KEEPING IN TOUCH NEWSLETTER – MAY 2022

Welcome to the May edition of our Newsletter.

One issue which is now arising on a regular basis is that of employees resigning and claiming Constructive Dismissal.

In many of these cases even though the employee might ultimately be able to argue that they had a good case, a lot of employees do not take account of the legislation and Court decisions relating to Constructive Dismissal.

The test in relation to a Constructive Dismissal is either a breach of contract going to the root of the Contract of Employment or that the actions of the employer were so unreasonable that the employee had no alternative but to resign.

The decisions of the Labour Court and the Workplace Relations Commission have been consistent in that before an employee can resign and properly bring a Constructive Dismissal case, the employee needs to give the employer an opportunity to address the grievance the employee has. This means raising a grievance before resigning. Where there is a grievance policy in a company, that full procedure must be fully complied with.

There can be circumstances where the act or acts of an employer are so egregious which justify an employee resigning without going through the grievance process but there are a tiny minority of situations.

One of the issues constantly coming up is that employees who have resigned did so without understanding the legal implications and only then contact a solicitor for advice in relation to bringing a Constructive Dismissal case, after they had resigned.

One of the difficulties in advising clients in these situations is the fact that they often fail to understand that their ignorance of the law in relation to the requirements to be able to bring a Constructive Dismissal case, are ones which a Court or Tribunal will say, they should have been aware of.

One of the important issues for any employee considering resigning is to obtain legal advice before doing so. Unfortunately, a significant number of employees do not do so.

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***Before acting or refraining from acting on anything in this Newsletter, legal advice should be sought from a solicitor.**
****In contentious cases, a solicitor may not charge fees or expenses as a portion or percentage of any award of settlement.**

OUT AND ABOUT IN APRIL 2022

On the 19th April 2022, Richard Grogan was quoted in the Irish Legal News on the issue of Settlement Agreements and Waivers.

On the 19th April 2022, Richard was interviewed for the 5:30 p.m. news on Virgin Media by Richard Chambers, on the new legislation relating to the new Work-Life Balance proposals from the government.

On the 20th April 2022, Richard was interviewed on the Niall Boylan Show on Classic Hits FM, on the issue of Work-Life Balance and the issues which will be arising for employers and employees.

On the 21st April 2022, Richard was interviewed on the Pat Kenny Show on the Work-Life Balance Bill as proposed by the government.

On the 21st April 2022, the interview with Richard Grogan was re-produced under the heading of 'Flexible Working' by Newstalk FM.

On the 23rd April 2022, Richard was interviewed by Siofra Mulqueen for the Business on RTE, on the issue of a four-day working week.

THE IMPORTANCE OF BRINGING CLAIMS WITHIN TIME TO THE WRC

This issue arose in the case of NHC Construction Limited and Shane Matthews PWD 2222.

In this case, the complainant argued that the complainant was entitled to a bonus of 10%.

The Labour Court set out the legislation in detail relating to the Payment of Wages, as a bonus would come within that provision. The Labour Court referred to the provisions of Section 41 of the Workplace Relations Act 2015 in setting out that the claim has to be made within 6 months of the date of the contravention, which can be extended to 12 months if there is reasonable cause.

In this case the Labour Court determined that no bonus would have been payable to the complainant within the relevant period, where they would have jurisdiction under Section 41 of the Workplace Relations Act. Therefore, the Labour Court held following the case of HSC -v- McDermott 2014 IEHC 331. They did not have jurisdiction to hear the case.

This case is a reminder of the importance of making sure that claims are lodged in time.

JURISDICTION OF THE WORKPLACE RELATIONS COMMISSION/LABOUR COURT TO HEAR UNFAIR DISMISSAL CASES

This issue arose in the case of Infosys Ltd and Shaikh, UDD 2224. The Court pointed out that the minimum intention of Section 3(a)(i) of the Unfair Dismissal Acts, is that if an employee is living and working in Ireland for the duration of the Contract of Employment, they are covered by the protection of that Act. The Court pointed out that this principle was upheld by the Employment Appeals Tribunal in a case of Amstrad Plc -v- Walker, UD 345/91. In this case the respondent argued that the Contract of Employment was at all times between the complainant and Infosys India and that the complainant was ordinarily resident in India for the duration of the contract. The Court pointed out however that the deputation letter that governed the arrangements to apply to the complainant while in Ireland, was a set of contractual arrangements agreed between the parties, for the duration of the complainant's time working in Ireland. The Court pointed out that while it is a fact that the complainant remained in the employment of the entity outside of the State, with no right to claim within the State once the temporary arrangement set out in the deputation letter came to an end, and indeed, a legal requirement was specified in the ICT permit that he would return to India at the end of that time, it is, nonetheless, an indisputable fact, as held by the Labour Court, that he lived and worked in Ireland while covered by the terms of that letter, and that by doing so, he was dismissed.

The Court quoted the case of McIlwraith -v- Seitz Filtration (GB) Ltd and Zimmerman -v- Der Deutsche Schulverin, UD373/1998, that even if a contract is stated to be the subject of the laws of another jurisdiction, an employee who meets the requirements of the Act, is entitled to proceedings under the Act.

The Court pointed out that the respondent was correct in arguing that the fact that a complainant paid Tax and PRSI in Ireland does not automatically confer jurisdiction on the Court and referred to case UD 2209/2011.

The Court pointed out that at Article 8 of EC Regulations 593 of 2008, have to be read as part of the entire Regulations and that Article 3, makes clear that rights which cannot be derogated from by agreement continue to apply even if the parties agree that the laws of a different country are to apply.

In this case the Court gave a preliminary ruling that the employee could proceed with the claim under the Unfair Dismissal legislation.

This is an important decision of the Labour Court as regards conferring jurisdiction.

