to how to avoid the problem. It is quite simply that employers recognise that Pregnancy and Maternity Leave are specially protected periods.

2. Redundancy In Ireland – Tips and Traps

At first sight Redundancy would appear to be a very straight forward matter. To a certain extent this is a correct statement. Where you have a business which is closing down and everybody is being made redundant the issues are clear. The problem cases arise where the business is not closing down and individuals are being selected for redundancy.

An issue which is arising since the pandemic has been that redundancy now is seen as a cloak to select the underperforming or worst employees. Claims relating to this already are going to the WRC. The other significant issue is fair selection for redundancy. You might think that this comes within the ambit of what I said previously. To an extent it does but in addition it is also a separate heading in itself. A third area of concern, which is again giving rise to cases, are individuals who are either pregnant or on Maternity Leave being selected for redundancy.

In this paper I intent to hopefully walk-through matters with you as to whether you are dealing for an employer or an employee.

What is a Redundancy?

This is one of those issues which actually sometimes arises and can cause some difficulties. Section 7 (2) of the Redundancy Payment Act 1967, as amended by Section 4 of the Redundancy Payment Act 1971 sets out that a person who is dismissed shall be deemed to be dismissed by reason of redundancy if his or her dismissal results "wholly or mainly" from one of the following;

(a) The fact that the employer has ceased or intends to cease to carry on the business for the purpose of which the employee was employed by him, or has ceased or intends to cease to carry on that business in the place that the employee was so employed, or,
(b) The fact that the requirement of that business for employees to carry out work of a particular kind in the place where he was so employed have ceased or diminished or expected to cease or diminish, or,
(c) The fact that his employer has decided to carry on the business with fewer or no employees, whether by requiring the work for which the employee had been employed (or had been doing before his dismissal) to be done by other employees or otherwise, or,
(d) The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforth be done in a different manner for which the employee is not sufficiently qualified or trained, or,
(e) The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal)

should henceforth be done by a person who is capable of doing other work for which the employee is not sufficiently qualified or trained.

It is important to remember that in a redundancy situation the burden of proof is on the employer to show that it is a valid redundancy.

If the employer cannot show that it is a valid redundancy then in those circumstances it becomes an Unfair Dismissal.

There will be times where the employee who has been made redundant will effectively contend it was an Unfair Dismissal disguised as a redundancy. A case in point is the case of Capaldi –v- C-Step Shoes Limited UD806/1989 where the EAT found on the basis of the evidence before them that the Managing Director did threaten to let the employee go but he could not do so and instead he contrived a redundancy to get rid of her.

There is a significant issue for an employer who tries to manufacture a redundancy situation. If they fail to show it was a valid redundancy then it is effectively an Unfair Dismissal. The employer then does not have the option of running it as an Unfair Dismissal case on the basis that the employee may have contributed to their own dismissal. If an employer nails their colours to the mast that this is a redundancy they are stuck with that defence of a redundancy if that is rejected as a valid defence.

There are a number of steps which an employer must go through to put in place a valid redundancy and if those steps are not followed or there is a defect in those steps then the employer may well by their actions convert what may have been valid redundancy and may in fact be a valid redundancy into an Unfair Dismissal claim based on fair procedure. The reason for this is that Section 6 (4) of the Unfair Dismissal Act provides that a dismissal shall be deemed not to be unfair of it results wholly or mainly from one of the issues set out in that Section and that includes redundancy of the employee.

However, as I have said in an Unfair Dismissal case the burden of proof is on the employer so if an employee claims that a redundancy was not valid redundancy but was instead a dismissal and claims Unfair Dismissal then in those circumstances the Burden of Proof rests firmly on the shoulders of the employer to show that it is a valid redundancy.

The selection Process

At the start it is imperative for employers to understand that redundancy is not a method by which the best employees are retained and the worst employees are got rid of. Now, to be fair it is probably possible to orchestrate such a situation but it is fraught with difficulties. Get it wrong and the employer can be in multiple Unfair Dismissal cases.

In putting in place a redundancy it is important to remember that there has to be a selection process. That selection process must be impersonal. The selection relates to the job not to the individual. Provided the selection process is a fair process than in those circumstances the redundancy will stand as a fair selection.

The standard process being LIFO being "Last In First Out" is the oldest selection process. It is not open to challenge on the selection ground. Saying this LIFO is a very blunt instrument. It may be applied without impacting an employer where you are dealing with a group of workers doing exactly the same job and where the roles are interchangeable.

In the majority of redundancy situations, the employer will need to look at what jobs the employer will require going forward and what qualifications of those jobs the employer will require. There is no reason why an employer cannot have combinations. For example, if an employer has a production line along with office facilities and drivers and decides that the business does not need as many operatives and as many drivers then LIFO can be applied to those categories of workers. When it comes to other jobs sometimes certain job attributes are going to be required. So, in a company that is a production company you will often need to have production manager. You may need to have an accounts person. You may need to have dispatchers. Now the LIFO rule may not be appropriate in a number of those jobs. Those who organise the trucks to go out with product and are in contact with the truck drivers may if you have a multicultural workforce which comprises drivers who are from different countries and different languages which are spoken and you are only going to have one dispatcher going forward it may be reasonable to set out that the dispatcher will have a language that the drivers or a majority of the drivers will understand, In dealing with the accounts section and there is going to be a requirement that there are certain statutory returns that are going to have to be made which would require a person to be a qualified accountant then it is reasonable to set out that the job would be done by somebody who would have a particular accountancy qualification. In those types of situations, it may well be that the person with the least service will actually be the person retained. What is important in the selection process is that it can be objectively justified if challenged.

In case ADJ16010 the Adjudication Officer had to deal with an Unfair Dismissal case where it was claimed the employee had been made redundant. The Adjudication Officer in that case helpfully set out that the test as to whether it was a valid redundancy was clearly set out in case UD206/2011 where the EAT stated;

"*When an employer is making an employee redundancy, while retaining other employees, the selection criteria being used should be 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 to be adopted will come under close scrutiny if an employee claims they were unfairly selected for redundancy. The employer must follow the agreed procedure when making the redundancy. Where there*

are no agreed procedures in relation to selection for redundancy, as in this case, then the employer must act fairly and reasonably".

I will deal with this a little bit further in this section of the talk but it is as well to deal with it at this stage now.

In some major and large organisations there will be a policy or procedure sometimes by way of a collective agreement relating to the selection for redundancy and the process which will apply. In the majority of companies and businesses there will be no redundancy selection process or procedures. In those circumstances the employer needs to act fairly.

This may now sound strange but in those circumstances the employer should apply their own disciplinary procedures or the Code of Practice on Grievance and Disciplinary Procedures if they do not have a Disciplinary Procedure or if the Code is more beneficial to the employee. I will hear you sat that this is not a disciplinary matter where somebody is being made redundancy. That is true but in dealing with matters this will ensure fair procedures if these are applied.

So, what are the steps and employer should do?

1. The employer should put in place a document setting out the business requirements, what skills will be required, how an individual has been selected for being at risk of redundancy. I use the word "At Risk" on purpose. Simply arriving and telling an employee that they are being made redundant is a way of ensuring a claim for Unfair Dismissal on the lack of fair procedures.
2. Once the group of workers who are "at risk" is identified they should each be written to.
3. The letter to the employee at risk should advise them that they are at risk of redundancy. It is best practice to attach the document prepared by the employer setting out why the employee is at risk of redundancy at that stage.
4. The employee in that at risk letter should be called to a meeting to discuss the situation.
   The employee at that stage must be advised of their right to be represented by a fellow employee or Union official. Now this causes problems with employers who say that they do not recognise a Union. That may well be the position. However, under the Code of Practice on Grievance and Disciplinary Procedures an employee whose job is at risk is entitled to be represented by a fellow employee or Union Official. The fact that a Union Official attends at a meeting does not mean that the employer is recognising a Union for negotiating purposes.
5. At the meeting the employee should be allowed ask any questions which they wish to ask which are reasonable. They must be asked then to put forward their proposals as to how their job could be retained.
6. The employer needs to consider the arguments put forward by the employee.

7. When the employer has considered same and assuming that the employer does not accept those arguments then in those circumstances the employee should be given a letter advising them that they are being made redundant and when the redundancy will take place.
8. That letter should advise the employee of a right of appeal to an Independent Person who is not involved in the process previously.
9. There should be a full appeal and 5,6, and 7 above should apply.

When I mention the issue of an employer it may well be in small organisation effectively there is going to be no appeal process where there will be anybody independent. In those circumstances except in the smallest of organisations it is beneficial to have somebody from outside deal with matters at the initial stage and that the employer then would deal with matters on appeal. In larger organisations where there is a HR Department or there are a number of managers one of them can deal with the matter at the start and it can then go to somebody higher in the organisation to make the final decision.

The issue of the selection for redundancy is an issue which is going to be arising. This issue arose in a case ADJ/00014858. The employee was not successful in that case. However, it is helpful to look at it as regards to the law on this matter. The relevant legislation is Section 6 of the Unfair Dismissals Act, 1977. In relation to the issue of selection for redundancy subsection 3 is the relevant subsection which provides:

"(3) without prejudice to the generality of subsection (1) of this Section, if an employee was dismissal due to redundancy but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have not been dismissed, and either the selection of that employee for dismissal resulted wholly or mainly from one or more of the matters specified in subsection (2) of this section or another matter that would not be the ground justifying dismissal, or her was selected for dismissal in contravention of a procedure (being a procedure that has been agreed upon by or on behalf of the employer and by the employee or a trade union or an excepted body under the Trade Union Act 1941 and 1977) representing him or has been established by the custom and practice of the employment concerned, relating to redundancy and there were no special reasons justifying a departure from that procedure, then the dismissal shall be deemed, for the purposes of this Act, to be an Unfair Dismissal".

It is also important to look at the provisions of Section 7 Subsection 2 of the Redundancy Payment Act 1967, as amended.

In these cases, the question is always going to be whether the employee was properly selected for redundancy. In these types of cases, it will be imperative for employers to have the appropriate documentation in place showing the selection process and how it was applied to the employee and how the employee was given fair procedures in relation to same.

This issue was addressed in the case ADJ-00019921 where the Adjudication Officer helpfully set out the case of Williams –v- Comps Air 982 1ICR156 where Browne Wilkinson J in considering the issue of fair selection identified the following general accepted principles governing how reasonably employers will typically act namely:

"The employer will seek to give as much warning as possible of impending redundancies so as to enable the union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.

The employer will consult the union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the union the criteria to be applied in selecting the employees to be made redundant. Where the selection has been made, the employer will consider with the union whether the selection has been made in accordance with those criteria.

Whether or not an agreement as to the criteria to be adopted has been agreed with the union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length or service.

The employer will seek to ensure that the selection is made fairly in accordance with these criteria and would consider the representations the union may make as to such selection.

The employer will seek to see whether instead if dismissing an employee he could offer alternative employment".

This case is one where there is an issue with the tests as regards the third namely the issue of matters such as attendance records, efficiency at the job. These are personal rather than issues relating to the job itself. It is important, in my view, that when determining whether or not there is a redundancy that any issues which are personal to the employee should not part of the process, as far as practicable. Where they are to be included in the process then the selection matrix needs to be able to show why these issues were taken into account and their relevance.

On the issue of fair selection, the case of Boucher –v- Irish Productivity Centre 1994 ELR205 was a case which covered the issue of unfair selection. The selection had been carried out without any consultation or interview. The EAT emphasised that those in the group likely to be dismissed should be made aware that such assessment is being made and should be given an opportunity to give their views which should be considered.

