Introduction

Welcome to the June issue of Keeping in Touch.*

For this firm it has been a fantastic month. At the Irish Law Awards we won the Employment Law Firm of the Year Award 2018. The trophy takes pride of place on the mantelpiece in our consultation room. Richard Grogan won the Leinster (Including Dublin) Employment lawyer of the Year 2018.

This was very much a team effort. Every person in this firm played a significant role in achieving the awards. The Solicitors in the firm cannot do this on their own. Yes, we can prepare cases. We can present cases. We can do the legal research. However, a huge amount of work goes on in an employment case in the background. Having committed and dedicated support colleagues there to manage the file, manage diaries, manage meetings, ensure notifications go out in good time, ensuring submissions are delivered in good time and a myriad of other support services are absolutely imperative for the firm to be able to provide the services we do to our clients.

We are immensely proud to have won the awards. We are a specialist boutique law firm. We were up against well established and highly respected firms and individuals whom we have the highest personal and professional regard for. We greatly appreciate the kind comments and congratulations which we receive from colleagues in those firms which we truly appreciate.

The awards came due to nominations we had received not only from our clients, which we are very grateful for, but also from colleagues in others firms who nominated us. We are delighted and humbled that colleagues felt us worthy to nominate us. We believe, and we hope we are not wrong in this, that the reason colleagues nominated us was because of their dealings with us but also possibly because of the fact that we are known as a firm whom colleagues can phone to get advice from on cases. No Solicitor who has phoned this office will not receive assistance from us in helping them in any case. We have no problem giving of our time or our precedents or our experience in assisting other Solicitors.

We are very strongly of the view that Employment Law is an area where both employers and employees are best served by being represented by a Solicitor. We provide the services but there are many other excellent firms whom employers and employees can get advice from.

Finally, we would like to thank the judging panel of the Irish Law Awards for deeming us worthy to receive the awards for which we are very grateful.

We were thrilled that two of our submissions on the Employment (Miscellaneous Provisions) Bill 2017 were accepted on 17th May at the Committee Stage of the Bill. One was that Adjudication Officers can issue a witness summons. This was a serious defect in the Workplace Relations Act 2015. It is one we have been highlighting for years. The second related to Banded Hours Contracts. We argued the bands were two wide. The Minister has accepted this submission and extended the number of bands and restricted the width of the bands.

We still have serious reservations about the 2017 Bill. Hopefully some other amendments will be also accepted as the Bill progresses.

This publication is jointly written by Richard Grogan and Michelle Loughnane. Both of us are available to answer any questions you may have on the issues covered.

Index

Out and About

In the May issue of the Law Society Gazette this office was featured as part of an article designed to promote the use of the Law Society Logo for Solicitor firms. We were delighted that this office was picked to display the use by us of the Logo. Information relating to the use of the Logo can be obtained directly from the Law Society as can the relevant Logo for using on letterheads, emails and in our case also on our office blinds.

On Breakingnews.ie we were quoted in a case before the WRC where a sum of over €35,000 was awarded to our client in respect of a pregnancy related dismissal and associated cases against The Landmark Hotel Limited. This case has been appealed by the employee and by the employer.

On 8th May the office was covered in articles in the Irish Times, the Irish Independent.ie and Herald.ie relating to a case where this office acted and obtained an award for a client relating to racial discrimination. The case involved Merchants Arch Restaurant Company Ltd. We acted for the employee in this case against the employer.

The issue of visas allowing non-Irish Nationals to work in Ireland is an area where there is a considerable confusion. We were delighted to have an opportunity to be quoted in a piece by the Dublin Inquirer dealing with this complex issue.

On 10 May Richard Grogan presented a paper on "Termination of Employment" at the Law Society of Ireland/Skillnet Seminar in Carrick-on-Shannon. The paper is available to download from our website.

On 11 May the firm were winners of the Employment Law Firm of the Year and Richard Grogan received the Award as Leinster (Including Dublin) Employment Lawyer of the Year from Irish Law Awards.

On 17 May Richard Grogan of this firm was interviewed by Dr Ciara Kelly on Lunchtime Live on Newstalk FM on the issue of accidents in schools and the ban in some schools on children being allowed run.

New Practice Direction for Personal Injuries Cases arising out of Bullying and/or Harassment

On 23rd April 2018, the Courts Service posted a new practice direction for personal injuries cases arising out of bullying and/or harassment. All of these cases must now be set down for trial in the Dublin Personal Injuries List. All existing cases must now be transferred to the Dublin Personal Injuries List save for those cases already under case management in the non jury list by Mr. Justice Noonan and those cases that have already been fixed for hearing in the non jury list. Applications to transfer can be made in the non jury list on Thursdays. A certificate of readiness will not be required for these type of cases.