RGA | Richard Grogan & ASSOCIATES

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Letter to Minister for Enterprise Trade & Employment
- Exclusion of certain periods for calculating Maximum working hours

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Tánaiste and Minister for Enterprise,
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11 May 2022

RG/LC/RIC2/2

Richard Grogan

Re: Organisation of Working Time Act – Section 15 – Exclusion of Certain Periods

Dear Minister,

The Organisation of Working Time Act in Section 15 (4)(AA) excludes absences from work while on Parental Leave, Force Majeure leave or Carers Leave within the meaning of the Carer's Leave Act 2001. It would appear that periods of Paternity Leave and Parents Leave are not exempt from inclusion in the periods for ascertaining whether a person worked in excess of the maximum working hours of 48 hours per week averaged over a four-month period of time if they are on either of these leaves.

It would appear that this may have been a simple oversight when drafting those pieces of legislation. I would ask you to consider amending the Organisation of Working Time Act in Section 15 to include these two periods of time. This could be included as a simple amending section to any upcoming piece of legislation in your Department such as the right to request remote working.

It would appear, as I said, this is simply an oversight.

Kind regards,

Yours sincerely,

Richard Grogan
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APPEALS TO THE LABOUR COURT – WHAT THE LABOUR COURT CAN CONSIDER?

This issue arose in a case of Galley Marine Enterprises Ltd and Mohammed Abbasy PWD 221.

In this case the Labour Court addressed the issue of a de novo appeal.

The Court pointed out that it is well established that an appeal arises from a decision of an Adjudication Officer to the Labour Court under Section 44 of the Workplace Relations Act 2015 and is a de novo hearing.

The Court referred to the case of Fitzgibbon -v- The Law Society 2014 IESC48 and the judgment of Mr. Justice Clarke, as he then was, where it was stated:

"it seems to me that the critical characteristics of a de novo appeal are twofold. First, the decision taken by the first instant body against whose decision an appeal is brought, is wholly irrelevant. Second, the appeal body is required to come to its own conclusions on the evidence and materials available to it. The evidence and materials which were properly before the first body are not automatically properly before the appeal body".

The Labour Court set out in its decision that the Court has on occasions had to consider whether it is permissible for parties in an appeal to enlarge their claim on appeal. The Court referred to the case of Dawn Country Meats Ltd -v- Hill, DWT14/2012, where it was held that in a de novo appeal, a party is entitled to adduce any evidence they wish ("provided it is relevant and probative and so long as the nature of the claim remains the same as that dealt with at first instance").

The Court pointed out that it could not allow an appellant to pursue:

"*an entirely new claim".*

The Court explained that this would be because the Court:

"*would be purporting to exercise an original jurisdiction that it does not have".*

This is a very helpful and important decision from the Court.

DISMISSAL OF AN EMPLOYEE

The issue as to whether a dismissal had occurred arose in the case of Claddagh Ring Ltd and Amjadi UDD 2223.

In this case the Court helpfully set out all the relevant legislation. The Respondent had submitted that the employee was not dismissed but had been put on lay-off. The Court reviewed the email to the employee and pointed out that:

"*No explanation was given in that email of the meaning of an assertion that a decision had been taken to suspend the employment of the appellant".*

The Court pointed out that the email did not contain the notice required to lay-off an employee as defined in the Redundancy Payment Act 1967. The Court referred to the case of McKenzie Ltd -v- Smith 1976 IRLR 345 that indefinite suspension of an employee was considered to amount to dismissal. They also referred to the case of Deegan -v- Dunnes Stores 1992 ELR 184, that an indefinite suspension was found to be tantamount to a dismissal. In this case the Court determined that there had been a dismissal and compensation was awarded.

This case is a very helpful decision in reminding employers of the importance of having clear and definitive words in any communication to an employee particularly where the employer only intends to put the employee on lay-off. It is also a reminder of course that a lengthy period of suspension even where the employee has been advised that a disciplinary action may be taken can itself amount to an Unfair Dismissal.

COMPENSATION IN UNFAIR DISMISSAL CASES

This arose in the case of Accenture Global Solutions Ltd and Maria Paola Ciucci UDD 2227.

In this case the issue arose as to the level of compensation. The provisions of Section 7(1)(ii) was referred to by the Court. That Section states:

"if the employee incurred no such financial loss, payment to the employee by the employer of such compensation (if any, but not exceeding an amount of four weeks remuneration in respect of the employment from which he was dismissed calculated as aforesaid) as is just and equitable having regard to all the circumstances"

Where an employee has not suffered any economic loss then in those circumstances compensation is limited to four weeks wages.

FAIR PROCEDURES IN DISCIPLINARY MATTERS

This issue was raised in the case of Alan Keane and Cummer Coaches Ltd, ADJ-00032605.

In this case the Adjudication Officer went through the legislation in detail.

The Adjudication Officer pointed out that notwithstanding the rather flawed investigative process, the Adjudication Officer noted, that the complainant did not challenge either the decision to suspend or indeed any aspect of the processes at the time. The Adjudication Officer pointed out that the procedural deficiencies surrounding the investigation and the decision to suspend must be considered in line with Section 6(1) of the Act.

The Adjudication Officer referred to the case of Elstone -v- CIE High Court 13th March 1989, unreported, where it was held;

"that the mere fact that some failing is due or agreed procedure is not a final and decisive matter for the Court on appeal, is clear from the

provisions of Section 6(1) that regard must be had to all the circumstances and not to one circumstance to the exclusion of others".

The Adjudication Officer also referred to the case of Shortt -v- Royal Liver Assurance Ltd 2008 IEHC 332, where Laffoy J. held that a central consideration to fair procedures is whether or not any purported breach of natural justice was 'likely to imperil a fair hearing or fair result'.

In this case the Adjudication Officer held that having regard to the wholly independent disciplinary and appeal hearings, which the Adjudication Officer had identified prior to the disciplinary hearing, were insufficient to render the dismissal procedurally unfair.

This is a helpful decision in dealing with the issue of matters prior to a disciplinary hearing itself. Saying this, it would be our view that this would depend on the particular circumstances of each particular case.

UNFAIR DISMISSAL – MISCONDUCT

This issue arose in the case of Strandvaus Ltd and Sylwester Michalski, UDD 229.