In Mulligan –v- J2 Global (Ireland) Limited UD993/2009 in respect of redundancy the EAT stated:

"*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 pout a consultation process risks being found in breach of the Unfair Dismissal Acts and such a lack of procedures may lead to the conclusion that an unfair selection for redundancy has taken place".*

In JVC Europe –v- Panasi 2011 IEHC279 Mr. Justice Charleton stated;

"*It is made abundantly clear by the legislation that redundancy, while it is a dismissal, is not unfair. A dismissal however can be distinguished as redundancy that is not lawful. Upon dismissal an employer can simply say that the employee was not dismissed for a reason specific to that person but that instead his or her services were no longer required pointing to apparently genuine reasons for dispensing with the services of the employee. In all cases of dismissal, whether by reason of redundancy or substantial grounds justifying dismissal, the burden of proof rests on the employer to demonstrate that the termination of the employment came within a lawful reason".*

Another case that was quoted is that of St. Leger –v- Frontline Distributors Ireland Limited 1995 ELR160 where Dermot McCarthy SC stated;

"*Impersonality runs throughout the five definitions of the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person involved lose their job. It is worthy to note that the EC Directive on Collective Redundancies uses a shorter and simpler definition "One or more reasons not related to the individual's worker concerned".*

It is important always to remember that the issue of the basis for selecting the employee must again be fully set out. This was emphasised by the Labour Court in the case of Component Distributors (CD Ireland) Limited and Byrnes UDD1854 where the Labour Court said:

"*The Court accepts that the respondent was entitled to restructure the business and reduce the workforce if necessary. While the Court accepts that the respondent was entitled to decide on the most appropriate means of achieving its operational requirements, its entitlement in that regard is not unfettered. The right of the complainant to retain her employment must have been taken into consideration. That necessarily obliged the respondent to look at all available options by which this could be achieved*".

In Burnes the Labour Court noted that the claimant had not been supplied with all company documentation as the Board of Management proposals were confidential.

The issue of confidential documentation is allowed but it is important that the employer in those circumstances can demonstrate that they were confidential and there was a good business reason for not disclosing same. This can sometimes be a difficult issue for an employer to prove.

When it comes to restructuring again the whole issue in an organisation as regards fair selection is one that the employer will need to be in a position to demonstrate. This often happens when you will have two parts of a business merging.

In Edwards –v- Aerials & Electronics (Ireland) Limited UD236/1985 the EAT considered the case in which a Dublin based Managing Director was dismissed following a reorganisation and the employers' decision to run the company from Belfast. The EAT held;

"*The claimant has raised major doubts as to whether the redundancy was genuine. We recognise that the function of a full-time managing Director no longer exists, but we must direct our minds to the cause-and-effect relationship between redundancy and dismissal. The issue was whether he was dismissed because the employer had decided to reorganise the structure of the company, or whether the decision was taken to dismiss him for some other reason. In other words, was the reorganisation a cause or a consequence?"*

In that case the EAT held that on balance they were inclined to the view that it was a consequence rather than a cause.

Very often in a selection process you are going to be dealing with a pool of workers. This issue arose in case ADJ-00023219 where in that case the employer relied on the cases UD12/2011 Moran -v- Ernst & Young UD1259/2012 and Mulqueen –v- Prometric Ireland UD206/2011. In that case the Adjudication Officer while accepting there was financial evidence for the necessity to effect redundancies the Adjudication Officer found no credible evidence was advanced to justify the relevant employee being chosen for redundancy.

No evidence was advanced to demonstrate that the selection was based on an unbiased, objective and transparent matrix of skills and competencies nor indeed was any evidence advanced to demonstrate that this was approached from an objective perspective where a job as opposed to a position was to the forefront of the deliberations on the matter.

No plausible explanation was advanced for the failure to explore part time work or temporary layoff or an alternative option for redundancy. The company failed to justify the very narrow time frame given to the claimant to come up with an alternative solution given the prolonged period allowed for the strategic review and no account appears to be taken of the claimant's limited insight into the financial imperatives during these redundancies.

I will be dealing further with the issue of looking to see if there are alternatives to redundancy. This is an issue which we will look at later on in this talk.

It however must be remembered that the fact that a position may in fact be redundant is not in itself sufficient to mean that the employer will win an Unfair Dismissal case. In Tolerance Technologies Limited –v- Joe Foran UDD1638 is a case where the Labour Court found;

"*The Court, while finding that the respondent's position was redundant also found that the manner of his 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 27th and 28th October 2015*".

A recent case on this matter is the case of Trinity College Dublin and Ahmad UDD2030 where the Labour Court quoted the case of Gillian Free –v- Oxigen 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 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…where there is no agreed procedure in relation to selection for redundancy…then the employer must act fairly and reasonably".*

In that case the Court accepted on balance that the requirements of the University for the work the complainant was carrying out had ceased due to the lack of funding for that role and that therefore was the cause of termination of the employment. The Court went on to find that this was a redundancy situation. However, the Court noted that he was no longer on a specified purpose contract and now on a contract of indefinite duration. The Court stated it was clear that sufficient efforts were not made to seek alternative roles for him. The Court could therefore not accept that this dismissal by virtue of fair selection of redundancy had been discharged by the respondent and consequently found that the complainant was unfairly dismissal. In that case an award of €20,000 on top of what was an enhanced redundancy was awarded to the employee.

Ultimately the decision as to whether a redundancy took place because of the manner of the selection process it became an Unfair Dismissal will always be a matter which will ultimately be determined by the WRC or on appeal to the Labour Court.

Where redundancy arises and there is no procedure or custom in place the reasonableness of the selection criteria is usually focused on and tends to be asserted by the objective standards of the way in which a reasonable employer

in those circumstances in that line of business at time would have behaved. The issue arose in the case of TUS Community Supervisor and a Local Development Company ADJ-00020033 where the Adjudication Officer pointed to the case of Bunyan –v- United Dominion Trust (Ireland) Limited 1982 ILRM404 where the EAT endorsed and applied the view quoted from NC Watling Co. Limited –v- Richardson 1978 IRLR225 where it was stated;

"*The fairness or unfairness of dismissal is to be judged by the objective standard 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 the reasonable employer would have done and/or concluded*".

In Stephen Cullen and Designer Group Engineering Contractors Limited ADJ-00031644 the Adjudication Officer held all issues of fairness applied but the absence of constructive engagement resulted in an award of €46,000.

Unfair Selection for Redundancy

This issue arose in case ADJ-00024960 where the Adjudication Officer took the time to set out the law on this in great detail.

The Adjudication Officer pointed out that the statutory definition of redundancy is in Section 7 (2) of the Redundancy Payment Act 1967. It was also set out at Section 6 (4) of the Unfair Dismissal Act 1977 provides that in (c) the redundancy of an employee is a dismissal.

Under Section 6 (3) of the 1977 Act there may be a finding of Unfair Selection for redundancy where an employee is dismissed but the circumstances constituting the redundancy applied equally to one or more other employees in similar employment with the same employer who have also been dismissed. This is set out in Section 6 (3) (a) and (b). The Adjudication Officer set out that the onus is placed on the employer by virtue of Section 6 (6) of the Act of 1977 which provides;

"*In determining for the purposes of this Act whether the dismissal of an employee was an Unfair Dismissal or not, it shall be for the employer to show that the dismissal resulted wholly or mainly from one or more of the matters specified in subsection (4) of this section or that there were other substantial grounds justifying the dismissal".*

Under Section 6 (4) Redundancy is a substantial ground and once redundancy is established the employer has discharged the onus. However, an employee may meet a redundancy defence by claiming the unfair selection under Section 6 (3).

In the case of Williams –v- Comp Air 1982 1ICR156 Browne Wilkinson J in considering the issue of fair selection identified the following as generally accepted principles governing how reasonable employers will typically act.

1. The employer will seek to give as much warning as possible of impending redundancies so as to enable the Union and employees who may be affected to take early steps to inform themselves of the relevant facts, consider possible alternative solutions and, if necessary, find alternative employment in the undertaking or elsewhere.
2. The employer will consult the Union as to the best means by which the desired management result can be achieved fairly and with as little hardship to the employees as possible. In particular, the employer will seek to agree with the Union the criteria to be applied in selecting the employees to be made redundant. When a selection has been made, the employer will consider with the Union whether the selection has been made in accordance with those criteria.
3. Whether or not an agreement as to the criteria to be adopted has been agreed with the Union, the employer will seek to establish criteria for selection which so far as possible do not depend solely upon the opinion of the person making the selection but can be objectively checked against such things as attendance records, efficiency at the job, experience or length of service.
4. The employer will seek to ensure that the selection is made fairly and in accordance with these criteria and will consider any representations the Union may make as to such selection.
5. The employer will seek to see whether instead of dismissing an employee he/she could offer him/her alternative employment.

The Adjudication Officer pointed to the case of Boucher –v- Irish Productivity Centre 1994 ELR205 which was an illustration of the unfair selection process. In this case, no agreement was reached as to the method for selection of redundancy. The selection process was carried out without any consultation or interviews. In describing this selection process as unfair and holding that the claimants had been unfairly dismissed the Employment Appeals Tribunal set out that those in the group likely to be dismissed should be made aware that such assessment is being made and they should be given an opportunity to give their views which should be considered.

Also, the case of Mulligan –v- J2 Global (Ireland) Limited UD/993/2009 in respect of redundancy is one where the Adjudication Officer quoted the case where the Employment Appeals Tribunal stated;

"*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 Dismissal Act as such lack of procedure may lead to the conclusion that an unfair selection for redundancy has taken place".*

In the case of JBC Europe –v- Panasi 2011 IEHC279 being a judgement of Mr. Justice Charleton was also quoted and in particular the statement;

"The comment on the nature of redundancy made in St. Leger –v- Frontline Distributors Limited 1995 ELR160 and 161 and 162 by Dermot McCarthy as Chairman of the Employment Appeals Tribunal is apposite as;

"Impersonality runs throughout the five definitions ion the Act. Redundancy impacts on the job and only as a consequence of the redundancy does the person lose his job. It is worthy to note that the EC Directive on Collective Redundancies uses a shorter and simpler definition "one or more reasons not related to the individual worker concerned".

The Adjudication Officer pointed out also that Mr. Justice Charleton's remarks that;

"It may be prudent as a mark of a genuine redundancy, that alternatives to letting the employee go, should be examined".

It is helpful that the Adjudication Officer has taken the time to set out the case law in such depth.

Redundancy – Selection Process

This issue arose in case ADJ-00027580.

The Adjudication Officer in this case referred to the Labour Court determination UDD219 Dublin Tech Summit F5 Digital Media Communication and Krissie Lundy where the Labour Court stated:

"The Court cannot accept that what amounted to a selection process designed to identify as between two employees who should be retained in the business, can be considered fair or transparent in circumstances where, as is accepted by the respondent, neither employee was made aware that such a process was being conducted. It is the dismissal which is the issue in this appeal. It is not disputed that the role carried out by the complainant was made redundant and that the various elements of that role were assigned to other staff through a realignment of responsibility from the company and in the view of the Court this absence of knowledge on the part of the claimant deprived her of an opportunity to properly address the matters under consideration in the selection process and deprived her of the opportunity to make proposals as regards her future role in the company or otherwise to make a coherent case for her retention in employment.

In those circumstances the court concludes that the procedures adopted by the respondent to identify as between two employees which employee was to be dismissed were so lacking in transparency and fairness as to mean that the Court cannot accept that the dismissal of the employee arose through the

redundancy of the employee. This is so because the respondent has been unable to demonstrate a fair process of decision making leading to the dismissal of the employee as against another employee arising from the redundancy of the claimant's previous role. In those circumstances the Court must conclude that the respondent had failed to discharge the burden resting upon it to establish that the dismissal of the claimant was unfair".

