Welcome to the September issue of Keeping in Touch

In the Workplace Relations Commission we now have the position that cases have been heard in public and as a result of the Supreme Court decision it will now be the issue of examination and cross-examination on oath.

This is a change. However, previously witnesses would have been called and they would have been cross-examined. Now this will happen on oath. In the Labour Court it was always the position that matters were given on oath.

However, one issue which is slipping through the cracks is that the Workplace Relations Act 2015 does provide for documentation being provided. For example, working time records or medical records. In employment equality cases dealing with disability matters or equal status claims traditionally these cases were taken where any medical evidence would have been produced by way of medical certificate.

We are now into the situation that because in the Workplace Relations Commission and by extension effectively the Labour Court any such documentation including medical evidence will have to be given on oath and be subject to cross examination if it is being challenged.

We then have the issue in relation to possibly cases relating to a request to remote work that issues such as risk assessment documents, safety and health assessments being done by a third party would all be matters where actual physical evidence will have to be provided by a witness in person.

This is going to create significant additional costs.

One issue which is likely then to arise in relation to claims in the Workplace Relations Commission is the issue of legal aid. Equally the issue of costs is going to arise more often. At the present time neither the Workplace Relations Commission or the Labour Court award costs. However, when the case of Von Colson and Kamann is looked at that provides that any compensation is there not only to cover the economic cost of the person bringing a claim.

The issue which is going to arise and probably will arise by way of a Judicial Review, at some stage, to the High Court is going to be the issue where because of the requirements for evidence, witnesses and increasingly the issue of the production of documentation that issues relating to the economic cost of an employee, in particular, bringing a claim will need to be addressed at some stage. In addition, both the Workplace Relations Commission and the Labour Court are seeking submissions in advance of hearings. This includes not only submissions on the facts but also submissions on the law and the relevant case law being produced.

Previous decisions of the Supreme Court have held that the process in the Workplace Relations Commission is an inquisitorial process. The fact that evidence now has to be given on oath and subject to cross examination has not changed that determination by the Supreme Court.

The issue which is then going to come up is whether it is actually necessary for a party bringing a claim, or defending a claim to actually have to produce the relevant case law or whether they can simply set out what their understanding of the law is and because it is an inquisitorial process, particularly in the Workplace Relations Commission that there is no requirement to produce same but that it is actually an obligation on the Adjudication Officer to ascertain what the relevant case law is.

The recent decision of the Supreme Court was welcomed by many. The full implications of that as to how the Workplace Relations Commission and the Labour Court is going to operate going forward is going to require decisions on that being issued by both the Workplace Relations Commission and the Labour Court and it is probable at some stage the issue as to the processes within both will end up back in the High Court and ultimately possibly in the Supreme Court as to how they operate and the issue of costs. The issue of costs itself may ultimately end up in the CJEU. The reason for this is that a Tribunal in Ireland or the Court is entitled to set its own procedures. However, when the case of Von Colson and Kamann is looked at the issue then is whether European Law in relation to claims under any European piece of legislation will then dictate whether or not the issue of the actual cost of an employee bringing a claim will have to be addressed by both the Workplace Relations Commission and the Labour Court.

You might wonder why we have not mentioned the issue of employers. Of course, employers are going to have substantial costs. The difficulty for employers is that there is no method for them to recover costs in any circumstance.

When the Employment Appeals Tribunal was first set up and later the extension of cases going to the Labour Relations Commission the idea was that they would be lawyer free zones and would be non-legalistic. Now we have a situation in the Workplace Relations Commission and in the Labour Court where matters have become legalistic. That is not the fault of either the Workplace Relations Commission nor the Labour Court. It is the way that matters have developed outside their control.

We are into a period of change and it is likely that there is going to be significant challenges. One of the issues for employers going forward, in particular, is that employees will be entitled to insist on virtually every single piece of paper, or document which an employer wishes to produce to be proved on oath. Of course, the same right will apply to the employer as regards the claim by the employee. This is simply going to significantly increase costs and at some stage the issue of costs in the Workplace Relations Commission and the Labour Court is going to have to be addressed.

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Out and About in August 2021

On August 7 Richard was interviewed by Paul O'Donoghue of Newstalk FM on the issue of returning to the workplace.

On 7 August Richard was quoted in an article in the Irish Independent on *"can bosses check whether an employee has been vaccinated".*

On 10 August Lawyered Law put together a piece setting out our recent posts on returning to the workplace.

On August 12 Richard was quoted in the Irish Times on the issue of employees who work from home could lose money.

On August 12 Richard was also quoted in the Irish Daily Mail on the heading *"Tsunami of legal issues"* relating to staff being asked to go back to work and the issue of the GDPR arising out of questions concerning vaccination.

On August 13 Richard was quoted in the Irish Independent and Breaking News in relation to a case where an employee obtained an award of €10,000 compensation for being dismissed in a remote working request which was refused.

On August 20 Richard was interviewed on the Niall Boylan Show on Classic Hits FM relating to the legal issues which are likely to arise in relation to the issues around remote working and requests for same.

On 25 August Richard was interviewed on Lunchtime Live by Andrea Gilligan around issues concerning asking for vaccination certificates.

On August 25 Newstalk FM produced an article relating to the issue of returning to the workplace and quoted Richard on the issue that the *"Government return to work protocol a complete mess"*

On 30 August Richard was on RTE Drivetime to discuss the issues around returning to offices.

Gender Pay Gap Information Act 2021

The definition of a gender pay gap is the percentage difference between the average gross hourly earning for men and women. The current pay gap in Ireland is around 14.4%.

The Act amends the Employment Equality Act 1998 by inserting a new Section 20 A.