The Labour Court in this case set out that it was well established that in exercising its jurisdiction to determine appeals under the Unfair Dismissal Act, 1977, it is not the role of the Court to substitute its decision for that of the respondent. The Court pointed out that it is not there to re-run the disciplinary process and to attempt to step into the respondent's shoes, so as to speak. The Court pointed out that its function is to consider whether in all the circumstances a reasonable employer would have arrived at the decision the respondent arrived at. The Court pointed out that the established jurisprudence in relation to dismissal law in Ireland takes a very restricted view as to what constitutes gross misconduct justifying summary dismissal. The Court pointed out that this is evidenced, for example, by the determination of the Employment Appeals Tribunal in Lennon -v- Bredin, reproduced at page 315 of Madden and Kerr, Unfair Dismissal Cases, where the EAT stated:

"*Section 8 of the Minimum Notice and Terms of Employment Act 1973, saves an employer from the liability for Minimum Notice where the dismissal is for misconduct. We have always held that this exemption applies only to cases of very bad behaviour of such a kind that no*

reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer;

We believe the legislature had in mind such things as violent assault or larceny or behaviour in the same sort of serious category.

If the legislature had intended to exempt an employer from giving notice in such cases, where the behaviour fell short of being able to fairly be called by the dirty word 'misconduct' we have always felt that they would have said so by adding such words, (after the word misconduct) as negligence, slovenly workmanship, bad time-keeping, etc., they did not do so."

The Court in this case pointed out that they had serious concerns with regards to certain aspects of the procedures followed by the respondent.

The Court stated that they did not accept the complainant's submission that in the circumstance of the case, they were so exceptional, that they should have been permitted to be accompanied by a solicitor. However, the Court pointed out on the other hand, that there was no evidence before the Court that the complainant could have availed himself of the assistance of a colleague who would have been sufficiently skilled to provide him with meaningful representation to deal with the allegations. The Court pointed out that this was particularly so in the complainant's lack of proficiency in English was also considered. The Court pointed out that relying on a colleague who is a fellow Polish National, and whose English happens to be somewhat better than the complainants, to provide interpretation services to the complainant when he was at risk of losing his employment, put the complainant at a significant disadvantage throughout the process when it came to articulating his version of events. The Court pointed out that clearly the respondent accepted this in advance of the appeals stage, as he agreed to provide a professional interpreter then. However, the Court pointed out that this was 'too late in the day'. The Court pointed out that the respondent's approach throughout the disciplinary process, to which it subjected the complainant, fell far short of meeting the requirements of the fundamental principles of Audi Alteram Partem and was therefore unfair. Compensation was awarded.

This case clearly sets out the importance of employers having in place the appropriate procedures and making sure that those procedures are fair but also that those hearing appeals or dealing with disciplinary

matters are not involved in the making of a complaint that may arise with regards a disciplinary matter.

DETERMINING WHETHER A DISMISSAL IS FAIR OR NOT

This issue arose in the case of Bartosz Bogucki and Dynniq UK Ltd, ADJ-00029065.

The Adjudication Officer referred to the Employment Appeals Tribunal case of Bigaignon -v- Powerteam Electrical Services Ltd 2012 23 ELR 195, where it was held:

"the tribunal had to consider if the respondent acted fairly and if dismissal was proportionate to the alleged misconduct. Does the punishment fit the crime? In considering this question the fact that the tribunal itself would have taken a different view in a particular case is not relevant. The task of the tribunal is not to consider what sanctions the tribunal might impose but rather whether the reaction of the respondent and the sanction imposed lay within the range of reasonable responses. The proportionality of the responses is key in that even where proper procedures are followed in effecting a dismissal, if the sanction is disproportionate, the dismissal will be rendered unfair …… the precise terms of the test to be applied as to whether the sanction was reasonable was set out in its Noritake (Ireland) Ltd -v- Kenna UD88 1983, where the tribunal considered the matter in light of three questions.

1. *Did the company believe the employee misconducted himself as alleged? If so,*

2. *Did the company have reasonable grounds to sustain that belief? If so,*

3. *Was the penalty of dismissal proportionate to the alleged misconduct"*

It is helpful that the Adjudication Officer set out the test again in relation to this matter in this decision.

UNFAIR DISMISSAL – INCAPACITY OF AN EMPLOYEE FOLLOWING DISMISSAL TO SEEK WORK – LEVEL OF COMPENSATION

This issue was addressed in a case of Bidvest Noonan Ltd and Lantas UDD 2219, where the Labour Court reviewed the legislation in detail. The Court held that any loss suffered by the complaint since his dismissal was attributable to his incapacity to engage in employment as a result of ill health and, consequently, not attributable to his dismissal.

The Court pointed out that having reached that conclusion, the maximum award payable to the complainant arising from his Unfair Dismissal is, in accordance with the Act at Section 7, being a sum equivalent to four weeks remuneration.

This of course is something that is well known by employment solicitors but it is useful that this matter has again been clearly set out by the Court.

USE OF CCTV IN DISCIPLINARY CASES

This issue arose in the case of Go-Ahead Transport Services (Dublin) Ltd and Gifford, UDD-2225.

The complainant in this case argued that the decision to dismiss was fundamentally flawed as the complainant was never given the company's CCTV policy. It was argued that the data used by the respondent was used and obtained contrary to their own CCTV policy and that the use and purposes of which were not made known to the complainant and his personal data was used without his knowledge. It was argued that nowhere in the company Handbook or in bus signage were staff informed that CCTV will be used in disciplinary procedures.

The complainant referred to the case of Patricia Heffernan -v- Dunnes Stores, UDD-1355/09, where the EAT held that a dismissal was unfair because surveillance equipment was used without the employee's knowledge.

The Court in their decision stated that arguments about the use of data are outside the competence of the Labour Court and any alleged breaches of a complainant's rights in this regard are a matter for a different forum.

This is an interesting decision of the Labour Court in that effectively it means that data obtained contrary to the GDPR rules may in fact be used in cases before the WRC and the Labour Court.

The issue is then how are these matters going to be dealt with in employment law situations.

The first and most obvious of course is that separate proceedings would issue in the Circuit Court against an employer who does so.