The practice direction is set out below for your ease of reference:

1. All actions which include a claim for damages for personal injuries arising out of an allegation of bullying and/or harassment must be set down for trial in the Dublin Personal Injuries List.

2. Such actions as have already been set down for trial in the Non Jury List must be transferred as soon as possible to the Dublin Personal Injuries List with the exception of :–

   (i) those actions under case management in the Non Jury List by Mr. Justice Noonan;

   (ii) those actions for which a date has already been fixed for hearing in the Non Jury List.

3. All applications to transfer actions to the Dublin Personal Injuries List should be made in the Non Jury List on any Thursday in term.

4. Having regard to the practice in the Dublin Personal Injuries List, whereby a certificate of readiness to proceed to trial is not required, there is no requirement to certify such cases as ready for trial.

Non-Disparaging Clauses in Termination Agreements

These are sometimes referred to as Non-Derogatory Clauses. We receive many questions in particular from employees as to why these clauses would be put in a Termination Agreement. They are standard practice. No employee should believe that the clause has been drafted with just them in mind. It is very common for employers to include a clause in any settlement agreement between the employer and the employee when the employee is leaving, particularly if they are obtaining a termination payment, that there would be nothing bad or derogatory or disparaging said about the employer, the directors of the employer or other employees of the employer.

When acting for employers their approach is very simple. They say the employee has been paid a sum of money to go away and settle the employment claims. The employees received independent legal advice. The employer's attitude is usually that they insist upon gagging the employee from moaning about the complaints that the employee had and this is an integral part of the deal for getting money as part of any settlement.

When acting for employers it is called "Managing Reputational Damage" arising from the employment dispute. That is just a fancy way of saying "Gagging Clause". It might also be called a "Non-Slagging Off Clause". These Non-Disparaging Clauses which employee representatives will refer to as gagging or non-slagging off clauses can be drafted in various different ways. Generally speaking it is that the employee will say or write nothing which is negative about the employer. This includes everything from their Facebook page to them moaning about how they were dealt with to anybody who will listen to them.
Sometimes employees will enter into these agreements without getting legal advice. You will probably be offered the opportunity to obtain legal advice. It is well worth the time of the employee doing so. It is necessary to ask some questions:

1. Does it cover negative comments about associated companies, their products or brands?

2. Does it cover negative comments about other employees and directors of the employer?

3. Does it cover written as well as verbal comments?

4. Does it include social media?

5. Does it relate to anything that has happened in the past?

Sometimes these clauses will say that the employee promises or, to use a legal terminology, warrants that before signing the agreement that the employee did not say anything derogatory about the employer or do anything in writing, by way of verbal comments or in particular on social media. This can be a dangerous clause and it is one that if anything has happened in the past the employee may well had known about it and if the employee signs they can then have a situation that the employer can come against them in respect of the termination payment as there will have been a breach of a particular clause. It is therefore very important that an employee gets legal advice.

Getting legal advice

In any termination agreement it is necessary that the employee understands every single clause and what they mean. Any good employment solicitor acting for an employer will put a clause stating that the employee has been offered the opportunity to obtain independent legal advice. They will usually provide that a sum of money will be provided to the employee to obtain the said advice. If the employee does not get that advice before signing then they are deemed to know what is in the agreement, what the effect of it is and cannot bemoan the fact that something subsequently arises against them.

Of course an employee should seek a reciprocal clause. What does that mean? It means that if the employer is looking for a non-disparaging clause that they can enforce against the employee, the employee should equally be looking for such a clause that the employee can enforce against the employer. If the employer is seeking a clause that there will be no slagging off of the employer, the company, its directors or employees, the employee can reasonably insist that they would receive a similar clause applicable to them.

It can never be 100% reciprocal. You may ask why? The reason for this is that an employer can only undertake that they will use their best endeavours not to do so. They can of course in certain cases provide that particular directors or employees will be bound by the agreement but then those particular employees need to be named. It really will only apply to more senior executives and directors. An employer reasonably cannot cover other employees lower down the scale in the company making comments that are derogatory of the employee. They can however use their best endeavours to ensure that this is not done by making sure that they do not say anything derogatory about an employee.

Where there are particular issues relating to particular managers, for example, it is very important that if you believe that a particular manager, supervisor or director was part of the difficulties that caused the employment issue to arise that they are named as part of the agreement as being covered by the non-derogatory clause.