The Act provides for certain information to be published being:

1. The difference between the mean and median hourly remuneration and bonus remuneration of full and part time employees of a male gender and employees of a female gender along with the percentage of each paid a bonus remuneration and also the percentage of each received benefits in kind.

Employers will be required to publish the reasons for any differences. Section 20 A (9) provides that this information may be required in respect of temporary employees.

The Act will apply to employers who:

- Employ more than 250 immediately once the reporting is commenced

- Employing less than 250 but 150 or more from 2 years after the anniversary of the regulations
- Employing less than 150 3 years after the anniversary of the regulations

The regulations shall not apply to employers having less than 50 employees.

Employees will be entitled to bring a claim to the WRC which it upheld will require the employer to take the specific action necessary to comply with the reporting.

This will place a significant requirement on larger employers going forward and now is the time to start planning for this.

Unfair Dismissal – Reinstatement

This issue arose in the case of a marketing executive and a hotel ADJ-00026682. The issue of reinstatement in what was a purported redundancy is unusual but is allowed. The reason for this is that all of the claims are taken under the Unfair Dismissal legislation.

The complainant in this case through their representative referred to the case of Bennett and Bunzi Ireland UD2409/2009 where counsel for the complainant in that case pointed out to a confirmed Unfair Dismissal where failure to return the complainant to a formal position still in existence was held to be unreasonable by the EAT.

The Adjudication Officer in this case referred to the provisions of Section 6 (3) of the legislation. The Adjudication Officer pointed out that a redundancy is based on impersonality and change and referred to the case of St. Ledger -v- Frontline Distributors Ireland Limited.

The Adjudication Officer quoted the case of JVC Europe Limited -v- Panisi where Mr Justice Charleton in the High Court stated:

"Redundancy cannot be a cloak for weeding out the less competent"

The Adjudication Officer stated that the respondent has recourse to redundancy as an accelerated financial management practice without

a corresponding due regard for the balancing rights of the complainant to be part of a genuine redundancy underscored with fair selection criteria amidst a reasonable management action Boucher -v-Irish Productivity Centre UD8821005/1992.

In this case reinstatement was awarded with a direction that the redundancy payment be repaid.

Setting Compensation in Unfair Dismissal Cases

This arose in case ADJ-00028651. The Adjudication Officer identified that the maximum compensation would be approximately €40,000.

The Adjudication Officer considered that the dismissal lay at the more serious level of gravity in that it was arbitrary, retaliation resulting in respect of which no fault can be attributed to the complainant and was devoid of any fair procedures. The Adjudication Officer pointed to Section 7 (2) (c) of the Act which requires an Adjudicator to take account of

"*The measures (if any) adopted by the employee or, as the case may be, his failure to adopt measures, to mitigate the loss of aforesaid"*

The Adjudication Officer pointed out that the case law in this matter whilst both the Labour Court and the WRC has been explicit on the obligation that falls on a complainant to actively seek employment.

In this case an award of €15,000 was made. It highlights the importance of an employee being seen to actively mitigate their loss.

Unfair Dismissal and Fair Procedures

This issue arose in case ADJ-00028840 being a case of Ogbodu and OSC One Complete Solutions Limited. The Adjudication Officer in this case pointed to the case of Barry -v- Precision Software Limited (UD624/2005) where the Tribunal said:

"In determining whether the dismissal was unfair or not, Section 6 (6) of the Unfair Dismissal Act 1977 provides that it will be for the employer to

ensure that there were substantial grounds justifying the dismissal… it is not for the Tribunal to intrude into the respondent's managerial decision. The Tribunal has to look at what a reasonable employer would do in the circumstances. Neither is it for the Tribunal to consider what sanctions it would impose. The Tribunals function is to decide whether the employer's reaction and sanction came within the range of responses, which a reasonable employer might make."

The Adjudication Officer in this case said that they were satisfied that the manner in which the respondent conducted the investigation, disciplinary hearing and appeal hearing fully complied with the respondents disciplinary and grievance procedures and at all times was conducted with fair procedures and the principles of natural justice. On that basis the case was dismissed.

It is one of these issues which regularly comes up in cases that employees particularly do not always understand that in Unfair Dismissal cases it is more about procedures than anything else and the issue of right and wrong are only relevant in cases where there is an issue of a Tribunal determining that no reasonable employer in those circumstances could have acted as the employer did in the particular case.

Unfair Dismissal – Fair Procedures

This issue arose again in case ADJ-00026532 being a case of Elaine McDonald and Brickmore Construction Limited.

The Adjudication Officer pointed out that there was no dispute that the stated reason for dismissal at the time it took place was redundancy.

The Adjudication Officer pointed out that the WRC and the Labour Court have consistently held that it is imperative that the employer in a dismissal case must not only show that there were substantial grounds justifying the dismissal but also that fair and proper procedures were followed before the dismissal took place. It follows the Adjudication Officer pointed out that before a decision made to dismiss an employee an employer should first tell the employee of the aspects in which he or she is failing to do the job adequately, warn the employee of the possibility of dismissal on this ground and give the employee an

opportunity to improve their performance. The Adjudication Officer held that the respondent had conceded at the hearing that he had not followed fair procedures in effecting the dismissal. The Adjudication Officer pointed out that the it appears from the submission of the parties that the complainant did not refuse to comply with the direction however it was not disputed whether it was due to unfamiliarity with the new system, unsatisfactory time management, workload or other reasons that the complainant did not furnish the account which the required records that had been requested. The Adjudication Officer found that the procedures employed by the respondent or rather the lack thereof was a serious oversight.