The issue however, in disciplinary hearings should proceedings issue at that stage, and at the same time seeking an injunction seeking to stop an employer using such data and/or for the deletion of such data so that it would not be available for the person hearing the disciplinary hearing.

Both of the above solutions are a very expensive process for both employers and employees.

In addition, where such an injunction would be sought in the Circuit Court, it may well have the effect of delaying a disciplinary hearing taking place in anyway quickly if the injunction is granted.

There is a third solution and that is that the Workplace Relations Commission and the Labour Court would be given jurisdiction to determine whether or not CCTV could be used in disciplinary proceedings and the extent to which it could be so used.

A further issue of course arises, if proceedings are brought to the Circuit Court and that is, that in accessing compensation the Circuit Court Judge will be assessing compensation on the breach of the individual's rights. The Circuit Court Judge will then have to determine as part of assessing compensation for the breach, how that breach impacted on the employee.

There is then again, a further issue which arises as to whether a complaint can be made to the Data Protection Commissioner and in such circumstances if such a complaint is made does it have the effect of effectively stalling any disciplinary process pending a determination by the Data Protection Commissioner as to whether that information can be used. The issue then arises that if the Data Protection Commissioner did determine that it should not have been used, what

impact does that then have on any case before the Workplace Relations or the Labour Court on appeal.

This is an issue which needs to be clarified extremely quickly so as to avoid difficulties into the future.

USE OF INTERNAL PROCEDURES IN A CONSTRUCTIVE DISMISSAL CASE

This arose in the case of Bronagh Whelan and Glana Controlled Hygiene Ltd ADJ-00028850.

The Adjudication Officer in this case referred to the case of Reid -v- Oracle EMEA, UD 1350 2014 where the EAT held:

"it is incumbent on any employee to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are unfair".

In this case the Adjudicator Officer concluded that while there were aspects of the respondent's behaviour that provided grounds for the complainant to believe it to be unreasonable the action of the complainant in resigning without notice and not invoking the provisions of the Grievance procedure were also unreasonable.

This case is a timely reminder of the importance of employees using the internal Grievance procedure before resigning.

CONSTRUCTIVE DISMISSAL/BURDEN OF PROOF

This issue arose in the case of Thomas Murphy and Kilsaran Concrete Unlimited Company, ADJ-00028616.

The Adjudication Officer set out the relevant legislation in Section 1 of the Unfair Dismissals Act 1977. The Adjudication Officer set out that it is settled that in law that an employee who claims that they have been Constructively Dismissed must satisfy two tests known as the 'Contract Test' or the 'Test of Reasonableness' as was set out in the case of Western Excavating (ECC) Ltd -v- Sharp 1978 IRL 332.

The Adjudication Officer dealt with the Reasonableness Test as being:

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

The Adjudication Officer referred to the case of Kenouche -v- Four Star Pizza UD962/2008, in that as regards this test the EAT stated:

"…the conduct referred to in the Act cannot be petty or minor but must be something serious or significant which goes to the root of the relationship between the employer and the employee. Consequently, the tribunal must look at the conduct of the employer and the reasonableness of the resignation of the employee".

In relation to this, the Adjudication Officer pointed to the case of Mr. O -v- An Employer 2005 16 ELR 132 where it was held:

"*in normal circumstances a complainant who seeks to invoke the Reasonableness Test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. However, there is authority for the proposition that this is not fixed or universally applicable and there can be situations in which a failure to give prior formal notice of grievance will not be fatal".*

In the conclusion, the Adjudication Officer referred to the case of Caci Non-Live Limited -v- Daniela Paone 2017 UDD 750 where the Labour Court held:

"*it is well settled law that a complainant who is advancing a claim of Constructive Dismissal under the Act must demonstrate his or her employer has acted so unreasonably and/or committed a fundamental breach of contract such that it was not possible for that person to remain in their employment any longer. Whether or not this test has been satisfied in any particular case, has to be considered from an objective perspective".*

It is very helpful that the Adjudication Officer has set out the law in such detail in this case.

One of the difficulties of Constructive Dismissal cases is that the burden of proof is on the employee. Any employee who is considering resigning should of course get advice before doing so as the legal test places a considerable burden on the employee to prove their case.

REDUNDANCY & UNFAIR DISMISSAL CLAIMS

This issue arose in the case of Terence Farquharson and A.R.B Underwriting Ltd, ADJ-00030122.

This case involved a claim of unfair selection for redundancy. The Adjudication Officer referred to the case of Williams -v- Comp Air 1982, 1ICR 156, where Browne-Wilkinson J. in considering the issue of fair selection identified the following is generally accepted principles governing how reasonable employers will typically act, being:

"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, to 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 on the opinion of the person making the selection who 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 in accordance with these criteria and will consider any representation the Union may make as to such selection;

5. The employer will seek to see whether instead of dismissing an employer he could offer him alternative employment."

The Adjudication Officer referred to the case of Boucher -v- Irish Productivity Centre, 1994 ELR 205, as an illustration of an unfair selection process. In that case no agreement was reached as to the method of selection for redundancy. The selection process was carried out without any consultation or interviews in describing the selection process as unfair and holding that the claimants had been unfairly dismissed. The Employment Appeals Tribunal emphasised that those in the group likely to be dismissed should be made aware that such an assessment is being made and they should be given an opportunity to give their views, which should be considered.

The Adjudication Officer also referred to the case of Mulligan -v- J2 Global (Ireland) Ltd, UD 993/2009, where the EAT stated:

"in cases of redundancy best practice is to carry out a genuine consultation prior to reaching a decision as to redundancy".

The Adjudication Officer pointed out in this case that the Managing Director confirmed both in submissions and in the course of the Hearing, that there was no consultation process. The Adjudication Officer found that the complainant was asked to attend a meeting, where he was informed, he was being made redundant. The Adjudication Officer held that this meeting cannot be regarded as an adequate part of a consultation process. Compensation in this case was awarded.

This case is a reminder of the importance of parties going through a full consultation process prior to making somebody redundant.