It is helpful that the Adjudication Officer has taken the time to set out the decision of the Labour Court on this matter. The issue of redundancy and the selection for redundancy is an issue which is going to arise a number of times in the coming year and it is important for employers that fair procedures are applied and in the absence of fair procedures then there is every opportunity that the employee may well win an unfair dismissal.

Considering Suitable Alternative Employment

As part of any redundancy process an employer is obliged to look at alternatives to redundancy.

This may simply be there is other work which the employee could undertake. Are there roles within an organisation which the employee could perform? It is of course not a matter for the employee to come up with an alternative to redundancy. It is a matter for the employer to look to see what alternatives to redundancy were or could be put in place. Again, in any hearing this issue is going to be looked at and it is a matter for the employer to have the appropriate documentation in place. Looking to put in place the reasons subsequent to the redundancy is not the way forward, it is a matter for the employer to have the relevant documentation in place as to what alternative roles were looked at and considered.

In the case of Student Union Commercial Services Limited and Alen Traynor UDD1726 the Labour Court dealt with a situation where the Court held that there was a genuine redundancy situation which existed. You might then think that this therefore was the end of the Unfair Dismissal case. Far from it, The Court in this case looked at the case of Mulcahy –v- Kelly 1993 ELR35 where the EAT held that it was well established that there is an obligation on an employer to look for alternatives to redundancy. In the case of Mulcahy –v- Kelly the EAT in that case held;

"*It is well established that there is an obligation on an employer to look for an alternative to redundancy*".

In the Traynor Case the Labour Court pointed out that this duty may involve locating alternative work within the organisation even if this involves dismissing another employee with shorter service. The Court pointed out in Thomas & Beets Manufacturing Limited –v- Harding 1980 IRLR225 that the English EAT found the complainants dismissal unfair because she could have

found work as a packer even though this would have meant dismissing a recently employer packer.

The Labour Court pointed out that where there is no agreed procedure in relation to selection for redundancy then the employer must act fairly and reasonably and the Court referred to Section 6 (7) of the Act as amended and sets this out in detail.

In this case the Court was satisfied that the respondent employer did follow a consultation process with the complainant. The Court noted that the company had a number of business units which had fluctuating numbers of staff employed. The Court pointed out that it was presented with no information to demonstrate that the respondent carried out an exercise to consider alternative options or suggestions. The Court went on to say that the Court accepted that had such an exercise been carried out it may not have identified any alternative positions suitable to the complainant, However, the Court pointed out importantly that it seemed still that no such exercise was engaged and on that basis the Court found that the approach adopted by the respondent was somewhat arbitrary and therefore the dismissal of the employee pursuant to Section 6 (7) was unfair. The Court in that case awarded a sum of €12,000 on top of the existing redundancy payment which had been made. This decision of the Labour Court is very similar to the approach taken by the Labour Court in the case of Trinity College Dublin and Ahmad UDD2030 referred to previously.

A UK case on this was a case of Babar Indian Restaurant –v- Rawat 1985 IRLR57. In this case the employer operated three separate businesses. One of which was a restaurant, the restaurant owner closed a frozen food business. He redeployed two of the staff to the restaurant. Mr. Rawat was an employee of the restaurant and was dismissed to make way for the redeployment. It was held that the restaurant was a separate business from the now closed frozen food entity. Looking solely within the restaurant business there were no grounds for redundancy. The claim for Unfair Dismissal was upheld.

In Murphy and Regan Employment Law under redundancy it is stated;

"*For a redundancy selection to be fair, objective selection criteria must be applied to the correct pool of employees. In particular, the pool of selection must be reasonably defined and the selection criteria applied by the employer must be applied to all employees in similar employment*".

In the Labour Court case of UDD1629 being a case of Kohinoor Limited and Ali the Labour Court gave a detailed overview in relation to redundancy and the selection process. The Court in that case pointed out that it was satisfied that having made the decision to make a number of employees redundant from among a number of chefs carrying out the same or similar duties this was done with the assistance of expert advice and that the company had devised a very detailed selection matrix to decide on the criteria to be used to select those to be made redundant. The Court found that the selection criteria

was fair and reasonable. The Court found that redundancy was a reason for dismissal and dismissed the Unfair Dismissal case. This case is a very useful reminder for colleagues as to best practice which should be engaged in when undertaking a redundancy.

I am simply mentioning this at this stage as to highlight the importance of looking for alternative jobs which may mean that somebody else may lose their job. For example, take a business where there are two small supermarkets run by the same employer in a town. They are at opposite ends of the town but not that far apart. The employer decides to close shop number 1 but to retain shop number 2. Both shops have the same number of staff. They have a manager, individuals who take in goods and stack shelves, those who work at the meat and fish counters for example and those who work on the checkout. The work that is undertaken by those in shop number 1 is exactly the same as the work undertaken by those in shop number 2. All of the employees in shop number 1 have longer service than those operating in similar positions in shop number 2. In those circumstances while shop number 1 is going to close it may well be that shop numbers 2's staff at the ones to be made redundant. However, an employer is entitled to look at the future requirements of the business. In the previous example, to put it in some context, let us assume that the particular town is one that had a large number of Irish speakers and polish nationals. Let us assume that the Irish speakers and Polish nationals tend to go to shop number 2 because the butchers on the meat counter speaks Irish and Polish respectively and that there are a number of other staff who are bilingual. In those circumstances the employer would be entitled to say for the purposes of the business going forward, that those particular employees who are bilingual would be retained on a selection process which would identify being bilingual was a skill set which the business would require. The same situation could arise in a Solicitors office where the office is reducing the number of secretaries and support staff. It may be decided that because of remote working and the use of technology that where there were two secretaries acting in the litigation section only one would be required going forward. The longest serving secretary may have spent their entire period dealing with personal injury work. The secretary with less service may have had experience as a legal executive, for example, dealing with debt collection and property repossession. The firm might well decide that it sees in the next number of years that a secretary with that skill set would be needed as the work might move from personal injury more to debt collection and property repossession. Again, that is a business reason which could be taken into account in the selection process.

The reason I am mentioning these is that if that is being done it is important right at the start of the process when advising an employee that they are at risk to set out how the pool was set out and how they were selected for being at risk compared with somebody else. In the two examples which I have given it may well be that an employee in shop number 1 actually speaks polish or Irish but that business owner never knew that and that it wasn't something that they made people aware of. In the case of the secretary in the Solicitors

office they may when working for a pervious firm have been involved in debt collection and property repossession. The reason I am saying this is that it is important that the employee has an opportunity to put forward the best defence that they can to save their job. They can only do so when all the facts are made clear to them. So, what can be said is that it is imperative that the employer looks for alternatives. That may well involve displacing somebody who may have shorter service or it may involve explaining to an employee who has longer service why going forward the skill sets which they possess may not be skill sets which the business will want going forward but the employee must be given an opportunity to challenge that position.

Offers of Suitable Alternative Employment

The relevant legislation in Section 7 (2) (a) and Section 15 (2) of the Redundancy Payment Acts. The issue which will then arise is whether it is suitable alternative employment.

In case ADJ-00016132 the Adjudication Officer in this case quoted the second edition of Employment Law 19.123 where it is stated;

"*The question of suitability may be determined objectively, whereas the reasonableness of the employee's refusal is subjective and must be considered from the employee's perspective thus the employees' perception of the alternative job must be taken into account*".

In that case the Adjudication Officer quoted the case of An Executors of Everest –v- Cox it was found that;

"*The employee's behaviour must be judged from her point of view on the basis of the facts as they appeared or reasonably have appeared to her, at the time the decision had to be made".*

The English EAT case of Hudson –v- George Harrison Limited shows that the arbiter of fact, before making a decision on the reasonableness of the employee's decision to refuse to take up an alternative position can look at the employee's personal circumstances. In that case the EAT stated;

"Section 141 (2) being the English Legislation, question involves taking into account the personal circumstances of the employee. The test is wholly subjective but it includes taking into account those personal circumstances".

In case ADJ-00026793 the case involves a Security Guard and a Security Company. The complainant contended that he was entitled to a redundancy payment as the respondent removed him from his job on a particular site and failed to offer him reasonable alternative employment. The complainant in this case was a static security Guard. He was informed that there was no work for him on the site he usually worked at. He was given no reason except that the client did not want him there and the respondent offered him alternative work

in Limerick which was well away from his home in Galway. Work was offered in Galway but at 50% of the hours, the respondent contended that this was reasonable. The Adjudication Officer referred to Section 7 and Section 15 of the Act, The Adjudication Officer in this case held that the offer of reengagement was alternative employment with very different and less favourable conditions and that it was not unreasonable to refuse the offer. In these circumstances redundancy was awarded.

The Labour Court in the case of Garret Browne –v- Di Simo RPD1014 applied the English EAT case of Cambridge and District Cooperative Society Limited –v- Ruse 1993 IRLR156 where the Labour Court stated;

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

This issue arose also in the case of L Connaughon & Sons Limited and Healy RPD205. The facts are relevant.

The employee was employed as an office administrator in the employers company in their warehouse at Grand Canal Quay Dublin. She lived in Wicklow and travelled to work by train. The company moved the business to Clonshaugh. The employee could no longer commute to work by train. She requested redundancy and was refused. The employer contended that the new location was within 10 kilometres of the previous location and that the employer was willing to collect the employee at the train station at her usual starting time with her return journey each day to leave her back there at her usual time.

In this case the Labour Court held that while there was a move within Dublin there is a difference in terms of place for an employee who commuted by train and then found that her employer was relocating to a place where there was no train link and which is considerably further from her home. The Court said that in the circumstances of the commuting difficulties in Dublin this represented a major change to the terms of her contract which most rational people would regard as a change of such significance as would affect the employee's ability to continue to work for the employer. The Labour Court affirmed the decision to provide redundancy.

The case of Browne & Di Simo RPD1914 which I referred to previously is a case where the Labour Court considered the law in considerable detail.

In that case the employer had been in one location and was offered a position Nutgrove Shopping Centre. The Labour Court correctly pointed out that while the employee was naturally concerned about the potential loss as her earning s were dependent on the amount of business, she conducted at no point did the employee endeavour to test out that concern. The Labour Court pointed out that in accordance with Section 15 of the Act there is a facility for her to carry out her work in the new premises on a trial basis while retaining her

right of possible redundancy payment. The Court was satisfied that the offer to continue the employment on the same terms and conditions amounted to suitable alternative employment within the meaning of Section 15 of the Act and that the refusal to accept an option of working in Nutgrove Shopping Centre was unreasonable.

A lot of these cases turn on change in location. Of course, if a business is moving location that is not of itself a ground for an employer to make an employee redundant. It is a matter for an employee in those circumstances to seek redundancy. Cases involving particular a change in location is always going to depend on how much of an additional commute the employee will be subjected to. Limited commuting times will not result in a redundancy claim being successful, Longer ones will. There is no hard and fast rule in these cases. There is no guide that would say that 5 minutes is ok but 20 minutes is not.

These cases will depend on the particular circumstances of the particular case and often also the particular circumstances of the employee. By this we mean that you could have a situation where one employee travels by bus or train the other employee travels and has a car parking space. The location changes. The employee who travels by public transport and does not have access to car parking has an additional 20-minute walk to get to work. By this we mean that if you have two employees. One who is travelling by public transport and does not have a car and another who has a car and is provided with car parking on site have a change in location that the additional commute time may be exactly the same but the person who is provided with a car and a car parking space may not be in a position to claim redundancy whereas the other individual who is travelling by public transport who has the additional commuting time where they have to walk in foul or fine weather may well have a claim for redundancy.