Again, this is a case which raised the issue of fair procedures and for some reason this issue of fair procedures consistently comes up in unfair dismissal cases. An employer who fails to follow fair procedures runs a significant risk and in those circumstance an award will be made, as happened in this case.

A Continuum in Employment

This issue arose in case ADJ-00020527. The Adjudication Officer referred to the case of Hurley –v- Co. Cork VEC EDA1124 where the Labour Court discussed the application of Section 77 (6) (a) when they stated;

"*Under Section 77 subsection 6 (a) an Act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which had a clear and adverse effect on the complainant (Barclay Bank plc – Kapur 1989 ILRM387). This subsection would apply, where, for example, an employer pursues a policy or practice of not affording certain benefits to employees who brought equality claims. In such cases the time limit will only run from the time that the policy or practice is discontinued…"*

The Adjudication Officer referred to the case of Arthur –v- London Eastern Railway Limited 2007 IRLR58 where Mummery J held that to consider a complaint of an act of part of a continuum, there must be an act within the statutory time limit permitted where he stated;

"*There must be an act (or failure) within the three month period, but the complaint is not confined to that act (or failure) the last act (or failure) within the three month period may be treated as part of a series of similar acts (or failures) occurring outside that period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time…"*

Redundancy – lay off and counter notice

This issue arose in ADJ-00027518 in a case of Marcel Miklos and MHL Facilities Services Limited.

The Adjudication Officer pointed out that an RP9 Form from the complainant had been received but only page one of the form was completed and that it was not in the statutory form as to be determined by the Labour Court in MCT Outsourcing Limited -v- Con O'Brien RPD1915. The Adjudication Officer pointed out it was also noted that the respondent does not appear to have been prejudiced by the failure of the complainant to fully complete the form. The Adjudication Officer pointed out that Section 13 of the Redundancy Payment Act sets out the right of an employer to give a counter notice and set out the legislation in this regard. The Adjudication Officer was satisfied that the respondent attempted to give counter notice of the claim to the respondent. The text message provided for a minimum of four months work but on the basis of effectively three shifts per week of effectively 24 hours work per week.

The Adjudication Officer referred to the case of Leinster Cleaning Services -v- Arunis Muningus RPD199 where the Labour Court set out that

"An employer who seeks to defeat an employee's well founded claim for redundancy in a lay off situation must take such steps as will permit the employee to form a reasonable expectation that not later than four weeks after the date of the employers counter notice the employee would enter upon a period of employment of not less than 13 weeks during which he will not be laid off of kept on short time for any week"

The Adjudication Officer pointed out that the notice of over 13 weeks worked did not provide assurance that the employee would not be laid

off or kept on short time for any week. On that basis the redundancy payment was awarded.

This is a useful case that employers need to be aware of which is effectively that when giving a counter notice it is important to clearly set out in any counter notice that there will be no question of the employee being placed on lay off. This can be done very easily where the RP9 form is used. Using any other form of communication is allowed but it is important to make sure that the statutory provisions are fully complied with.

Unfair Dismissal – Redundancy and the obligation on an employer to look at alternatives to redundancy

This issue arose in ADJ-00031669 being a case of Forde and ONC Freight Limited trading as Lynx Transport. The Adjudication Officer in this case set out the legislation in great detail. The Adjudication Officer quoted the case of Panisi -v- JBC Europe Limited 2012 ELR70 where Mr Justice Charleton held:

"It may be prudent as a mark of a genuine redundancy, that alternatives to letting an employee go should be examined. Similarly, a fair selection process may indicate an honest approach to redundancy by an employer."

The case of Component Distributors CD Ireland Limited and Byrnes UDD1854 the Court stated:

"The Court accepts that the respondent was entitled to restructure the business and reduce its 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 this regard is not unfeathered. The right of the complainant to retain her employment must be taken into consideration. That necessarily obliged the respondent to look at all available options by which this could be achieved"

The Adjudication Officer also referred to the redundancy chapter by Terence McCrann in Murphy & Regan Employment Law where it was 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 selections must be reasonably defined, and the selection criteria employed by the employer must be applied to all employees in similar employment"

In the case of Gillian Free -v- Oxigen Environmental UDD206/2011 the Adjudication Officer noted that the EAT stated:

"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 grievance procedure in relation to the selection for redundancy… then the employer must act fairly and reasonably"

In this case compensation of €7,200 was awarded.

Redundancy and Unfair Dismissal

This issue arose in ADJ-00032094. The Adjudication Officer in this case referred to the case of Mulligan -v- J2 Global Ireland Limited UD993/2009 where the EAT stated

"In cases of redundancy, the best practice is to carry out a genuine consultation process prior to reaching a decision such as 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"

The Adjudication Officer also referred to the High Court case of JBC Europe Limited -v- Panasi IEHC279 2011 where Mr Justice Charleton stated:

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

This case is one where compensation was awarded. It highlights the importance of employers putting in place a consultation process and looking to seek to see are there alternatives to making the employee redundant.

Redundancy and Dismissal

This issue arose in the case of Tanneron Limited and Gerard Conolin UDD2151.

The Labour Court in this case stated;

"*The dismissal of an employee is deemed not to be unfair if it results wholly or mainly from redundancy. The burden of proof to establish that a dismissal was due wholly or mainly to redundancy rests on the employer who must also justify the selection process*".

The Court pointed out that the first issue that the Court was to determine was if there was a true redundancy. The Labour Court pointed out that Mr. Justice Charleton in JVC Europe –v- Panisi 2012 ELR70 was a case which was instrumental in identifying what is required to establish that a true redundancy exists and the situation is not as the learned Judge put it an attempt to use redundancy as a cloak to weed out under performing employees.