BURDEN OF PROVING CLAIMS UNDER THE SAFETY HEALTH & WELFARE AT WORK ACT

This issue was addressed in the case of Mary Finn and the Department of Education & Skills ADJ-28340.

The Adjudication Officer in this case referred to the case of Toni & Guy Blackrock -v- Paul O'Neill 2010, 21 ELR1, and the article 'Penalisation pursuant to Section 20 Safety Health & Welfare at Work Act 2005 IELJ

2014' by Sarah O'Mahoney B.L., where she in her article emphasised that the Court held that it is necessary for the claimant to establish that the detriment complained of was imposed because of, or in retaliation for the employee having taken Protected Act, this can be summarised as the 'But For Test".

While the claim failed, it is helpful that the Adjudication Officer set out the law in some detail in this decision.

PENALISATION UNDER THE SAFETY HEALTH & WELFARE AT WORK ACT

This issue arose in the case of Olivia Quinn and Grosvenor Cleaning Services Ltd, ADJ-32563.

The Adjudication Officer referred to Section (a)(b) of the Act 2005 and referred to the provisions of Section 2.6 and Section 27 dealing with penalisation.

The Adjudication Officer pointed out that the Labour Court had made it clear that there is a distinction between a detriment suffered by an employee because of an employee's failure to fulfil a duty under the 2005 Act and a detriment amounting to Penalisation under the Act as set out in the case of Patrick Kelly trading as Western Insulation and Girdsius. The Adjudication Officer referred to the case of Murphy and Regan Employment Law Second Edition 2017, in this regard.

The Adjudication Officer held that there could be no doubt that the transfer occurred solely because of the complaint that the supervisor made and additional pressure being brought on the employer to transfer her with reference to future tendering processes.

The Adjudication Officer pointed out that the supervisor had gone to her manager to complain about how her crew was being treated and that in turn directly caused her removal from the site she had worked in for 18 years and that this was a very significant act of Penalisation.

The Adjudication Officer pointed out that while the employer may say they have no choice but to implement an unlawful act, as to do otherwise would have only damaged their prospect of renewing the contract, and the transfer only occurred because the supervisor raised a grievance about how her staff were being treated and her concern for

their welfare. The Adjudication Officer pointed out the fact that the request made by the client, as detailed in the email set out in the decision, should have been challenged by her employer and not acceded to, clearly demonstrated that she was being removed for making a complaint. On that fact the Adjudication Officer held that the employee had been penalised.

In this case compensation of €21,000 was awarded.

TEST OF WHETHER AN EMPLOYER ACTS REASONABLY IN DISMISSING AN EMPLOYEE

This issue arose in the case of An Post and Edward Hurley UDD 2216.

The Labour Court addressed this issue stating:

"*the Court in its deliberations noted that the test for reasonableness was set out in Noritake (IRL) Ltd -v- Kenna UD 88/ 1983* as follows:

> "did the company believe that the employee's misconducted himself as alleged?
>
> If so, did the company have reasonable grounds to sustain that belief?
>
> If so, was the penalty of dismissal proportionate to the alleged misconduct?"

The Court pointed out that the issue was further considered in Bank of Ireland -v- Riley 2015 IEHC 241, where Noonan J noted that Section 6(7) of the Unfair Dismissal Act makes it clear that a Court may have regard to the reasonableness of the employer's conduct in relation to dismissal. However:

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

It is helpful that the Court has re-set out the test.

RETIREMENT AGE

This issue arose in the case of Sean Fleming and Instant Upright Ltd, ADJ-0033239.

The Adjudication Officer in this case was dealing with this under the Unfair Dismissal legislation. The Adjudication Officer referred to Section 2(1)(b) of the Unfair Dismissal Acts which provides:

"*except insofar as any provision of this Act otherwise provides this Act shall not apply in relation to any of the following persons;*

(b) an employee who is dismissed, and who on or before the date of his dismissal, had reached the normal retiring age for employees of the same employer in similar employments or who on that date had not attained the age of 65 years".

In this case the relevant clause in the contract stated;

"the normal retirement age in the company is the date of your sixty fifth birthday. The company will contact you three months in advance to ensure that all issues relating to your retirement are in place".

The Adjudication Officer referred to the case of the Institute of Technology Sligo -v- John Comiskey UDD 2140, where the Labour Court held:

"the Oxford English Dictionary defines the word 'normal' as meaning;

"conforming to standards usual, regular, typical"

Taking that definition into account, the plain meaning of Section 2(1)(b) can reasonably be understood as excluding from the protection of the Act those persons who have reached the age at which employees in similar employments usually, typically, regularly or normally retire.

In this case, an argument was put forward that other employees were retained after their retirement age but the Adjudication Officer pointed out that these were on fixed twelve-month contracts and that these employees were the exception to the general rule.

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

It should be noted that this case was taken under the Unfair Dismissal legislation and not under the Equality legislation.

REASONABLE ACCOMMODATION FOR THE PURPOSES OF THE EMPLOYMENT EQUALITY ACT, 1998

This issue arose in the case of Constantin Jarstea and O'Brien Fine Foods Unlimited Company, ADJ-00029757.

In this case the respondent argued that regards reasonable accommodation that the Nano Nagle case is relevant in that there is;

1. No requirement on an employer to find another distinct and separate job for an employee with a disability and

2. There is a requirement on employers to explore alternative modes of accommodation to establish if the position held by the employee with a disability is capable of adaptation to accommodate that employee.

The respondent argued that the duty to accommodate is not infinite. It cannot result in removing all the duties which a disabled person is unable to perform. That would represent a disproportionate burden. In other words, they argued that to create a new role would place a disproportionate burden on the employer.

The respondent argued that the absence of consultation alone is not deemed to constitute discrimination.

The respondent referred that the Supreme Court had reiterated the principles in Humphries -v- Westwood Fitness Club, being a decision of Dunne J. 2004 15ELR 296, where the Labour Court held that for an employer to form a bona fide belief that the employee was not fully capable of performing the duties for which she was employed an employer would normally be required to make adequate enquires to establish fully the factual position in relation to the employee's capacity.