As we move out of the pandemic issues of redundancy are going to arise. There is no doubt that some businesses will contract. There will be fewer staff employed. Issues will arise in relation to suitable alternative employment. Where an employer proposes reduces salaries or wages or reduced hours or in some cases longer hours the issue will be to look at the position from the perspective from the employee. For example, a business that decides they will want some staff to start earlier in the day but finish earlier and some to start later but finish later may well be in a position that some employees will seek redundancy in those circumstances. The employer might regard it as reasonable to take account of the requirements of customers of clients however the personal circumstances of the employee are ones which will be taken into account in a claim where the employee seeks redundancy.

Problem Cases Which Will Arise

In reading this seminar note today you might have considered that the problem issues have already been dealt with in some depth but in fact they are only the start of the difficulties when it comes to making an employee redundant and I intend to look at some of these.

Making a pregnant employee or an employee who is on Maternity Leave redundant

The Equality Legislation in Ireland is very clear and sets out that the dismissal of a worker who is pregnant or is on Maternity is contrary to the law.

The burden of Proof in such cases is set out in Section 85 of the Employment Equality Acts 1998-2015. The Act now provides for the allocation of the probative burden between the complainant and the respondent in cases coming within its ambit. The Section provides in effect that the complainant bears the initial burden of proof of facts from which discrimination may be inferred. If those facts are established, and if they are regarded by the Court as of sufficient significance to raise an inference of discrimination, the onus passes to the respondent to show that the principle of equal treatment has not been infringed in relation to the complainant.

In cases involving pregnancy or maternity redundancies generally speaking the evidence from the employee will simply be that they were pregnant, or that they were on maternity, and that they were made redundant.

The Labour Court in the case of Teresa Cross (Shanahan) Croc's Hair and Beauty and Helen Ahern Case EDA195 reviewed the law on this matter.

The Court set out that the protection of women during pregnancy had been made clear by the European Court of Justice that since pregnancy is a uniquely female condition. Less favourable treatment on grounds of pregnancy constitutes direct discrimination on the grounds of gender and referred to the decision in the case C-177/88 Dekker –v- Stichting Vormingscentrum Voort Jong Volvassenen. Equality on the grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union. The Charter is incorporated in the Treaty on the Functioning of the European Union as a result of the Lisbon Treaty and has the same standing in all proceedings as current Treaties.

The principle of discrimination on the grounds of pregnancy constitutes direct discrimination on the grounds of sex is now codified in Directive 2006 -54/EC on the principles of equal treatment of men and women (Recast Directive). The Directive provides that Article 2.2 (c) that a less favourable treatment of women relating to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes unlawful discrimination for the purposes of

that Directive. The Labour Court pointed out in case C-406/06 Paquay that in accordance with its case law the prohibition on less favourable treatment on grounds of pregnancy comes within the ambit of both the Equal Treatment Directive and the Pregnancy Directive.

In the Paquay case the judgement stated;

"*However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Those measures must guarantee real and effective judicial protection and have real deterrent effect on the employer*".

In the case of Trailercare Holdings Limited and Healy EDA128 the Labour Court in that case stated;

"*It is abundantly clear from these authorities, and from the legislative provisions of the European Union, that women are to be afforded special protection from adverse treatment and in particular from dismissal on account of their condition, from the commencement of their pregnancy until the end of their maternity leave. The entitlement of that protection is to be regarded as a fundamental and inviolable right within the legal order of the Union which the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction. It seems equally clear that where a pregnant woman is dismissed during the period of special protection the employer bears the burden of proving on cogent and credible evidence, that the dismissal was in no sense whatsoever related to her pregnancy*".

Article 10 of the relevant Directive effectively provides that total prohibition on the dismissal of pregnant employees except where they are duly substantial grounds. In addition, it provides that the grounds must be set out in writing.

Effectively when it comes to redundancy in the case of a women who is pregnant or is on maternity it would appear that dismissal has to be able to be justified in writing and failure to justify in writing in itself is sufficient to bring the employee into a claim for discrimination under the Equality Legislation. However, in looking at Article 10 of Council Directive 92/85/EEC in the Paquay case the CJEU pointed out that even taking preparatory steps for a decision to dismiss an employee who is pregnant or on maternity even if not notified to them until after the Maternity Leave ends is in itself a breach of Article 10.

Claiming Redundancy after layoff

This issue is going to arise once the restriction on claiming redundancy in Section 12A of the Redundancy Payment Act 1967 is revoked.

The Legislation in Section 11(2) provides for an employee to claim redundancy where they have been on layoff or on reduced working hours or pay.

The test is whether the remuneration of the employee is less than one half of his or her normal weekly remuneration or his or her hours of work are reduced to less than one half of her or her normal weekly hours.

There are two issues which arise here.

They come under the provisions of Section 12. Normally the employee will furnish what is called an RP9 Form. This is the notice of intention to claim redundancy. In those circumstances the employer is entitled to furnish a counter notice. The counter notice is under Section 13 and it is a notice sent to the employee stating that no later than four weeks after the date of the counter notice the employee will receive a minimum of thirteen weeks full employment and during that period the employee will not be laid off or kept on short time for any week. Effectively it is full time employment.

There is a significant trap here for employers. The notice must be served within 7 days of receipt of the RP9. There is no provision to give an extension.

I raise this specifically as an issue for colleagues to be aware of. Take a situation where an RP9 is sent with a Certificate of Posting on a Wednesday. It arrives on Friday in the post to the employer. The employer contacts you on Monday. You now only have until Friday to get the counter notice actually served on the employee. Therefore, where an employer contacts you in relation to an RP9 which they have received it requires immediate attention. In the last recession there was a number of redundancy claims that would run weekly. Regularly the defence was raised that a counter notice was attempted to be served but that they didn't get it served in time. Each and every one of those cases was rejected and the employee was entitled to a redundancy payment.

An Employee Resigning – Can they claim Redundancy – Yes.

The case of Drumcondra Child Care Limited and Szumera RPD1814 is an interesting case concerning the application of the Redundancy Payment Act 1967.

The facts of the case are interesting and were agreed by the parties. The employee was employed as a part time cleaner. She was placed on temporary layoff on 25 August 2017 until 1 January 2018. After a period of four weeks on temporary lay-off the employee wrote to the respondent terminating her employment with effect from 1 January 2018. The employee contended that pursuant to Section 12 (2) of the Act she was entitled to Statutory Redundancy. The employer contended it had served a counter notice but not within the 7-day time frame.

The Labour Court set out the provisions of Section 12 and 13 of the Act. The Court also helpfully set out the case of Industrial Yarns Limited –v- Leo Greene and another 1984ILRM15 at page 20 where Costello J (as he then was) stated;

"*The Section 12 procedure was amended by Section 11 of the 1971 Act. After the employer has served the Section 11 notice of layoff the employee could now serve one of two notices;*

Either (a) a notice of intention to claim redundancy, or
(b) A notice terminating his contract (which is deemed to be a notice to claim a redundancy payment). He cannot serve both".

The Labour Court held that the claim fell squarely within the meaning of Section 12 (2) of the Act. The letter sent by the employee to the employer informed the employer, after she had been on a period of enforced layoff of longer than 4 weeks, is to be added in accordance with Section 12 (2) of the Act to be a notice of intention to claim a redundancy lump sum. There will be many employers who will see a letter of resignation coming in and will give a sigh of relief that the employee has simply left and they won't have to pay redundancy. The opposite is the position. It must be remembered to come within Section 12 the employee must not give notice.

A case where an employee lost but at the same time is interesting as to how employees can effectively manufacture a redundancy payment claim arose in the case of Merchandising and Demonstrating Limited and Colley RPD191. There is no issue in this case that anything was manufactured but it identifies how a claim could be. In that case the Labour Court had to deal with a situation where the employee had never been given a contract of employment. The Court looked at Section 11(2) of the Act which described the circumstances of short time within the meaning which could be applied in the particular case as the remuneration was less than half of existing pay under a new proposed arrangement.

However, the Court pointed out that the provision was qualified by the time requirement set out in Section 12 of the Act before this could be claimed. The employee had not been on short time for four or more consecutive weeks or for six or more weeks within a thirteen-week period and therefore Section 11(2) was not applicable. This was an "if and when" contract. What is an interesting aspect that it was claimed by the employee that she never resigned but indicated simply she would not accept one day work every week. There is a provision in the Redundancy Legislation that if there is a breach of contract when the employee can immediately resign and claim redundancy. This was not actually pleaded in this case.

The other interesting aspect is that the employee would have been better working one day every week for four consecutive weeks and then may well have come within the provisions of Section 11(2) of the Act. Even if the contract at that stage had been an "if and when" contract as held by the

Labour Court in this case the employee would still have been able rely on Section 11 if her remuneration was less than half the existing pay that she would have been receiving.

In this case the employee had not got legal advice before resigning and indicates the importance of the employee doping so. If this had been addressed in a different way the employee would probably have been able to get redundancy, quite fairly.

As I have mentioned the issue of a contract being frustrated. This is an issue which arose in case ADJ-200025512 involving a Chef and a Community Service Provider. The Adjudication Officer set out Section 7 of the Redundancy Payment Act in detail. The Adjudication Officer also set out the provisions of Section 9. The relevant Section here is Section 9 (1) (c) where the employee terminated the contract under which he was employed by the employer in circumstances;

"Such that he is entitled to so terminate it by reason of the employers conduct".

In this case the Adjudication Officer held that subsection (c) allows for dismissal to take place where the employee is allowed to terminate their own contract because of the conduct of the employer. The employee considered her new role and location to be unsuitable. The respondent listened to those concerns and made a commitment that it would be considered. The employee it appears had not taken the opportunity for that consideration to take place. The Adjudication Officer stated they could not predict the outcome of that consideration but had no reason to doubt the respondent employer would ensure it would take place when the complainant returned from sick leave. The Adjudication Officer in that case held that the employee had not been dismissed. What is interesting however is that Section 9 (1) (c) of the Act is an issue which employees will look to in the coming months. Let me explain in a little bit more detail as to the type of situation I see arising. You will have a situation where employers will go for remote/homeworking or blended working. The contract of employment for the employee provides that they will work in a particular office or premises. The employer now seeks to enforce blended working. There will be some employees who will be quite happy to take a redundancy payment and therefore this is an issue employers need to be aware of. Trying to force through a change in a contract may well result in the employee seeking to rely on this provision. The alternative will be that the employer will find the employee simply stating that their contract provides that they will work from the office. They intend to come to the office and they have no intention of doing work from home. The employer may seek then to enforce a form of blended working and this is where the provisions of Section 9 (1) (c) may well be looked at by a number of employees as a way of claiming redundancy.

Where employees can fall foul of the Redundancy Payment Acts

Where an employee moves between organisations then in those circumstances the employee may well find themselves that they have lost employment rights and service.

In case RPD197 being a case of Olejniczak & Glenbeigh Fire and Flood Limited the issue arose as to whether or not the employee had the appropriate service. The employee contended she had been employed by the group from March 2009 until her post was made redundant in May 2018. In May 2017 the employee contended she had been promoted within the group of companies.