The Court pointed out that it was struck by the evidence of Mr. Melia regarding the respondent's finances. The Court pointed out that the complainant then argues that the respondent is obliged to consider alternatives to redundancy. The Court pointed out that it is correct as noted in Mulcahy –v- Kelly 1993 ELR35 that;

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

The Labour Court pointed out that a genuine redundancy offers an employer protection against claims under the Unfair Dismissal Act. The burden of proof rests with the employer to show that alternatives to redundancy were considered and that there are good reasons why any such alternatives were not chosen. The Court pointed out that

failure to meet this burden of proof leads to the possibility that employees may have been dismissed unfairly contrary to the Unfair Dismissals Act. In this case also the complainants cited the case of Grenet –v- Electronic Arts Ireland Limited as a basis for contending that the person who made the employee redundant was not legally entitled to make the decision as that person was not an employee of the respondent. The Court pointed out that there was a crucial difference between that case and the particular case here as in that previous case the decision maker was an employee of a parent company who relied solely on the relationship between his company and the subsidiary as the basis for the alleged legal authority to make the decision regarding an employee of the subsidiary. The Court pointed out that in the absence of evidence that the board of the subsidiary company, the actual employer in this case, had given authority to the decision maker, the Court noted that it had no legal authority in respect of the relevant employment.

In this case the Court pointed out that no evidence was produced to the Court to contradict the fact that Mr. Reynolds at all times acted as chief executive.

The Court pointed out that the most important issue raised by the complainant is whether the selection criteria was fair and whether being based of performance they were as identified in Panisi simply a cloak used to weed out a perceived underperformer. The respondent referred the Court to the case of Mary Highland –v- Templeville Developments Limited UD1515 2019 that criteria for redundancy based on performance can be valid provided they are impersonal and objective. The Court pointed out that the task for the Court was to determine if the criteria met these requirements or if they were determined in such a way as to target an individual and then to be used as a cloak in making this determination.

The Labour Court pointed out that notwithstanding the Highland case the Court has to apply extra scrutiny to criteria based on performance. The Court pointed out that the Court has to do so in order to be sure that the individual was not targeted for dismissal due to their performance or perceived performance in order to circumvent their rights under the Unfair Dismissal Legislation. The Court pointed out that the criteria have to be judged on their own specifics.

The Court pointed out it was not satisfied on the fact that the respondent had met the burden of proof in the case and on that basis therefore it was an unfair dismissal.

In setting compensation in this case the Court took into account that the employee had sought to his credit to mitigate his losses and also took into account that the monies paid to the complainant at the time of his dismissal in respect of the proposed redundancy.

This is an interesting case in that it sets out clearly the importance of employers following fair procedures and certainly the selection criteria. Equally the issue is going to come up and will continue to come up in the next year or so relating to selection processes and whether they are for the purposes of weeding out particular individuals. The burden on employers in such cases will be high, particularly in smaller organisations.

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.

Gross Misconduct

This issue arose in case ADJ-00027692. The Adjudication Officer pointed out that the issue of gross misconduct is not set out in the legislation as to what it actually means. The Adjudication Officer pointed out that the issue relating to this has been set out in a large number of cases being:

1. Ruffley -v- Board of Management St Anne's School 2017 IEFC33
2. Bank of Ireland -v- Reilly 2015 IELJ72
3. Bunyan -v- UDT 1982 ILRM404
4. JVC Europe Limited -v- Panisi 2011 IEHC279
5. Adesokan and Sainsburys Supermarkets Limited 2017 ICR500

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

We are simply recording the cases here for those who would like to look at these in more detail.

Fair Procedure and Gross Misconduct

This issue arose in the case of Daniel Mullen and Regatta Great Outdoors Ireland Limited. The Adjudication Officer in this case set out the test in relation to gross misconduct in stating:

"In cases where a dismissal involved gross misconduct the EAT set out the appropriate test to be applied in such circumstances."

In O'Riordan -v- Great Southern Hotels UD1469-2003 the EAT stated as follows

"In cases of gross misconduct, the function of the Tribunal is not to determine the innocence or guilt of the accused of wrongdoing. The test for the Tribunal in such cases is whether the respondent had a genuine case to believe, on reasonable grounds, arising from a fair investigation that the employee was guilty of the alleged wrongdoing."

It is useful that the Adjudication Officer in this case set out the appropriate test.

Constructive Dismissal – The Tests

This arose in case ADJ-00027901.

The Adjudication Officer pointed out as endorsed by the Labour Court in Paris Bakery & Pastry Limited -v- Mrzljak DWT1468 a formation of the legal test in respect of constructive dismissal was set out the UK Court of Appeal in Western Excavating (ECC) Limited -v- Sharp 1978 ER713 in comprising two tests referred to as the contract and the reasonableness tests. The Adjudication Officer quoted from the case where it stated

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

The reasonableness test is where 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 then referred to the case of Berber -v- Dunnes Stores 2009 ELR61 where the Supreme Court stated:

"The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with this"

The Adjudication Officer pointed out that the burden of proof is squarely on the employee. The Adjudication Officer referred to the case of Harrold -v- St Michael's House 2008 ELR where it was stated:

"There is something of a mirror image between ordinary dismissal and constructive dismissal. Just as an employer for reasons of fairness and natural justice must go through disciplinary procedures before dismissing, so too an employee should invoke the employer's grievance procedure in an effort to revoke his grievance. The duty is an imperative in employees' resignations"

In this case compensation of €1,200 was awarded.

Constructive Dismissal – the importance of using the grievance procedure

This issue arose again in case ADJ-00024206. The Adjudication Officer in this case noted that in case UD1350/2014 M. Reid -v- Oracle EMA Ltd where the EAT stated:

"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."