There are some issues which will not be covered by any such non-disparaging clause. If for example an employee receives a summons to be a witness in Court then they must give honest answers to questions that are raised, even if that could be derogatory of the employer. No employer can restrict an employee from making a protected disclosure. However, if an employee is considering making a protected disclosure after a termination agreement has been put in place, it is absolutely imperative that they get advice from a specialist employment law Solicitor on the termination agreement and in respect of making the protected disclosure. If a matter is a protected disclosure but is not made absolutely in accordance with the provisions of the legislation then the employee will most definitely be in breach of the termination agreement and can themselves be sued. If it is a protected disclosure that is made exactly in accordance with the terms of the legislation then the employee will not be in breach of any termination agreement as the determination agreement cannot exclude a legal right. It would be important for the employee to get specific advice that what they are doing is actually a protected disclosure. There can be other criminal and regulatory matters. Often these will fall under the whistleblowing legislation. Sometimes however, they may not. Again, this is an issue where legal advice must always be taken.

There are always two sides to any termination agreement. The employee will feel aggrieved that they have been dismissed or effectively forced out of the organisation. The employer will often feel aggrieved that they have to pay an employee whom they wanted to get out of the organisation a substantial sum of money. Neither side is going to be happy. The employee is often going to be unhappy as to the amount they receive. The employer is going to be unhappy as to the amount they have to pay. The employee will often believe they should have got more. The employer will invariably believe that the employee should have got a lot less.

Understanding the two sides of the issue can avoid problems.

The Format of Adjudication Officers' Decisions

While at times we may be critical of particular decisions, one thing that is striking us at the present time and Adjudication Officers must be congratulated for this is that:

1. The facts of cases are being set out generally in quite lengthy detail.

2. Relevant case law is being set out by Adjudication Officers.

3. It is clear that Adjudication Officers are not simply setting out case law quoted to them by the parties but are actually taking the time to investigate the law and to put in place a decision which sets out in their view any other cases which they believe are relevant.

The process of setting these out particularly in the more complex areas of law such as Unfair Dismissal, as just one example is very useful. It allows those reviewing the decisions to have an understanding of the issues which were before the Adjudication Officer, the reasons why they reach the decision that they did and how the compensation has been arrived at.

Of course there is going to be times where we do not agree with particular decisions of an Adjudication Officer. That is why there is an appeal process. There will be times where decisions of the Labour Court will not be agreed with. That again is why there is an appeal process.

For anybody which is dealing with the appeal it is extremely useful that the basis of the decision have been set out. It is equally very useful that the relevant facts have been set out. Where a case goes on appeal to the Labour Court invariably there will be issue which have been agreed between the parties which makes it far easier and quicker for the Labour Court to deal with as there will be certain matter which will not be in dispute.

What is evident from a lot of the decisions issuing is that there is a time lag between the hearing and the decision issuing. We do not believe that this is due to the delays, normally, by Adjudication Officers. There will of course be delays in certain cases. However, it is our belief that a significant issue relating to the delay between the date of the hearing and the decision issuing is because of lack of staff in the WRC to process the decisions. We will certainly urge the Minister going forward to deal with this in a proactive way by proactive additional staff to the WRC so that decisions can issue earlier. It is important for employers and employees that decisions issue at the earliest date possible.

Who is an Employer?

The issue as who the correct employer often arises. In EDA1823 the Labour Court had to deal with this issue involving Tesco Ireland Ltd and Marek Pawlisiak. Proceedings issued against Tesco Ireland Ltd. The Respondent submitted at all material times he was engaged through a company called Noonan Group Services Ltd as the provider of managed services and not as a provider of agency personnel and that that company was not an employment agency within the meaning of the Employment Agency Act 1971 and did not hold a license under that Act. They contended that Noonan Services Group Ltd was not a

provider of agency workers within the meaning of Section 2 (5) of that Act.

The Court set out the provisions of the 1998 Act. The Court pointed out that it was very familiar with the distinction between a provider of agency personnel and a provider of managed services. The Court pointed out that neither the 1971 Act being the Employment Agency Act 1971 nor the 2012 Act applied to a business the operation of which comes within the category of a provider of managed services.

The Court held that Noonan Services Group Ltd was the employer and the therefore the employee in this case had no claim against Tesco. On that basis the claim failed.

This case is again an important reminder of ensuring that the right entity is sued.

If in doubt it now appears to be best practice to sue everybody and then work matters out at a later stage. This is particularly so when there can be an issue as to whether there is a service provider or managed services being provided.