The respondent also referred to the case of an Employer -v- A Worker EDA216, where the Labour Court held that if it was not possible to adapt the complainant's duties to accommodate him, as the facts demonstrated that he was incapable of performing that function thus adapted that no amount of support was going to assist him if he found himself on his own, which was always a possibility in his role as a care assistant. The Adjudication Officer referred to Section 16(1) and pointed out that if a person with a disability can be reasonably accommodated, they are to be deemed as capable of performing the job as if they have no disability provided that reasonable accommodation does not impose a disproportionate burden on the employer.

The Adjudication Officer in this case pointed out that while any failure to provide a complainant with alternative employment while regrettable from a general and human point of view, does not give rise to any liability under the Act.

MANDATORY RETIREMENT

This issue arose in the case of Patrick Cassidy and Portfolio Concentrate Solutions.

The Adjudication Officer in this case dealt with a case where a considerable amount of case law was set out. The Adjudication Officer set out that the Adjudication Officer was having regard to the provisions of Statutory Instrument No. 600 of 2017, Code of Practice on Longer Working. The Adjudication Officer set out the burden of proof and concluded that as the complainant's employment ended because of his age, the burden of proof was now allocated to the respondent to rebut that presumption.

The Adjudication Officer referred to the case of Donnellan -v- The Minister for Justice 2008 IEHC 467, which held that the retirement age of 60 years for an Assistant Garda Commissioner was objectively justified. In that case it was stated:

"*National measures relating to compulsory retirement ages are not excluded from consideration under the framework directive. Any discrimination with regard to age, must as put by that directive, serve a legitimate aim or purpose, and the mean taken to achieve that purpose must be appropriate and should go no further than is necessary i.e. they should be proportionate".*

In this case the Adjudication Officer held in favour of the employee and awarded compensation.

One of the issues that often arises is to which Act a claim for dismissal on the age grounds should be brought. Cases can be brought under either the Unfair Dismissal legislation or the Employment Equality legislation but the test in an Unfair Dismissal case is significantly different than that in an Equality claim and therefore normally these cases will be taken under the Employment Equality Acts.

MINIMUM NOTICE PAYMENTS

This issue arose in the case of NHC Construction Limited and Shane Matthews MND 227.

The Labour Court in this case helpfully set out the applicable law and also dealt with the issue of continuity of service.

The Labour Court confirmed that if an employee is absent from their employment for more than 26 weeks between consecutive periods because of a lay-off, sickness or injury, or by agreement with the employer, then such periods shall count as a period of service.

In this particular case the issue related to the payment of Minimum Notice. The weekly pay of the employee was €960 per week when the employee was made redundant. There was an issue as to whether the entitlement under the Minimum Notice and Terms of Employment Acts 1973 to 2005, was subject to the restriction in the Redundancy Payment legislation. The Labour Court has confirmed that the actual pay is the pay to be used for reckoning entitlements in relation to Minimum Notice, even where the €600 per week maximum applies in the case of a redundancy payment.

SEA FISHING INDUSTRY

An interesting decision has issued from the Labour Court under reference DWT 2222. The case involved Galloping Trawlers Ltd and Ahmed Elganagy.

The issue related to the jurisdiction of the Workplace Relations Commission and therefore on appeal, the Labour Court, to hearing claims under the Organisation of Working Time Act for those involved in the fishing industry.

The Court pointed out that the employee was subject to the provisions of Statutory Instrument No. 709 of 2003 being the Regulations on the European Communities (Worker on Board Sea Going Fishing Vessels) Organisation of Working Time (Regulations 2003). This Statutory Instrument transposed inter-domestic law of the provisions of Directive 2000/34 EC and was governed by the standard form of contact issued pursuant to the terms of the scheme of employment for Non-EEA crew.

Before the Workplace Relations Commission the Adjudication Officer can set out the decision for declining jurisdiction on the basis of Section 3(2)(a) of the Organisation of Working Time Act, which exempts a person engaged in sea fishing from Part II of the Act. This is the Minimum Rest Periods and other matters relating to working time and that Statutory Instrument No. 709/2003 sets out how the entitlements should apply. The Court set out that the question of dis-applying domestic legislation does not arise in this particular case and that the Court was a creature of Statute and cannot assume a jurisdiction which has not been conferred on it, either in primary legislation which would be the 1997 Act, or by Statutory Instrument No. 709 of 2003 or Statutory Instrument No. 672 of 2019. The Court therefore declined jurisdiction.

The effect of this decision is that those involved in the sea fishing industry have no claim to the Workplace Relations Commission for any breach under the Organisation of Working Time Act as regards Part II of that legislation. What the Minister did in relation to matters is to put in place, where there is a breach, effectively a claim of a criminal nature, but there is no complaint of a civil nature. These provisions were put in place by the Minister for Transport.

REST BREAKS

This issue arose in the case of Jennifer Duffy and Camphill Communities of Ireland, ADJ-00033463.

The Adjudication Officer referred to Section 12 of the Organisation of Working Time Act, being the section dealing with rest breaks during the day. The respondent had relied on Section 6 of the Act, being the

exemption. The Adjudication Officer then referred to the fact that the Regulations provide for compensatory rest breaks and refer to the duty of an employer in respect of the Health & Safety of the employee. The Adjudication Officer held that the respondent's organisation could be construed as similar to that of a hospital. The Adjudication Officer pointed out that the complainant worked a twelve-hour shift without a break. The Adjudication Officer stated that the taking of her meals with residents could not be regarded as a break given that the complainant had a supervisory role of working during this period. The Adjudication Officer pointed out that the respondent submitted that the exemption applied and that the complainant was provided with food and was paid for her meal time as objective justification for not providing breaks. The Adjudication Officer pointed out that in a case where the Exemption Order under Section 6 applied, the Act states in Section 6(3)(a) and (b):

"that paying the employee or providing other material benefits cannot be used as an objective justification for not providing breaks".