The Adjudication Officer also pointed to the case of Tierney UD866/1999 where it was stated:

"Central to this is that she shows that she has pursued to a reasonable extent all internal avenues of appeal without a satisfactory or reasonable outcome having being achieved"

The case of Travers -v- MBNA Ireland Limited UD7202006 it is also quoted where it was stated

"In Constructive Dismissal cases it is incumbent for a claimant to utilise all internal remedies made available to him unless good cause can be shown that the remedy or appeal process is unfair"

It helpful that the Adjudication Officer has set this matter out in such clarity.

It is unfortunate that in a number of cases involving the issue of constructive dismissal employees do not deal with the issues relating around the grievance procedure which is a condition precedent to winning an unfair dismissal claim for constructive dismissal.

Obligation on an employee to prove that the conduct was such as the complainant had no alternative but to resign in a constructive dismissal case

This issue was addressed in ADJ-00024206 where the Adjudication Officer noted the case of Berber -v- Dunnes Stores 2009 ELR61 where it was stated:

"The conduct of the employer complained of must be unreasonable and without proper cause and it's effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is as such that the employee cannot be expected to put up with it."

The Adjudication Officer pointed to the case of Mary Kirrane -v- Barncarroll Area Development Company Limited UDD1635 where the Labour Court stated:

"Where Constructive Dismissal is contended for it is for the person making the claim to establish that the behaviour of the employer was such as to leave the appellant no alternative but to terminate the employment or that the employer's behaviour has fundamentally undermined the employment relationship"

We are quoting this case as again this is an issue which consistently comes up where an employee has not used the grievance procedure or where they have not been able to show that the actions of the employer are such that they had no alternative to resign. In a Constructive Dismissal case the test will not be what the employee believes but rather what an objective view of the circumstances will dictate.

Constructive Dismissal and failure to follow internal procedures

This issue arose in case ADJ-00034206.

In this case the Adjudication Officer stressed the importance of the requirement to follow the internal grievance procedure for the employee. The Adjudication Officer referred to the case UD1350 2014 M. Reid -v- Oracle EMA Limited where the EAT stated:

"It is incumbent on any employees to utilise and exhaust all internal remedies made available to him or her unless he can show that the said remedies are fair"

The Adjudication Officer also referred to the case of Tierney -v- Ger Ireland Limited UD866/1999 where it was stated:

"Central to this is that she shows that she has pursued to a reasonable extent all internal avenues of appeal without a satisfactory or reasonable outcome having being achieved".

The Adjudication Officer also referred to the EAT case of John Travers -v- MBNA Ireland Limited UD720/2006 where it was stated:

"We find that the claimant did not exhaust the grievance procedure made available to him by the respondent and this proves fatal to the claimant's case… In constructive dismissal cases it is incumbent for a claimant to

utilise all internal remedies made available to him unless a good cause can be shown that the remedy or appeal process is unfair"

It is helpful that the Adjudication Officer has set out the law on this in detail.

It is one of the issues in relation to constructive dismissal cases that employees tend invariably to resign without having used the internal grievance procedures. This will be fatal to a claim for constructive dismissal in most cases.

Constructive Dismissal - That the employee has no alternative but to resign

This issue arose in case ADJ-00024206. The Adjudication Officer in this case referred to the case of Berber –v- Dunnes Stores 2009 ELR61 where Finnegan J stated:

"*The conduct of the employer complained of must be unreasonable and without proper cause and its effect on the employee must be judged subjectively, reasonably and sensibly in order to determine if it is as such that the employee cannot be expected to put up with it".*

The Adjudication Officer also referred to a Labour Court case of UDD1635 Mary Kirrane –v- Barncarroll Area Development Homes Limited where the Labour Court stated:

"*Where Constructive Dismissal is intended it is for the person making the claim to establish that the behaviour of the employer was such as to leave the appellant no alternative but to terminate the employment or that the employer's behaviour has fundamentally undermined the employment relationship. The person claiming constructive dismissal has an obligation to access available grievance procedures in a course of attempting to deal with whatever situation has lead to consideration of termination of the employment".*

This case is helpful in again setting out what the burden of proof is. In an ordinary Unfair Dismissal case the burden of proof is fairly on the employer. In a constructive dismissal case the burden is fairly on the employee.

Annual Leave

An interesting case arose in relation to this and to the right of an employee to claim annual leave for more than the annual leave year arose in a case of Helen O'Regan and Eventure Foods Limited Red Cherry Café ADJ-00030264.

The employee in this case challenged her annual leave entitlements for the years 2018, 2019 and 2020. The employee in this case commenced work with the respondent as a catering assistant on the 28th January 2018. Her maternity leave commenced on the 2nd March 2020. This was due to end on the 28th August 2020 at which time she was planning to take parental leave from the 30th August 2020 until the 13th September 2020. She decided that she would not be returning to work and requested her holiday pay based on her earnings for the 10th October 2020.

The Adjudication Officer referred to Section 19 of the Organisation of Working Time Act. The Adjudication Officer stated that the first question to be appressed was whether the complainant can include all her untaken annual leave for the years 2018, 2019 and 2020 in the calculation of cesser pay due when she ended her employment on the 13th September 2020. The Adjudication Officer quoted the case of Royal Liver Assurance -v- Macken 2020 4IR427 which referred to Section 27 (4) of the 1997 Act. In that case as the Adjudication Officer pointed out the High Court held that the latest date of contravention to grant leave is the last date of the leave year in question. The Adjudication Officer pointed out that in the context of that decision the period to submit a complaint in relation to the granting of annual leave is 6 months from the end of the leave year.