There are a number of provisions in the Redundancy Payment Acts which can catch an employee pout in these situations. Section 9 (3) (a) of the Act states that a dismissal under the terms of the Act will not be deemed to have taken place if an employee moves from one part of a group to another, a reengagement took place with the agreement of the employee, the previous employer and the employer. The legislation provides that the employment will not be deemed to be a dismissal if the employee is reengaged by another employer immediately on the termination of the previous employment. What is important however is before the commencement of the period of employment with the new employer the employee must receive a statement in writing on behalf of the previous employer and the new employer which sets out the terms and conditions of the contract of employment with the new employer, specifying that the employees period of service with the previous employer will be regarded by the new employer as service with the new employer and contains particulars of the service mentioned previously. The employee must also notify in writing the new employer that the employee accepts the statement required by that sub paragraph.

Rarely, if ever, does this actually happen.

Where that has not happened, as in this case, the employee was not entitled to redundancy. There is a saving provision in Section 16 which refers to a situation where a person is reengaged by an associated company. In this case the Labour Court looked at the definition of a subsidiary which is set out in the Redundancy Payment Acts and Section 7 of the Companies Act 2014. The Labour Court set out that no evidence was offered to support the idea that the company was a subsidiary of the other or that both were subsidiaries of a third company. The case turned on the fact that the employer in this case contended that the particular company was not part of a group company. It would now appear effectively that employees in cases are going to have to produce evidence themselves that this is a move between a group company or a subsidiary of a group company.

Where an employee believes they are moving from one group company to another group company and we're using that in the broadest terms it is absolutely imperative that the employee has the appropriate contract put in place which complies with the provisions of Section 9 of the Redundancy

Payment Acts. If they do not then the employee as in this case can fall foul of the Redundancy Payment Legislation and lose their right to redundancy.

Redundancy where there is a transfer under the Transfer of Undertaking Regulations

The issue of a transfer from one entity to another often arises in the area of redundancy. There are often employees who do not wish to move from one organisation to a new organisation or see it as an opportunity to obtain redundancy. The Labour Court in case RPD1713 being a case of Ardcolum Motor Factors Limited and Gildea is one where the Labour Court held that an employee who refuses to transfer does not become entitled to redundancy under the 1967 Act. A similar approach was taken by the Labour Court in case RPD1710.

This issue also arose in case ADJ18637 involving a legal firm. This involved an employee who worked as a legal secretary in a legal partnership. There were three partners. One partner dissolved the partnership. The managing partner informed the employee in 2015 that she was being made redundant. She was then advised that this individual was starting her own company and invited the employee to work with the new company. The employee joined the firm. In this case the employee had no written contract. No notices under the Transfer of Undertaking Regulations issued. The firm of Solicitors contended there was no redundancy as the employee was not dismissed. The employer relied on the case Symantec Limited –v- Lyons and Leddy 2009 IEHC56 where the High Court had held that a transfer on the same terms and conditions meant that a person had not been made redundant by virtue of regulation 4 (1) of those Regulations.

There is a UK case involving Robert Graham Hynd –v- David Armstrong & 24 Others 2007ECIH16XA158/04 which is authority for the contention that a Partnership comes within the reach of the European Communities (Protection of Employees on Transfer of Undertaking) Regulations 2003. In that case the Solicitor successfully challenged his dismissal due to redundancy on the dissolution of a Partnership in which he was employed and argued he was entitled to the protection of Regulation 4 when the partners established a new firm. The Court in the UK accepted that the employee was employed by a Partnership and could draw on the regulations to contest this dismissal due to redundancy and assert his right to a transfer into the new company.

The reason I am mentioning this is that the Transfer of Undertakings both stops an employer making an employee redundant but also stop an employee claiming redundancy.

Wages / Salary during Layoff

These cases are most definitely going to arise. The relevant case in Ireland is a case of Law -v- Irish Country Meats (Pig Meats) Limited 1988ELR266 which held that unless there is an express or implied term permitting the layoff without pay then it is a breach of the employee's contract of employment to do so. An implied term would include custom and practice as was set out in the case of Petkevicius –v- Goode Concrete Limited 2014 IEHC66. This issue did arise in a case ADJ/12935. The Adjudication Officer in that case referred to these cases but also to the construction industry where there would have been ups and downs but not in the particular industry in which the claim involved. The Adjudication Officer held that as there was no express term in the contract allowing layoff without pay the employee was entitled to pay.

There will be many employees who do not have a contract of employment. There will be many employees who do have a contract of employment that does not have a specific layoff clause. In those circumstances the employee may well come looking for their wages during the period of layoff. The first issue stated is of course that the claim can only go back 6 months from the date that the claim is lodged. The second is that employers will look to situations where the employer would say that the employer had no option but to lay off the employee due to the regulations brought in by the Government closing the business. It would be my view, and I have discussed this with other employment law Solicitors and Counsel, that Section 5 of the Payment of Wages Act is clear that without a specific lay-off clause the wages must be paid. At the same time where an employer is frustrated from opening their business by the actions of the Government the employer will rely on what we call the "flooded mine". This is the provision of an act of God or in this case an act of Government which restricted the business being able to operate. However, that only applies for the period of time that the business was closed and could not operate. For those who are in or were in essential services and do not have a contract with a specific lay-off clause in it they may be in a more difficult situation as their business was able to open.

The time limit to bring a claim

Normally when dealing with the WRC most practitioners will look at it being 6 months. This issue arose in the case in the case of Brian Cahill trading as Jerpoint Inn and Helen Greene as regards the jurisdiction. The Labour Court in that case pointed out that there appeared to be a misunderstanding in relation to the time limit on claims for redundancy payment. The legal representative for the employer was arguing that the claim as not lodged within six months of the date of termination. The Labour Court pointed out that the limitation period under Section 41(6) of the Workplace Relations Act 2015 applies which is 12 months. Equally, for getting an extension of time it is not for an additional six months but it is for an additional 12 months.

Period of Employment and Reckonable Employment

At first sight it might appear that this is one and the same thing. It most definitely is not.

For determining the length of time which a person is employed for it is important to look at Schedule 3 of the Redundancy Payment Act 1967. The most usual which is likely to arise is that of employee being on lay off. Regulation 5 of the Schedule 3 specifically provide that lay off will not mean that there has been a break in service.

However, as regards reckonable service which is the basis under which the Redundancy calculation will be made, absence in excess of 52 consecutive weeks by reason on an occupational accident, absences of 26 weeks by reason of an illness, or absences by reason of lay off by the employer are discounted in calculating the amount of Redundancy to be paid to the employee.

This issue recently arose in a case ADJ-00038047 in the case of Duggan and Suntask Solar Ireland. In that case the Adjudication Officer appears to have worked on the basis that periods of lay off are not taken into account in calculating the issue of the length of service. This I disagree with.

This is an issue which is going to arise over the coming months and it is my reading of the Legislation, that lay off does not break continuity of service for the requirement of having two years continues employment but it does impact on the amount of reckonable service for calculating the Redundancy payment.

If an employee commenced employment on the 1st of January 2015, and was made Redundant on the 31st of December 2021 that employee would have 6 years continuous service, even if they have been on lay off since 1 January 2021. For continuous service they would have 6 years' service but for reckonable service they would have 5 years' service.

However, it is important to remember that the Government have announced that they will be making contribution towards the Redundancy payment to cover periods during which the employee was on lay off of up to €1,850.

The form of any WRC Decision

Issues have arisen in the past in relation to the form of WRC decisions and it is important in my view for colleagues to be aware of difficulties which can arise as regards obtaining payment and where it may be necessary even if you win a case of Redundancy to appeal a matter to the Labour Court.

For the Department of Social Protection to be in a position to make a payment and the decision of the WRC will need to set out:

1. Start date.
2. Finish date.
3. Rate of pay.
4. Any periods of lay off or other periods which would not be taken into a calculating the Redundancy payment.

Some decisions set these out. Others do not. Where they are not set out in, and you need to move an application to Department without any information, they will not pay out.

Because the Government will be paying portion of any Redundancy payment where an individual has been on lay off, due to Covid, it will be important to have date set out as to when the lay-off occurred so that it will come in the covered period from the 20th of March 2020.

The reason I refer to the Department of Social Protection is that where you obtain an award, if that award is not paid, an application can be made to the Department of Social Protection for payment.

If the company goes to liquidation, equally, the application should go the Department, but in those circumstances, through the liquidator. However, there is nothing to stop the employee putting in their own payment form to the Department.

1. All payments which go from the Department will be paid directly to the bank account of the employee. It is therefore necessary to make sure that you have the relevant bank details.

In the events that you get a decision from the WRC which does not set out the information set out above, then in those circumstances, it will be virtually impossible to get a payment form the Department and it may also be impossible to get implementation from the District Court against the company because of the fact that the relevant information will not be there. In the event of doubt, it would be my advice that an appeal is lodged to the Labour Court.

It is probably beneficial in appearing before the WRC just specifically to request that part of any written submission that the relevant information is set out in the decision again.

Conclusion

For many, redundancy will be a matter of fact. However, redundancy legislation is complex. There are going to be many disputes. As we come out of the Pandemic there are going to be employees who want to get redundancy where the employer does not want to pay it and does not want to make the employee redundant, Equally, there are going to be situations where an employer wants to make an employee redundant and the employee does not want to be made redundant. Put that into the mix and you can see a considerable amount of litigation arising in this area.

On top of that you are going to have the claims where an employee is made redundant but is not paid their redundancy payment.

There are going to be many genuine redundancies which because of the way in which an employer makes the employee redundant converts into either an Equality claim or an Unfair Dismissal claim.

I unfortunately anticipate a considerable amount of work in the area of redundancy.

It must always be remembered that redundancy while at law being treated as impersonal is very personal. It is personal both to the employee and to the employer. No employer takes on an employee wishing to make them redundant. There will be employers who will be forced to make individuals redundant and it will be the last thing they want to do as they will have had a good working relationship with the employee over many years and will both like and respect the employee. Equally, there will be employees who will want to fight for their job rather than being made redundant. Of course, there are going to be situations where both employers see it as an opportunity of getting rid of what they might regard as a difficult or troublesome employee and there will be employees who will be looking to be made redundant where there is no valid redundancy there but will use the legislation to orchestrate a redundancy claim.

I do hope that the paper today is of some help to colleagues in dealing with what is a complex area of law.

3. **Remote Working and Flexible Working**

The issues which are going to be the biggest opportunities and challenges for both will be issues around remote working and flexible working.

The "Making Remote Work" Plan announced by the Government to a significant extent also looks to implement EU Directive 2019/1158. This Directive must be implemented by 2 August 2022. The Directive covers issues around work life balance for parents and carers.

In looking at remote working there are huge advantages for business generally. There are also challenges. I do not say "problems" or "difficulties". I use the word challenges as with every challenge there are solutions.

In looking at remote working, and this includes everything from e-work to platform work there is already a suite of resources for both employees and those tasked with the job of introducing it.

The Department of Enterprise Trade and Employment (DETE) and the Health and Safety Authority (HSA) have useful guides for both employers and those tasked with its introduction. Now if I had any criticism for example the DETE website guide asks lots of important questions. It identifies issues to be addressed but gives little guidance on how they actually are going to do that.

But let us look at the positives first and then the challenges.

The positive advantages:

1. There will be less congestion on our roads, less commute times even where people are not working at home but in a hub or co-working.

2. Employees will be able to work closer to or at home thereby creating better work/life balances.

3. Accommodation pressure in large cities will be eased.

4. The depopulation of rural areas will decline and in the medium term be reversed.

5. The opportunity for those with young children or carer obligations to obtain good well-paying jobs will increase.

6. There will be greater opportunities for those with disabilities to obtain employment.

7. It will enable more women with children to enter or remain in the workforce.

The above are just some of the advantages.