The Adjudication Officer held that given that the respondent made no provision to provide a break and required the complainant to work twelve hour shifts without a break that the Adjudication Officer considered this to be a serious breach of the Act. In this case compensation of five weeks was given in an amount of €3,000.

PENALISATION UNDER THE TERMS OF EMPLOYMENT (INFORMATION) ACT, 1994

This issue arose in the case of Thomas Moore and Skyframe Façades Ltd (In Liquidation) ADJ-00031652.

The provisions of Section 6(c)(i) of the Act includes provision of compensation. The Adjudication Officer pointed out that:

"*firstly, the complainant will have to prove that they sought to invoke their rights under the Act and secondly, the complainant will have to demonstrate the unfair treatment as envisaged by Section 6(c) and finally, the complainant will have to demonstrate a causal link between the invocation of his rights and the unfair treatment suffered"*

The Adjudicator Officer referred to the case of Toni & Guy Blackrock Ltd ELR 21, and the Judgment of the Labour Court. In this case the Adjudicator Officer awarded compensation for not having received a Contract of Employment, of four weeks, along with a further four weeks for the penalisation.

COVID-19 LAY-OFF PAYMENT SCHEME

This has recently been introduced. It covers those who were made redundant from the 13th March 2020 or who are made redundant before the 31st January 2025 and have lost the opportunity to build reckonable service due to temporary lay-off caused by Covid-19 restrictions from the 13th March 2020 to the 31st January 2022.

This means that those who were on lay-off in the 13th March 2020 to 31st January 2022 will still retain their rights if they are made redundant before the 31st January 2025. In the event of an employee who is made redundant after the 31st January 2025, who was on temporary lay-off in the relevant period from March 2020 to January 2022, they will lose the reckonable service for that period of time.

To qualify an employee must have 104 weeks continuous employment. It must be fully insurable under the Social Welfare Acts, the job must no longer exist, and the employee must be over the age of 16 years. The employee will have to show or prove they were temporarily laid off due to Covid-19 restrictions during some or all of the period from 13th March 2020 to 31st January 2022.

Applications should be made by employers who can apply on line at welfarepartners.ie

If the employer fails to apply for the payment, then the employee can contact the Redundancy & Insolvency Unit. The Redundancy & Insolvency Unit is based at Gandon House, Amiens Street, Dublin 1, D01 A361, and their email is redundancypayments@welfare.ie and insolvencypayments@welfare.ie

CONSUMER PROTECTION ACT – PENALISATION

In the case of FRS Business Services and Mullarney CPD 221, the Labour Court confirmed that the Court's jurisdiction under the Workplace Relations Act, 2015 in respect of that Act, is confined narrowly to the protection from penalisation by their employers of employees who make communication to the agency.

SUBMITTING CLAIMS TOO EARLY

This issue arose in the case of AA Euro Recruitment Ireland Ltd and Padraig Cotter, UDD 2228.

In this case the Court addressed the issue as to whether the complaint was submitted outside the time limits.

The Court pointed out that it drew both parties attention to the case of Alan Brady -v- Employment Appeals Tribunal 2015 26 ELR1 but that neither party made a Submission in respect of same.

The Court pointed out that it was not disputed that the complaint was lodged with the WRC on the 3rd December 2019, being three days before the complainant by his own evidence to the Court stated was the date of his dismissal.

The Court pointed out that Section 8(2)(a) of the Act states that a claim for redress should be initiated:

"*within a period of 6 months beginning on the date of the relevant dismissal*".

The Court pointed out that they found that the dismissal occurred on the 6th December 2019. The Court pointed out that unlike the Brady case, they cited that the complainant did not submit to the Court that the complaint was made during the notice period. It was pointed out that it was not disputed that the complaint was issued two weeks into a temporary lay-off which was provided for in the contract. The Court determined that the complaint was not submitted within the Statutory time period.

The issue of when a dismissal takes place is often one that can be uncertain. Is it the date of the dismissal? Is it the date that the notice period would have collapsed?

To avoid any difficulties, it is as well to cover off all instances. If an individual is dismissed for example has a notice period of six months, then to ensure that the claims are in, in time, a complaint can issue after the date of dismissal. Subsequently, a claim can be lodged when the full notice period would have expired. The WRC can be requested to amalgamate the claims. Then there is no issue that the claim is in time. The reason for saying this, is that at times there are issues as to whether the dismissal was effective as on the date of the dismissal or at the end of the notice period. This argument regularly arises when the employee is paid in lieu of notice.

Our understanding of matters is that where an employee requests a notice period be paid to them, then in those circumstances the date of dismissal can well be the actual date. Where they do not request the notice payment, but it is still paid to them, there is an argument that the dismissal does not effectively take place until after the notice period has expired.

To avoid the type of problems which arose in this case it is as well to cover both off by issuing two claims and requesting that the claims are then amalgamated together.

ISSUING PROCEEDINGS WHEN PLAINTIFF DOES NOT HAVE ALL PROOFS

An issue arose in a case of Cabot Financial (Ireland) Ltd -v- Kearney 2022 IHC 247, where the Court awarded the cost of a Summary Judgment Motion to the Defendant in circumstances where it was:

"*manifestly unreasonable of the Plaintiff to issue a Summary Summons which it could not adequately specially indorse*"

In paragraph 44 of the Judgment it states:

"*what is clear that during all the time the Defendant was obliged – obliged by the Plaintiff – to attend to these proceedings seeking Summary Judgment and incur the cost, in time, money and stress of doing so, the Plaintiff was, as to pleadings and proofs, not entitled to Summary*

Judgment and knew it. For all I know it may have believed when issuing the Summary Summons that it was likely to acquire the necessary proofs. But even if that is so, the Plaintiff took the risk of their non-acquisition and I see no reason why it should not bear the costs of the eventuation of the risk it knowingly took".

This case is a reminder of the importance of making sure that when seeking judgment, you have the necessary proofs in order.

NON-RECOVERY OF SICK PAY IN PERSONAL INJURY CASES

This issue arose in the High Court of Declan Hynes and Kilkenny County Council 2022 IHC 227 being a judgment of Mr. Justice Simons delivered on the 27th April 2022.