The Adjudication Officer then went on to consider that there are significant amounts of Court of Justice of the European Union jurisprudence in relation to the taking of annual leave as set out in case ADJ-00019188. It was pointed out that the CJEU jurisprudence has established that the right to annual leave is derived from a general principle of European law and the Charter of Fundamental Rights of the European Union. In particular Article 7 of the Working Time Directive which sets out the entitlements of paid annual leave which is

"Annual Leave

Member states shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice to the minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship has ended"

The Adjudication Officer pointed out that the CJEU has made important decisions in relation to carrying over of annual leave in particular KHSAG -v- Winifred Schulte C-241/10 which recognised that:

"Provision of national law setting out to carry over periods for annual leave not taken by the end of the reference period aims, as a rule, to give a worker who has been prevented from taking his annual leave an additional opportunity to benefit from the right at the end of the reference period or carry over period. However, the Court attached to that finding of principle the condition that a worker who has lost his rights to paid annual leave must have actually had the opportunity to exercise the rights conferred on him by that decision"

The Adjudication Officer pointed out that in that case the worker was unable to work due to serious health issues.

The Adjudication Officer pointed out that the implications of the other judgement is that the loss of annual leave is not automatic and can only ensue in circumstances where the employer can demonstrate that the worker who was put in a position to take the leave so as to exercise his or her rights to take that leave.

The Adjudication Officer pointed out that the respondent did not provide any evidence that the complainant was provided any opportunity to take paid annual leave or that he had a process or system which would provide evidence they did exercise due diligence in this matter. It was pointed out that the respondent did not provide any evidence that it had put the complainant on notice that annual leave will be forfeited on a *"use it or lose it"* basis. On that basis the Adjudication Officer awarded a sum of €2,481 which included €1,881 outstanding holiday pay.

This is an interesting decision in that the Adjudication Officer has clearly taken on board the issue that European Law effectively trumps the Irish legislation.

It will be interesting to see if a case like this goes to the Labour Court what their position in relation to this would be.

Timing of Annual Leave – Where the employer nominates certain days or times

This issue arose in case ADJ-00029053. The claim related to failure to consult with the employee concerning the taking of annual leave. A letter was sent to staff on the 29th March 2020 effectively stating that a set period of time was to be taken as annual leave. It was argued by the respondent that requiring the employee to take two weeks fully paid annual leave was more preferable than requiring the employee to take unpaid leave or placing the employee on temporary lay-off.

The Adjudication Officer referred to Section 20 of the Organisation of Working Time Act in full but the relevant Section is Section 20 (1) (b) which provides for the employer having consulted with the employees not later than one month before the day on which the annual leave is due to commence. The Adjudication Officer pointed out that the Labour Court case of Atlas Aluminium Limited -v- John Graham DWT0627 is authority for the proposition that the complainant's statutory entitlement to be consulted in relation to the taking of his annual leave was breached. In this case an award of €1,500 was made.

This is an interesting case in that a lot companies will fall foul when dictating when employees need to take their annual leave on the requirement to consult with the employee.

Holiday Pay – Should Overtime be Included

This arose in the case of Vincent Fallon and G4S Secure Solutions (IRE) Limited ADJ-00030160.

The Adjudication Officer in this case referred to the CJEU case being case C-385/17 Hein -v- Albert Holzkamm GmbH 2019 2 CLMR19 where the CJEU held that where an employee is contractually obliged to work overtime *"on a broadly regular and predictable basis"* that pay for overtime should be included in the calculation of holiday pay. In this case the Adjudication Officer found that the employees holiday pay should have been based on his normal working weekly pay of 45 hours of which 5 hours should have been paid at time and a half. The Adjudication Officer in this case did point out that the Labour Court in the case of MCM Security Limited -v- Power DWT95/2008 took a different view.

Public Holiday Rights

This issue arose in a case of *Paula Spain and Matter Private Hospital being case ADJ-00030720*. The Respondent in this case pointed to the case of *Cheshire Ireland -v- Donaghey DWT1674* where the employee in this case worked 19 hours per week but her working pattern was 4 hours on Tuesdays and 7.5 hours on Wednesdays and Thursdays. As all three Public Holidays which was the subject of her claim fell on a Monday when she was not normally rostered for work, the Labour Court found that the employer's approach of granting one fifth of her weekly hours, 3.8 hours, for each public holiday in the form of extra annual leave was compliant with the Regulations.

The Adjudication Officer in this case referred to the case of Cheshire Ireland -v- Gallagher being DWT1673 where the Adjudication Officer pointed out that the Labour Court in that case observed;

"The clear purpose of the Regulations is to ensure that during Public Holidays an employee receives no less (or no more) than he or she would have received if he or she was working during the period in question".

In this particular case the Adjudication Officer held that the manner in which the employee worked did not comply and compensation was awarded.

The Three Burdens of Proof in an Equality Case

This arose in a case of a cargo agent and an airline ADJ-00019998. In this case the Adjudication Officer dealt with the issue of the burden of proof and quoted the case of Hallinan -v- Moyvalley Resources DEC-S2008 – 25 which was a complaint taken under the Equal Status Act where the Equality Officer in that case stated that the following must be established

A) The complainant must establish that he or she is covered by the protected grounds
B) Establish which specific treatment has allegedly taken place
C) That the treatment was less favourable that was or would be afforded to a person not covered by the relevant discriminatory ground

The Adjudication Officer pointed out that in the case of Graham Anthony & Co. Limited -v- Mary Margretts EDA038 it was held that mere membership of a protected class and specific treatment:

"Is insufficient of itself to ground a complaint of discrimination. An additional element is required. The complainant must adduce other facts for which it may be inferred on the balance of probabilities that an act of discrimination has occurred"

The Adjudication Officer also pointed out that in a case of Dyflin Publications Limited -v- Ivana Spafic EDA823 the Labour Court stated:

"The Court should consider the primary facts which are relied upon by the complainant in a proper context. It also indicates that considering the burden of proof shifts the Court should consider any evidence adduced by the respondent to show that, when viewed in the proper context, the facts relied upon do not support the inference contended by the complainant."