However, I often think that when looking at something like a policy on remote working where there are huge advantages, it can be a bit like buying a new car or for some of us a "new to us car". When buying a car, we look at the seats, the body work, the inside of the car. We might look at the boot. Rarely will most of us examine the engine. The danger always is that you buy the car. You drive away. The windscreen washer runs out of water and you then have to search around under the bonnet and in the manual to try and find where the container is for the water. When we get our first warning light that comes on, we get into a panic because we will never have checked what the warning lights are. Most of us equate the warning triangle that comes up on the dashboard as something major. The majority of time it is something very minor but something that needs to be attended to. In the talk today I will be dealing with these issues but this paper is an addition to the talk so that those attending it will have an opportunity to consider some of the issues subsequently.

The challenge is to make sure, like when you get a car that you know what the warning signals are but that you take sufficient care of the vehicle to make sure that they don't come on. Therefore, this talk is primarily going to look at the issues which those in business will have to deal with.

The Targets

The target set by the Government is that 20% of public servants will work remotely. It would be my view that in private business 20% working remotely all of the time is probably a realistic target. However, in private business there will be a further group who will be part time remote workers and part time in office buildings or workplaces.

What are we dealing with?

At first sight you would think that you would be dealing with the issues of the policy brought out by the DETE. In fact, as we go through this talk today, I think there is an awful lot more that is involved. We certainly have the HSA when it comes to working remotely and their requirements under the Safety Health and Welfare at Work Act 2005 as amended. There will be Data Protection issues and GDPR. There will be EU Directive issues on everything from the Working Time Directive to Equality legislation which will need to be addressed. There will be issues with broadband. It might sound strange but I believe there is going to be issues with our planning laws and the attitude to planning in relation to homes and apartments both at a national level and in local authorities. There are going to be issues around vaccination and dealing with employees, in workplaces, who for one reason or another do not get vaccinated. There will be challenges for those involved in HR Management. There are going to be insurance issues. There will be taxation issues and there

will be the issues of the supports for businesses and the cost to the State of introducing remote working.

In looking at the issue of remote working I think the easiest way of dealing with this is to start at the start where somebody is looking at setting up remote working and the practical issues that are going to be needed to be addressed.

1. Remote working is not working at the kitchen table. The HSA guidelines set out that a proper work station must be installed. Even when individuals are working in a hub or co-working there will be a cost. It may well be a computer terminal, printer, scanner, desk, chair, lights.

2. Where a person is partly working remotely there may well be a double cost. There will be the cost of a workstation at home and in the workplace.

3. Home workstations will have to comply with the EU Directive on Display Screen Equipment (90/270/EEC) and Directive 87/319/EEC on the basic Safety and Health issues. The HSA guide has a very helpful document entitled "Homeworking Risk Assessment Checklist" in Appendix 1 of the Guide on Remote Working. It is not simply a matter of giving the employee a laptop and sending them home. In fact, the HSA guidelines would appear to indicate that there needs to be a separate screen and keyboard. It is easy to connect a laptop to a separate screen.

4. When the Pandemic started many employees working from home did so on a laptop. Now the EU Directive on Display Screen Equipment means laptops are not acceptable for prolonged work. Therefore, there will now be a cost for employers to provide a separate screen and keyboard. While the laptop may not become redundant for planning going forward probably it is going to be desktop rather than laptop which is going to be required.

5. Where there is no proper workstation set up that has been properly checked then there is a real risk of personal injury claims. These will either be repetitive strain injuries, back injuries or worse, eye injuries. Zoom fatigue may become the new "whiplash" claim for PI Solicitors.

6. A challenge will be the suitability of homes for remote working namely,

   (A) Will the location in the house comply with the H & S requirements?

   (B) Many apartments, in particular, are not suitable for a home workstation.

   (C) We may need to see Building Regulations changed to provide for sufficient space for at least one workstation. We have energy efficiency

rating currently. Will we need to see a work station rating for homes going forward?

(D) Where a home office is not practicable for Health and Safety reasons no employer can consent to home working.

(E) The options for giving employees to options of the employee self-certifying is not an option because the obligations are on the employer under the Safety Health and Welfare at Work Act, 2005, as amended.

So Let us look at the solutions.

For private enterprise clearly where they have invested in equipment such as laptops, they get a write off over 7 years. The same applies to static workstations. Now tax relief by way of at least 100% year one may be needed to facilitate the SME sector in particular. Large employers such as large private enterprises will not be able to plead inability to pay the cost of installing a full workstation at home. Smaller employers may be. As complaints will go to the Workplace Relations Commission, investment in home working may well be substantial. Where that investment is not made then there is the potential of a personal injury claim. Where the employer says that the cost of installing a home work station is too high then that will be a matter which will be determined by the Workplace Relations Commission.

The suitability of premises is outside the control of any employer. There will need to be a discussion on enlarging apartments and homes to provide for home offices. That will create its own friction between those wanting more high-density smaller homes and those involved in seeking to roll out remote working. However, if remote working is to be a reality for many, remote working requirements for homes will need to trump those looking for more compact properties. The answer may be that remote working will take place in hubs. That itself is going to delay remote working as we seek to build these hubs and in addition will create their own additional costs.

7. Broadband of course and the absence of broadband will limit the role out of remote working. Broadband issues will not affect those working in hubs or co-working.

8. In relation to hubs or co-working the challenge for these will be simply having sufficient locations. This is building or adapting of premises. Building or adapting premises will in itself create jobs which is beneficial to the economy but it takes time. There will also be significant additional management time in managing both those working at home and those in hubs, or, co-working. That will mean that the management skills of those managing the locations will need to be upgraded to deal with managing people from different departments. That should not be regarded as a problem. It is an opportunity to up skill the management

skills within business generally. The challenge is not to create stress and therefore burnout for those executives.

9. An issue which will affect those who are working remotely or away from the main premises is the issue of career progression. This has been identified as affecting those with a disability in particular. One of the advantages of remote working will be that individuals with a disability will find it easier to find a job close to their home. That is a huge advantage from a social perspective. The difficulty is managing matters to enable individuals who will be limited to the amount of travel they can reasonably undertake, and this will also particularly include with child-minding or carer duties, as to how they are going to progress in the organisation. This opens up the vista of issues under Equality Legislation and also Industrial relations disputes.

10. Remote working has somehow, in my view, been seen as an opportunity for those at a lower level within organisations primarily. The proposals cannot and do not exclude those in more senior positions. The challenge for all organisations will be how work will be organised to enable those higher up the management structure in organisations can avail of remote working without having a negative impact on their own progression or on the management of the organisation. Any form of glass ceiling as to the level at which an individual can progress while remote working will have a negative impact on the whole concept of remote working. It will mean that they will become a two-tier organisation. There will be those who wish to progress higher in the organisation who will need to be seen in the workplace which is the main workplace if I can call it that and those who accept that their career can only go so far who will be able to opt for remote working. If there is any form of glass ceiling effectively put in place then into the future there is going to be significant issues around Equality Legislation particularly by those will have a disability or those who have child care issues or who are caring for a relative including a spouse or partner.

11. Working Time Regulations.

The Organisation of Working Time Act derives from the Working Time Directive. One of the requirements of the Working Time Directive, as has been applied by the Labour Court in Ireland in what is known as the Keypak Case is that there is a duty on the employer to maintain working time records and in the absence of those records and properly monitoring working time the employer will be liable for any breach. The European Court of Justice in a case known as the Deutche Bank Case, being case C-55/18, is one where the European Court of Justice declared that the Directives relating to working time read in the light of the Charter of Fundamental Rights of the European Union precludes a national law, which according to its interpretation, does not require employers to set up a system enabling the duration of time worked each day by each worker to be measured. The European Court of Justice in

effect made an order that it was necessary for the effectiveness of the rights provided in the Working Time Directive and the Charter, that Member States must require employers to set up an objective reliable and accessible system enabling the duration of working time each day by each worker to be measured. The European Court of Justice set out that it is for Member States to define the specific arrangements for implementing such a system in particular the form that it may take having regard, as necessary, to the particular characteristics of each sector of activity concerned or the specific characteristics of certain undertakings according to their size. In that case and other cases on the area of Working Time Legislation, particularly places an obligation on an employer to put in place systems which are proactive and where the employer uses "due diligence" to record working time. Now working time is not only start and finish times. It also includes recording breaks and rest periods. This issue no doubt is going to end up in the Courts. There will be the practical issue of recording the time. It will not be a matter for the employer simple to pass it over to the employee. Yes, the employer may be able to require the employee to record start and finishing times and that times at which they take their breaks but that information will need to be submitted. It will need to be checked. It will not be a matter of having employees fill out that they started every day at 9am, they finished at 5pm and they took a lunch break between 1-2pm. Systems will need to be put in place to effectively monitor staff. You may wonder why. Where you had organisations where individuals came to work in the morning and went home in the evening the vast majority would not have had access to emails except at higher levels. Work mobile phones were not provided to every member of organisations. There will now be the real danger and the evidence is coming forward, slowly admittedly, that employees who have access to email, in particular, in their homes are more likely to check them. There is equally some evidence that managers knowing the individuals will have access to their emails and the work processes, are becoming more likely to contact an employee outside working hours. There appears to be some pressure from some reports that employees feel compelled to check emails in case something comes in. All of this is going to be a challenge to be addressed. If it is not addressed the reality is there will be a significant number of claims under the Organisation of Working Time Act which will go to the WRC and possibly to the Labour Court and may even go to the European Court of Justice where an employee will simply come in and say "I did not get my rest and break periods. I worked too many hours." There is every potential that because of the way the Working Time Directive is written that that is all the employee is going to have to do and the burden of proof will be on the employer to show otherwise. In the absence of working time records properly held and completed that is going to cause significant difficulties for any employer. Therefore, procedures will need to be put in place to monitor the work of employees. Now the systems are there. They can easily be installed in any computer system. The difficulty is of course GDPR.

There will be issues as to the level to which an employer can install algorithms.

There will also be the practical issue of any employer wanting to know that those staff, working remotely, are actually working remotely. Let me put it another way, that they are actually at their workstation and actually doing work. That will not be a problem where a person is in a hub or co-working. It will be an issue where somebody is working from home. Currently such basic issues as phoning employees at different times during the day, contacting them for a Zoom call on 5 minutes notice and other similarly basic checks are short term solutions. They take up a lot of management time. They are seen as intrusive by employees when they work out that this is really simply checking up on them.

Therefore, we are going to need very clear and precise rules on what checks and balances can be put in place. What can and cannot be installed in computers to check productivity and the fact that somebody is actually working, the extent to which employees can have a camera on a computer system turned off or object to a camera being installed or object to taking calls where a camera will have to be turned on, to the extent to which an employer can use that equipment to know the practical issues of monitoring start and finishing times and breaks is actually going to be recorded and dealt with.

The solution on something like this is going to have to be quite novel. It is effectively going to require rules to be set out which, may cause difficulties for employees and employers but which will be seen as fair on both sides. Clearly there is going to have to be a system whereby any employer can monitor staff attendances at work. That means monitoring when they start work and when they finish work and when they take their rest and break periods. That cannot mean that an employee will log on at a particular time, be in their chair for that full period of time or available on two minutes notice to take a Zoom call. Equally, the rules will have to respect the right of privacy for individuals. These rules will have to be specified by Government. They will have to be workable. In setting these out it is my view that this is not something for the DETE, on its own, to put in place. There will need to be input from those from business. There will need to be input from those who deal with Human Resources. There will need to be input from those who deal with GDPR and there will need to be legal input from those who deal both with personal injury cases and employment law. You may ask why I would include those involved in Personal injury. There is a very simple reason. One of the issues which is now coming forward in relation to working is that in the normal workplace individuals will have a work station but they will move around the workplace. That would be to go to meetings or to meet other people if only to discuss and issues with a colleague. Now they will be dealing with this sitting at their workstation and will not be moving around. In

monitoring working time there will be health and safety issues not only as regards excessive working but also to make sure that the work day is organised in such a way that individuals will not work all the time on a screen, that ion a regular basis that they will be required, and I use the work required, to stand up and move around and in particular to organise their work in such a way that they do not become static.