The issue which the judgment addressed is that of how Sick Pay, paid by an employer, should be treated.

At paragraph 3, of the judgement it states:

"the extent of the loss of earnings, will of course, depend on whether the injured party is entitled to Sick Pay under the terms and conditions of employment. The actual loss suffered will be the difference, if any, between (i) the amount of earnings the injured party would have received if they had been able to work and;

(ii) the amount of Sick Pay received.

Where as in the present case, generous provision is made for Sick Pay, in the relevant Contract of Employment, this has the potential to reduce, by a significant sum, the amount of damages which the respondent to the Personal Injury action is required to pay".

At paragraph 7, after reviewing the law on this matter the judgement states:

"it follows therefore that in calculating a claim for Loss of Earnings, it would be appropriate to deduct any sum paid to the injured party pursuant to a contractual right to Sick Pay. The actual loss suffered by the injured party is the shortfall, if any, between the amount received by way of Sick Pay and the amount to which the injured party would be expected to earn but for his inability to work".

This is a significant judgment particularly as regards those involved in drafting Contracts of Employment.

The judgment clearly sets out that the loss of earnings where there is a provision for Sick Pay, will be discounted as part of a Loss of Earnings claim. It would therefore appear to us that when drafting Contracts of Employment, it is useful to include a provision that in the event that an individual employee suffers an injury due to the fault of a third party that in those circumstances any payment, paid to the employee, will be treated as a loan which is recoverable. It does mean that where there is a generous Sick Pay policy that it would be advisable to amend such contracts to specify that in those circumstances, where an injury is caused by a third party, that any payment shall be treated as a loan which the employer will be obliged to seek to recover as part of any proceedings.

Of course, this will in reality not be applicable to employers who are paying a limited amount of Sick Pay. It would be more relevant to employers who may be paying a substantial amount of Sick Pay.

In the case which we have referred to over €40,000 was paid by way of Sick Pay. For those involved in Personal Injury litigation this is equally an important judgment and it is of particular relevance to Employment Law Solicitors who are involved in drafting Contracts of Employment where there would be substantial sick leave benefits payable to employees.

THE PROTECTED DISCLOSURES (AMENDMENT) BILL 2022

The Bill will give key amendments to enhance the strength of the 2014 Act.

The amendments will include:

Workers
The definition of worker will be extended to cover a new cohort of individuals to include

- Volunteers
- Shareholders
- Job Applicants
- Part Time Interns
- Board Members

Burden of Proof
The burden of proof will be reversed and now it will fall on the employer to provide that any alleged act of Penalisation did not occur due to the fact an individual made a Protected Disclosure.

Office of the Protected Disclosures Commissioner
A Protected Disclosures Office will be established. This will be of assistance in that one of the key functions of the office will be to assist in determining who the appropriate body is to make a disclosure to, where it is unclear.

Extension of Obligations
Private Sector organisation with 50 or more employees are obliged to establish formal channels and procedures for their employees to make Protected Disclosures. Public Sector organisations will be unaffected as they were already obliged to have procedures in place, regardless of their size, stemming from the 2014 Act.
There will be strict timeframes put in place to ensure Protected Disclosures are dealt with without undue delay by prescribed persons.

The obligation under the Act will include:

- Acknowledgement of receipt of a Protected Disclosure within 7 days

- In addition, to provide feedback to the reporting person on the actions taken or envisioned will be taken, as a follow up within 3 months.

PERSONAL INJURY AND AIRLINE INCIDENTS

Introduction
If you have been injured during air travel you may be able to bring a claim against the airline involved. Accidents on airlines are covered by the Montreal Convention (1999).

What to do when injured on a flight
- Report the accident to the cabin crew immediately – keep a note of their name
- Seek medical assistance as soon as possible
- Record the accident in writing by sending an email to the airline
- Keep your boarding card
- Take a note of your flight number

Making an aviation claim and The Montreal Convention
Under the Montreal Convention, as the injured party, you are entitled to bring proceedings in either the country where you live or the country you were flying to.
Article 17 of the Montreal Convention states that the airline is liable for damage sustained in the case of death or personal injury of a passenger provided that the accident took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The airline will accept liability for the injuries sustained, up to approximately €130,000. So long as your claim for compensation does not exceed the stated amount, there will be no need to prove that the particular airline was negligent and you are automatically entitled to compensation.

If your claim against the airline exceeds the sum of €130,000 (approx.) you will have to prove that the airline was at fault.

Aviation claims cover the process of getting on a flight, the duration of the flight and getting off a flight. The definition of getting on a flight and getting off a flight is one that has been the subject of quite a number of case law. In general, the rule of thumb is that if you have passed through security then you are determined to be getting on a flight. Likewise, at the point where you are coming off the plane until you actually get out to the point where the general public is enabled to have access within the airport you are deemed to be getting off a flight.

Accidents which take place on an airplane fall within the provisions of Section 56 of the Civil Law Miscellaneous Provisions Act 2011, specifically the exclusions in relation to claims covered by the Montreal Convention, and therefore fall outside the remit of the Personal Injury Assessment Board (PIAB).

Psychological injuries under the Montreal Convention
It has been established that purely psychologic injury is not in itself sufficient for a claim to recover under the convention. In the English case of Morris -v- KLM (2002) UKHL7, the Court of Appeal dismissed the Plaintiff's claim on this basis. In that case, the Plaintiff who was a 15-year-old girl, was sexually assaulted by a male passenger sitting next to her. She claimed that she suffered clinical depression as a result. She did not assert that there had been any physical injuries arising or connected with her depression. The Court of Appeal dismissed her appeal on the basis that she had sustained a mental injury only.

The Irish courts have also taken this view in the Circuit Court case of Geraldine Howe -v- City Flyer Express Limited. In that case, the Plaintiff claimed to have suffered nervous shock and post-traumatic stress disorder as a result of one of the engines on the aircraft catching fire. While the Judge in this case acknowledged the Plaintiff suffered a personal injury, he held that she cannot recover damages under Article 17 of the Convention because her injury was purely psychological in nature.