Burden of Proof in Equality Claims

This issue arose in case ADJ-00026173 being a case of Leah Tierney and Peter Mark Hair Salons Unlimited. The Adjudication Officer in that

cases noted that the Labour Court had stated that in the case of Southern Health Board -v- Mitchell 2001 ELR201 that:

"The first requirement is that the complainant must establish facts for which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a complainant must prove, on the balance of probabilities, the primary facts on which they rely in seeking to raise the presumption of unlawful discrimination. It is only if those primary facts are established to the satisfaction of the Court, and they are regarded by the Court as being of sufficient significance to raise the presumption of discrimination, that the onus shifts to the respondent to prove that there is no infringement of the principles of equal treatment."

The Adjudication Officer also quoted the case of Valpeters -v- Melbury Developments where the Court stated that under Section 85 A that:

"This requires that the complainant must first establish facts for which discrimination may be inferred. What those facts are will vary from case to case and there is no closed category of facts which can be relied upon. All that is required is that they must give sufficient significance to raise a presumption of discrimination. However, they must be established as facts on credible evidence. Mere speculation or assertions, unsupported by evidence, cannot be elevated to a factual basis upon which an inference of discrimination can be drawn."

Burden of Proof in Equality Cases - Continuum

The case of ADJ-00019998 is an interesting one as it dealt with the issue of continuum of cases.

The respondent in this case submitted that it was not possible for the complainant to include incidents outside the six-month period as being part of a continuum. They contended that separate unconnected assertions do not amount to a continuum. They relied on the case of County Cork VEC and Hurley EDA1124 where the Labour Court noted that

"In order for an act or omission outside the time limit to be taken into account there must have been actual omissions of victimisation (or discrimination) within the time limit".

The Adjudication Officer in the case referred to the case of County Dublin VEC – Dodo EDA1327/2013 which set out that a discriminatory act must have occurred within the limitation period in order to consider acts occurring outside the statutory period.

It is interesting that the Adjudication Officer in this case dealt with the issue of continuum.

Naming a Comparator in Equality Cases

This issue arose in ADJ-00019998 where the Adjudication Officer addressed this issue. The Adjudication Officer referred to the case of *Darguiz -v- Lough Corrib Engineering limited DEC-E2009-038* where the Equality Tribunal stated;

"I have no hesitation in using a hypothetical comparator in appropriate situations such as where it is shown that the existing potential comparators are unsuitable for one reason or another. However, in the instant case there were four non-Lithuanian employees working for the respondent on the same site at any one time and no reason has been adduced by the complainant as to why they were not suitable as comparators".

The Adjudication Officer pointed out that the Complaint must establish a difference in treatment relative to a named comparator in relation to the adverse consequences of availing of medical treatment or using the mobile phone while driving a vehicle with loaded goods or loaded cargo in an incorrect manor or been prohibited from using a particular machine or vehicle to move goods. The Complaint confirmed that there were usually two non-Irish workers on the daily team of twenty cargo agents. The argument that he was afraid to name them for fear they would suffer retaliation in circumstances where they would not have to appear at the hearing is questionable. The Adjudication Officer pointed out that while the Complainant did assert that two named individuals exited unscathed from lapses in standard operating procedures he could not confirm in cross examination that the lapses were actually observed or that the cargo agents were not taken to task subsequently.

The Adjudication Officer held that the Adjudication Officer could not find that the incidents complained of within the statutory limit constituted a prima facie case of discrimination.

The issue of having comparators is extremely important. While hypothetical comparators can be used it is always the situation that if there are comparators that can be named then in those circumstances they must be.

Equal Status Act – Proof of Discrimination

This issue arose in ADJ-00019998 where the Adjudication Officer pointed to the case of Hallinan -v- Moy Valley Resources DEC-S2008-25 in relation to a complaint taken under the Equal Status Act 2000. In that case the Equality Officer held that in order to establish a prima facia case of discrimination the following must be requested

(a) The complainant must establish that he or she is covered by the protective ground.
(b) Establish the specific breach has allegedly taken place.
(c) The treatment was less favourable than was or would be afforded to a person not covered by the relevant discriminatory grounds.

The mere fact that somebody may believe that they have been treated in a discriminatory fashion is not enough particularly in cases where the same treatment would be afforded to anybody whether they have a disability or not.

Time Limit to Bring a Claim

This issue arose in ADJ-00020527 concerning the time limit in relation to an Equality case. The complainant in this case had requested that events complained of spanned a considerable period of time. The Adjudication Officer looked at the issue of the time limits. The Adjudication Officer referred to Section 77(5)(a) of the Act and also Section 77(6)(a).

The Adjudication Officer referred to the case of *Hurley -v- County Cork VEC, EDA 1124* where the Court stated;

"Under Subsection 6(a) an act will be regarded as extending over a period, and so treated as done at the end of that period, if the employer maintains and keeps in force a discriminatory regime, rule, practice, or, principle which had a clear and adverse effect on the complainant (Barclay Bank PLC -V- Kapur 1989 ILRM387). This Subsection would apply, where, for example, an employer pursues a policy or practice of not affording certain benefits to employees who brought Equality claims. In such cases the time limit will only run from the time the policy or practice is discontinued…"

The Adjudication Officer pointed out that the Labour Court pointed to authority in an English and Wales Court of Appeal of *Robertson -v- Bexley Community Centre 2003 IRLR 434*, that an act *"Occurring after the presentation of the complaint's complaint*" may not be taken into account when considering if a continuum existed.