12. Insurance

You may wonder why I mention insurance. Depending on the arrangements that are put in place there may well be issues relating to what that location will cover by way of insurance. The employers will need to know what level of cover is in place for those working in hubs and who the insurer is. When it comes to private homes you might consider that again. But again, that is not the full picture. If an individual is working from home but it is not their home then there are going to be issues relating to having appropriate insurance in place and probably indemnities where a person is working from their parents or partners home.

13. I have already talked about having workstations properly monitored as regards their suitability. The reason I am raising it again is that there are going to be GDPR issues here. Employers are going to have to undertake a review of each workstation in each home. That will cover everything from proper light and heat to the workstation being properly set up. As regards the setting up of a workstation that can be done remotely and there are service providers in this area. There will however then be the issue of maintaining those records of the assessment. Contracts of Employment are going to have to be amended to include a provision that those surveys can be undertaken and in addition that both records can be maintained even after an employee leaves employment. There is a time limit to bring a Personal Injury claim of two years less 1 day. A Personal Injury summons can be extended if it is not served within 12 months. Therefore, effectively employers will need to be able to maintain those records for at least four years should a claim come in and if a claim does come in until the claim is disposed of.

14. Suitable Home Working

Again, this is an issue which I addressed. You can only have a person work from home where the premises which they will be working from is suitable. At the present time many apartments in our cities just are not suitable for home working. This will mean that on a survey the answer will be to the employee that their premises are not suitable and they cannot home work. Now the proposals are that if there is a dispute this matter will be dealt with by the Workplace Relations Commission. The question I am asking is how are they going to do this. The WRC are going to need experts on health and safety law. At the present time the

WRC effectively deal with a handful of Sections in Health and Safety Laws. They effectively deal with the issue of health and safety assessments for a pregnant woman and where there is a complaint of victimisation for having made a complaint under the Safety Health and Welfare at Work Act 2005, as amended. We are now going to have a situation where the WRC are going to have to have the expertise to determine whether a particular premises is actually suitable for home working. That is effectively more an engineer's qualification than a legal qualification. That means that completely different group of Adjudicators may well be required. In the alternative it will require a system whereby the WRC will have to have premises surveyed. If not, there is going to be the issue of an employee claiming that their premises is suitable. The employer saying the premises are not, issues then arising over having the premises assessed. Will the employee be able to stop the employer having an assessment undertaken, and if the employer does, and the employee disagrees with that report, how is the employee to challenge it other than getting their own assessment. The solution on this of course is that the WRC would have appointed specialists of a standing which would be acceptable to both employers and employees whether those employees are in the public or private sector. However, this is a specialist area. It will not be a matter of simply sending it to the HSA as they do not have the appropriate resources unless they are heavily resourced to enable those assessments to take place. There is also going to be the issue of the WRC being sufficiently resourced to enable complaints to be dealt with in a very speedy and effective way. Prior to the pandemic the average length of time for a case lodged in the WRC to receive a decision was a period of 8 months. That is longer at the present time. There is 42 days in which to put an appeal to the Labour Court and the Labour Court then are very efficient in hearing cases. In reality with the best will in the world a complaint is probably going to take on current resources within the WRC, even in a non-pandemic situation if matters go the full way to the Labour Court, at least a year to resolve. There is then going to the issue as to how this is going to be managed as part of the process, will it have a fast-track system within the WRC. The WRC was originally opened up on the basis that you were going to lodge a claim. You would get a hearing within eight weeks or mediation and you would get a decision eight weeks afterwards. That time limit never applied. This is going to be a practical issue as to what happened in the interim. Will the employee be working under protest where the employer says the home is not suitable for a home work station?

15. Planning For Properties

Again, I mentioned this before but I am going to mention it again. If we are going to have home working as part of any solution then individual's homes are going to have to be suitable for home working. This means

that planning for a high density or compact premises may not be suitable. The answer may be that remote working will only take place in hubs, However that is not going to be suitable for everybody, If home working is going to be in homes, if I could call it that rather than just simply remote working in hubs then the whole planning laws that are now being looked at to make properties more compact will need to be amended. There is no way that an employer whether public or private sector will be able to allow employees to work in a premises that does not comply with basic health and safety. There is little point in people having properties built and moving into them and then finding out that property is or is not going to be suitable for home working. It is going to require an approach that properties are going to have to be advertised a bit like the energy rating as to whether they are suitable for home working and how many people the property the accommodate to provide suitable home working for one or more people. The average 3 bed semi-detached or terraced property probably can accommodate 2 people home working in a bedroom each provided that if they are a couple, that there are no children. From a practical point of view an employee could be told that they can homework. What happens then if you have a couple who have a child will there be a requirement to tell the employer that they have a child. If so, which employee from which organisation will now be told that they can no longer work from home? This is going to create significant issues under equality legislation. Take a situation as I have set out of one individual working for the public service and the other for private enterprise. The property is only suitable for one home working station. Both parties bring the claim to the WRC to get a direction that they can work from home. How is the decision going to be made as to whether it is the public servant or the person in the private enterprise who is going to have to return to the workplace? As between employers how is that decision going to be made. I am simply raising this as an issue that I don't know the answer to at the present time but I am quite sure that Employment Lawyers will be bringing claims in those circumstances if somebody is not allowed home work.

16. Taxation

We are told that there are going to be taxation reliefs for those working from home. However, it is going to be an issue if remote working is going to work. Where employers have to incur the cost of what could be two work stations particularly where somebody is only going to be working part time at home then in those circumstances there is going to be the issue of the allowances and how they can be written off as a cost to the business or what grants or other supports will be available for home working. On the issue of tax reliefs that is going to affect all employers. You may say that the tax relief will be on the basis of a certain amount in respect of light and heat. The difficulty is going to be where an employee does not own the home themselves but is home working from that location. They could well be in a property owned by their parents or partner. Their patents may be the ones paying the light and heat and

other expenses. Is the tax relief going to go to the employee or is it going to go to the person or persons who actually own the property. If the person gets the allowances themselves even though it is not their own property and they pay that over will that be treated as income of the person to whom they pay it or how is it going to be addressed. I don't believe that this is terribly difficult to work out but it is going to be one of those issues which is going to arise. It has the possibility of being an anomaly and it is one that we are going to have to all address. It would appear reasonable that if somebody is in a property owned by somebody else and is receiving a tax allowance that they can pay that over to that person because it is there to defray expenses and in doing so would not in itself create a tax charge, Again I am raising this as an issue in that if you have one employee who is in a very energy efficient house and another who lives in a house that was build it 1900, the cost of heating is going to be substantially different, For one it might be negligible. The other it may be significant. If it is on the actual cost them one employee will receive more than the other. If it is a flat allowance then one employee will actually be making money whereas for the other employee it might be actually costing them to work at home. Clearly a flat allowance is probably the easiest solution. I am simply mentioning this because there are health and safety regulations relating to the level of heat that must be in a workplace and therefore it will be a requirement of any employee working from home that they keep the heat at that level.

17. GDPR

The issue of GDPR is only now starting to be looked at. Where you have people working in an office or workplace the issue of information being lost or moving outside the organisation is more limited, It is more likely to be due to a computer hacking. It may be done by mistake. There will be times when it is done on purpose. However, when we get to remote working there are additional concerns. All employers will be looking at a situation where information is now moving outside of their workplace, they will not have the same control over the remote workstation. If you have an individual working on a sensitive subject there is always going to be the potential that if they are sharing that premises with somebody else that without very strong GDRP protections, put in place as regards procedures there is always the potential of that information being shared. By that I mean if you have two individuals sharing a property with their workstations in the same room and there is information on a computer screen it is probably going to be relatively easy for the other person to see it. This is going to mean that there is going to have to be detailed policies and procedures put in place by all employers to protect sensitive data. At the present time somebody comes to the workplace. They turn on their computer. They may move around during the day. They go and get a coffee. They go for a rest break. They go to see and talk to a colleague or go to a meeting. They go to lunch. They may never close down their computer until they go home. Now we are going to have

to have a situation that if somebody is leaving their workstation, for whatever reason, for GDPR, the screen will have to be shut. It may not even be sufficient that they just close it down so that the screen is blank. It may well be to protect sensitive information that it will have to be turned off and then turned on again. This issue has yet to be fully addressed by most employers. There are then going to be issued with employee privacy if an employer is monitoring in those circumstances and where that information is received that somebody has turned on and turned off their computer ten times during the day, the issue relating to seeking information as to why that happened is going to be a GDPR issue. Let me put it at its most simple. A person comes to the workplace on a Friday. On Thursday night they had gone out with some work colleagues and had gone for dinner. They suffered some food poisoning, Not serious food poisoning but one that causes a discomfort. If they are in the workplace, they equally leave their work station six or ten times during the day because of it but they may never be turning off their computer. That may sound fairly petty but the reality on it is this is what we are going to be dealing with, The danger of a breach of GDPR is no greater or no less if a work station is left turned on which can be accessed for five minutes or for an hour. It takes second to copy and transmit a file somewhere else. You may say it would be very unusual for somebody sharing a property with somebody else that that person would seek to access information and send it somewhere else while their flat mate or house mate went to get a coffee but that is going to be a risk that every employer is going to have to address. It will equally apply where you have a person working from home who has children. Children are more computer literate than most of their parents. You could well have a seven or eight year old who wants to get onto YouTube while their parent is away from the workstation, for example making lunch for themselves and their child, for that child to access the computer and to actually transfer all the data somewhere else. So, what we are going to have to have been very detailed protocols for employers and employees. For all employers because of the issue of Data Protection breaches this is going to have to be signed off by the Data Protection Commissioner, There will need to be practical solutions coming forward as to how we manage GDPR issues outside the workplace and in the virtual workplace. The current protections that individuals have as regards data being transferred leaves all employers seriously at risk.

Flexible Working

The new Work Life Balance legislation has recently been announced. We have yet to see the full legislation but it is already likely one that is going to cause a significant number of difficulties and disputes in workplaces.

(1) It was originally announced that employees could get up to five days sick leave to look after a relative or a child. That was then changed to having a substantial medical condition. This is where the disputes are going to arise. We have already had these disputes in the past in relation to Force Majeure. In that Act, you have to show that your immediate attendance is required. That was always the stumbling block on any claim. Now we are going to be left in a situation in relation to these five days, that the employee is going to have to show a substantial medical issue.

(2) What is a substantial medical condition?
It is my belief that the legislation will not set out what is a substantial medical condition.

You will have a parent who has a child, who wakes up in the morning with a temperature of 102°. The parent may regard that as a substantial medical issue. The employer may not. It may well be that the child simply has picked up a minor infection. It could also be that the child has meningitis. This issue will not be clarified until someone has gone to a Doctor. If it turns out to be a serious issue then of course they are entitled to the day off unpaid. If it turns out that it is not a serious medical condition, then in those circumstances, they were not entitled to the day off. Will that then result in a Disciplinary action being taken by employers?