The Adjudication Officer pointed out that the Labour Court went on to adopt the reasoning in another Court of Appeal case of *Arthur -v- London Eastern Railway Limited 2007 IRLR59* where Mummery J held that to consider a compliant of an act as part of a continuum, there must be an act within the statutory limit permitted.

"There must be an act (or failure) within the three-month period (six months in Ireland), but the complaint is not confined to that act (or failure) the last act (or failure) within the three-month period may be treated as part of a series of similar acts (or failures) occurring outside that period. If it is, a complaint about the whole series of similar acts (or failures) will be treated as in time…. it may not be possible within Section 48(4) by reference, for example to a connecting rule, practice, scheme or policy but there may be some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to rely on them"

The Adjudication Officer pointed out the case of *A Store -v- A Worker 2016 27ELR250* where the Labour Court adopted the above reasoning and found the acts complained of constituted a continuum.
It is helpful that the Adjudication Officer has set out the law in this area in such detail.

Discretionary Bonuses

This arose in the case of Sarah Barra and Genzyme Ireland Limited. ADJ-00022451.

The Adjudication Officer referred to Section 1 and Section 5 of the Payment of Wages Act 1991. The contract in question stated;

"You will be entitled to participate in a discretionary bonus scheme". The Adjudication Officer pointed out that the legal interpretation of the definitions in section 1 and 5 require reference to the High Court case of Cleary & Others –v- B&Q Ireland Limited in 2016 IEHC119 and to Labour Court precedents especially Bord Gais Energy –v- Thomas PWD1729. In the Cleary case the Adjudication Officer pointed out that Mr. Justice McDermott stated;

"If the discretion is exercised unreasonably the employer will be in breach of contract if no reasonable employer would have exercised the discretion in that way. This imposes a very high onus on an employee to claim that the discretion was unreasonably exercised (for Hedigan J in Lichters & Hass –v- Depfa Bank Plc 2012 IEHC10).

In that case Mr. Justice McDermot stated;

"However, the use of the word "discretionary" is not always determinative of whether a contractual entitlement arises under a bonus scheme. He went on to state;

"In my judgement the extent of an employer's discretion in relation to a bonus scheme is relevant to the determination of the question of whether, and, if so, to what extent the scheme has contractual content".

In the particular case Mr. Justice McDermot held;

"I am satisfied that notwithstanding the employers difficult financial circumstances in this case, it bore a contractual obligation to pay the 3% bonus accrued to each employee during the relevant 6 month period and that this was a bonus properly payable as "wages" under Section 5 (1) of the 1991 Act.

The Adjudication Officer held that supportive of the respondent case was the Labour Court decision in PWD1729 Bord Gais Energy –v- Thomas. The Adjudication Officer stated that the respondent in the Bord Gais case in support of their argument cited Sullivan –v- Department of Education 1998 9ELR217 where "payable" was defined to mean "properly payable".

The Adjudication Officer pointed out that the Labour Court decision in Bord Gais Energy –v- Thomas and other closely allied cases ruled that "being on payroll" clause is valid and that the Adjudication Officer had to defer to this precedent. To depart from the precedent the Adjudication Officer pointed out would require a high bar to differentiate between the case and the precedents. The Adjudication Officer in this case held against the employee.

The reality of matters in cases of discretionary bonus claims is that there will always be an extremely high bar for an employee to get over to be in a position to pursue a claim for a discretionary bonus.

Refusing a reasonable settlement offer made in a court case can result in a Plaintiff being penalised financially – Calderbank letters

The use of Calderbank offers are becoming and seen as an effective tool used by defendants to achieve a settlement and reduce costs.

The use of a Calderbank letter can result in a financial penalty to a Plaintiff where the offer is not accepted.

What is a Calderbank letter?

A Calderbank letter is a formal offer of settlement to the solicitor acting for the Plaintiff. To qualify as a Calderbank letter the letter must:

- Be headed "without prejudice save as to the issue of costs"
- It must contain a specific offer to the Plaintiff in settlement of the claim in respect of both general and special damages
- The defendant must also offer to pay the Plaintiff's reasonable costs and expenses on a party and party basis up to the date of acceptance of the offer

- The letter must confirm that if costs cannot be agreed between the Plaintiff and the Defendant, they will be referred to taxation
- The letter must contain the specific date before which the Plaintiff must accept the offer
- The letter must state that although the offer is made without prejudice to the issue of costs the defendant has a right to refer to the correspondence on any issue of costs which may arise and that their rights in this are reserved

What is the relevant legislation?

Section 17 of the Civil Liability and Courts Act 2004 states that a formal offer must be made during the course of proceedings. However, in the case of a Calderbank letter they will essentially exclude it from the use in personal injury claims. This was until Section 169 (1) of the Legal Services Regulation Act 2015. That Act came into effect on the 7th October 2019.

This issue of Calderbank letters is also covered in Order 99 Rule 3 of (1) of the rules of the Superior Courts.

Are there time limits?

A Calderbank letter is not one that is subject to any time limit. It can be made at any stage in the proceedings. It can even be made during the hearing of a case. So, if a defendant is out of time to make a Section 17 Offer or Notice of Tender Offer the defendant now appears that they can make an offer in writing including an all-Calderbank offer which must be taken into account by the trial Judge when considering the question of costs at the end of any proceedings.

The use of Calderbank letters has become more common and is likely to become even more so in the future.

***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.**