(3) The next issue is clearly is that if it is to be a 'serious medical condition' the employee is going to have to get a Doctor's Certificate or a letter from a hospital. Now Doctors' Certificates will cost anything from between €40 and €70 depending on what part of the country you are in. It is going to be an unpaid day. Therefore, there is going to be a significant cost to any employees.

(4) The next issue is actually getting a Doctor to actually certify what is wrong with the child or relative. At the present time, when you get a medical certificate from a Doctor, it will simply say that someone is unfit for work. It is rare that they will specify what the illness is. We are now going to be asking Doctors to so specify. That is going to cause a difficulty for Doctors themselves.

(5) We then have the issue of GDPR. The employee gets the Doctors certificate, they give it to the employer. There is now the issue of having in place the appropriate procedure to ensure that this information only goes to the relevant individuals. That is a GDPR nightmare in itself for many employers.

(6) The next issue itself of course is the issue of the five days itself. Most employers who will get a phone call from an employee saying that they have a sick child will probably say "*look that's fine you can take it as one of the five days*". The employee will say, "do *I need to get a medical certificate*" and the employer might well say "*no*". That may be the approach of most good employers. So, you have a situation where the employee, lets say we have a situation where this runs on an annual leave year from the 1st January to 31st December, could by May or June have used the five days by simply phoning in to the employer. The employer then has that child having a serious medical condition later in the year and they phone in and say "*that they want to take the five days*". The employer says, "*they have already taken the five days*" and the employee then responds with "*well no, I simply advised you that I had a sick child, I never said that it was a serious medical condition. You said it would be used as one of the five days, I never asked for that, and I never consented to that, I just took it as unpaid days*".

This means that we are now going to have a situation where Staff Handbooks are going to have to be amended to cover the issue relating to days off, unpaid, to look after a child or relative. This may well mean that we end up in a far more legalistic position as regard the flexibility which employers might have given in the past.

(7) The next issue of course is the issue of flexible working. Now this is different from remote working. This is flexible working. So, what does this mean in practice. Well in practice this means that someone might be asking to start working at 10:30 in the morning instead of 9:00 and finishing later. It may mean looking to work two or three days a week instead of five days a week.

We are told that the legislation is going to have a provision whereby six months' notice has to be given and that the employer after they receive a request will have one month to respond.

The next issue then is what happens where the employer refuses.

(8) There will be many for whom the issue of flexible working just cannot work. Let me take the position of a Barista in a coffee shop. Most coffee shops will be working on the basis, from the period from approximately 7 O'clock in the morning to 10 O'clock and between 7:30 am and 10:00 am in the morning will be the busy time. An employee looking to start work at 10:00 or 10:30 may be one that realistically cannot be facilitated by the employer without taking on extra staff. The issue the employer will have in that case is trying to find a staff member who will work from 7:30 in the morning to 10:00 a.m.

If we take the legal profession as an example, it may well be that someone who is doing Conveyancing or Probate, that they could be facilitated with an earlier or a later start time. It may well be that they could start at 6:30 or 7:30 in the morning or 10:30 in the morning. They may be able to be facilitated to work a three or four day week.

Take however someone who is involved in Litigation. Saying that they are going to start working early in the morning and finish at 3:00 p.m. may not be realistic if there is a Court hearing. Equally, such an employee looking for a three or four day week could be caught with the issue as to what happens if a Hearing takes place on the day that they are off, or runs into that day. This is an issue which as yet has not been addressed.

(9) The next issue then is of course, that this right to flexible working where it is granted, will continue up until the child reaches the age of twelve years of age. It is eight years of age in the Directive but the Bill proposes to make it twelve years here in Ireland. That is allowed. The position there is that when the period of flexible working runs out, that employee will be entitled to return to the job they had immediately before the flexible working was granted.

Now let us take the situation of a firm where the Conveyancing Solicitor asks can they work four days a week. The Probate Solicitor asks can they work three days a week. The firm consents. Subsequently, the Probate work expands. The firm needs an extra Solicitor and therefore offers a job to a person working for two days a week. When the Solicitor who is working three days a week has used up their flexibility provision when the child reaches twelve years of age, now returns and says they want their five days a week job. Unless the firm has seven days work in a week that can accommodate two employees, you are looking at the situation of a redundancy. This does mean then that in taking on someone to cover, the firm is going to have to write in their contract, very much like a fixed-term or specified purpose contract, which sets out that they are there covering the two days that the other Solicitor is out on flexible working, that the employment will finish when that individual returns from flexible working and that the provisions of the Unfair Dismissal Acts will not apply to the termination. There is going to be the practical issue then of being able to get an employee in those circumstances. The reason I say that is, you take the situation where someone who has a one-year-old child, that means that technically for the next eleven years, they can be working this new flexible working. A new person has been taken in to cover the two days. I anticipate that the legislation will have a right for the employee to terminate the flexible working. The person then taking on the job will then be in the position that they do not know if that flexible working is going to go on for eleven years or whether it could finish on whatever the notice is going to be. I certainly believe that no firm is going to realistically be able to operate on looking into the future for a period of eleven years. I do not believe that there is any firm or business that could look back eleven years and say that the way they were working eleven years ago is exactly the same way they are working now or even if we say working pre-pandemic. I do not believe that this issue has been properly addressed or will be addressed.

(10) The next issue is then of course will be in the event of a dispute that matters go to the WRC. Now Adjudication Officers in the WRC are well used to dealing with employment rights. They will now have to be dealing with the issue of how a business operates. That is an entirely different skill set.

Conclusion

I have covered off the issue of remote working and flexible working. As regards the issue of remote working and flexible working, the issue which concerns me is how these matters are going to be dealt with in the WRC.

The WRC and the Labour Court have specific skills in relation to dealing with employment rights. The Labour Court is recognised as having special expertise in the area of Industrial Relations. Now however, both entities will have to be dealing with the issues relating to the practical side of remote working and flexible working.

On the issue of remote working, they will have to be dealing with the suitability of the premises, GDPR, the application of Health & Safety legislation, insurance and a myriad of other issues relating to the practical side of someone working remotely. Not the area of Heath & Safety legislation is one they will be able to deal with. They have expertise in that area. The issue that is likely to come up though is that an employee seeks to work from home. The employer sends in a Health & Safety expert who comes back with a report saying that the premises are not suitable. Neither the WRC or the Labour Court will say that they have the expertise to determine whether that certification is correct. Therefore, it will be down to evidence. The employee seeking the right to work from home, where the employer has an appropriate report, they will have to get their own report. That is a significant cost. If they do not get the report then it will be effectively uncontested evidence. While the employee can contest a specialist report, effectively that is the same as in a Court case a person challenging a Doctor's report with nobody to give evidence in respect of same. It has little or no value.

We are told that the compensation that can be awarded by the WRC will be four weeks wages. That effectively means that for most employees the cost of getting a report, not talking about the cost of bringing that expert to the WRC, is probably going to be more than the maximum compensation that they can receive. You can be absolutely sure that the WRC and the Labour Court are not going to be provided with the relevant experts that they can call upon to go out and investigate and determine whether a premises is suitable under Health & Safety and to check the premises for GDPR compliance for all risks or to make a determination in relation around insurance. We are going to have a situation where is a WRC Adjudicator or the Labour Court determine that it is suitable for the individual to work from home, all or part of the time, which is going to be an issue in itself, as to whether it is all or part of the time, then the issue is what if the employer has raised objections with appropriate

expert evidence in relation to the suitability of those premises from a Health & Safety point of view, as to the issue of a situation where that employee, or somebody else is injured. Will the employer have an out in relation to this? Will the employee who is injured be caught with an argument that the employee stated that the premises were safe and that the employer can rely upon that? What happens in relation to a third party who is injured?

These are issues which as yet have not been addressed, and I see them as significant.

In the area of flexible working there will be relatively 'open and shut cases' but if you take the case of a person who runs a coffee shop where there is a Barista looking to start work at 10:30 in the morning or a Solicitor's firm where you have a litigation Solicitor who is looking to work only three days a week or start at 11:00 O'clock in the morning or 10:30 in the morning, what is going to happen there?

Now the reason I am saying that is the WRC themselves list cases at 9:00 a.m. The Labour Court lists cases at 10:00 a.m. For employment law Solicitors, are they going to be able to go to the WRC or the Labour Court and say "*look you can't list me at 9:00 a.m. or you can't list me at 10 O'clock*", I very much doubt it. I cannot see a District Judge, and even less a High Court Judge accepting a situation that somebody says that because of flexible working arrangements they cannot start running a case until 11 O'clock in the morning.

I am simply mentioning this and these are pieces of legislation where no employment lawyer has been involved in the pre-legislative scrutiny of the legislation. Yes, the Unions and IBEC have been called in. Yes, they do have expertise in this area but it is going to be the employment lawyers who are going to be down fighting cases in the WRC and the Labour Court in relation to this. This is going to be expensive and disruptive legislation.

Conclusion to today's talk

In today's talk I have tried to cover the issues which are arising post the pandemic. I have raised the issue of pregnancy related dismissals and the rights of women on Maternity Leave because this is a growing area that has arisen because of the pandemic. Unfortunately, many employers do not seek legal advice before putting in place new arrangements.

I have covered the issue of redundancy mainly because of the fact that employers again are failing to get legal advice before putting in place redundancies. They are simply advising people or telling them that they are redundant and then they have the issue of a redundancy being challenged under the Unfair Dismissal legislation. Of course, employers can avoid claims by having in place a proper settlement agreement where the employee is legally advised prior to signing it and which pays in excess of Statutory

redundancy. The difficulty with such agreements is that generally the employer has not gone through the procedures before giving the employee the termination document.

In relation to remote working and flexible working, I see both pieces of legislation as great pieces of legislation from a social perspective but ones that have not been fully thought out as to how they are actually going to work in practice. The fact that there are going to be huge groups of employees who will never be able to avail of remote working or flexible working. For example, it is difficult to see how a Receptionist is going to be able to look for remote working. Equally, a Barista will not be able to look for remote working.

Colleagues, I appreciate that many of you will not have employment law as a specialist area in your practices. You will however be involved in various cases and advising both employers and employees. To keep up to date with developments I would have some simple advice. The first thing to do is to follow on the social media platforms, particularly LinkedIn. The larger firms do produce guides on employment law on a regular basis. Also follow those firms who do have a specialist service will give you access to updates. Also, you will find that many firms who provide employment law services have Newsletters. It is worthwhile signing up to those. Yes, our office has one. There is a very easy way to sign up. You simply go on to our website and ask to be signed up. I actually have no idea who has signed up for the Newsletter, I do not check, and actually do not have access to that list for GDPR purposes. Only two individuals in the firm have access to it and that is simply for updating it and for sending out the Newsletter. Our Newsletter is not used then as regards the contacts list for any other purpose, other than for sending out the Newsletter.

Finally, I would like to thank you for inviting me to speak here today. I am always delighted to receive an invite from colleagues and I am always delighted to accept. There is a fee that I receive for today but that fee I always direct to be paid to the Solicitors Benevolent Association. They are my 'go-to charity'. The reason I mention it here today is that I would ask you that when it comes around to renewing your Practising Certificate that you remember the Solicitors Benevolent Association. If you do make contributions to charities during the year, again I would ask you to think about that particular charity. It is a charity that simply puts bread and butter on the table. It does not put cake, if I can put it that way. It has limited funds and a significant number of individuals who have fallen on hard time and particularly, surviving spouses or children of former colleagues.

Again, I would like to express my sincere thanks for the invitation here to speak today and hope that this talk has been of some interest and help.