Unfair Dismissal Cases - Right of Representation

In case ADJ-6903 three particular decisions were quoted being the case of Lyons -v- Longford Westmeath Education & Training Board IEHC272/2017.

The arguments raised against the decision in Lyons are often those in the cases of EG -v- The Society of Actuaries in Ireland IEHC392/2017 and NM -v- Limerick and Clare Education & Training Board IEHC308/2015.

There is however a significant difference between these three cases.

The Lyons case related to the disciplinary process.

The other two cases referred to the investigation process.

In an investigation process no decision can be made which can be an adverse finding against an employee. The worst that can happen in such a case is that the person undertaking the investigation will determine that the matter will proceed to a disciplinary hearing. However, the person undertaking the investigation cannot determine what penalty could be imposed.

In the WRC currently there are two schools of thought. One group of AO's are following the Lyons case. A second group are not. There is possibly a third group who are coming somewhere down in the middle but the reality of matters is that there is uncertainty particularly in the WRC as to how to apply matters. There is no blame to apportion to any AO in respect of this matter. This issue is going to have to have a definitive decision from the Labour Court on this issue.

It is very likely at some stage that the issue of the Lyons case and these other two cases as to how they impact on a disciplinary process will go back to the High Court. At this stage it is our opinion, and it is only our opinion, though a number of employment Solicitors and Barristers would agree with us, that the Lyons case is the definitive case as it relates to a disciplinary process and the principles in the other cases have limited impact in respect of a disciplinary case because of the fact that they relate to an investigation process not to a disciplinary process.

Those representing employees in the WRC will invariably point out that the other two cases relate to the investigation process. Those acting for employers may be less inclined to point this out to an AO. The lack of consistency in the WRC is however causing difficulties. We would rather have a situation where the AO's take a particular approach which would either be right or wrong but at least is consistent and therefore the matters can go to the Labour Court to get a definitive ruling and if necessary to the High Court.

The issue relating to the Lyons case has been opened recently in the Labour Court but that case has been adjourned. It is a case in which this office is involved.

When that decision issues it will give a degree of clarity on this issue which will be welcome.

Unfair Dismissal Cases - putting the employee's version of events to witnesses

The case of Morbury Ltd T/A Top Security -and- Gablonski UDD1823 is a very helpful decision of the Labour Court. The Court in this case found that the individual undertaking the disciplinary process could not have fairly concluded that the employee's version of events was without foundation unless they have been put to the relevant witness and tested that witness' version of events. The case is an important reminder that where an employee raises a defence that defence must be put and considered before being dismissed.

While it is not set out in this decision even if the defence being put forward by an employee sounds unreasonable and implausible it must still be considered. If an employee says that a particular manager or other individual told the employee to do something even if it sounds ridiculous to the person hearing the disciplinary hearing, they must at a minimum put that defence to the individual whom the employee says told them this or did not tell them depending on what the issue is and get their version of events before dismissing an employee's defence.

Where the employer fails to do so then in those circumstances the entire process may result in the employee winning the Unfair Dismissal case.

The case which we refer to is an important case for the Labour Court restating this principle of law.

Unfair Dismissal - Fair Procedures

We review here some interesting cases on this issue.

The case of Joseph Brennan Bakeries and Graham Rogers UDD1821 is an interesting decision from the Labour Court.

Some interesting issues arise.

1. The Court held that the procedures applied by the employer involved at all stages arose for a particular individual who was the ultimate decision maker in the dismissal of the employee. That individual was the first person to review the CCTV footage. That individual decided to carry out an investigation procedure. The disciplinary hearing was chaired by that individual and following a short meeting outside between that individual and another that individual advised the employee that they were dismissed.

2. The Court pointed out that the multiplicity of roles undertaken by the named individual called in to question the fairness of the procedures. The Court pointed out that they were satisfied the enterprise is of a nature which afforded the employer the opportunity to ensure a clear separation of investigation and disciplinary process by selection of available management level personnel to carry out a different stage of the procedure.

This is a very helpful decision by the Court in setting out the issue of fair procedures in a disciplinary hearing.

The Court also pointed out that the failure of the employer to set out in writing details of the allegations against him and the failure to share with him all relevant material including CCTV footage which gave rights to the initial investigation are significant failures of procedures followed in dealing with the matter.

In this case the Court held the employee was 60% responsible and ordered a payment of €6,000.

The case however is extremely important for the principles laid out by the High Court in relation to fair procedures.

In ADJ-6644 the AO in this case quoted the case of the Labour Court in the case of McStone Systems Ltd -v- Tyka UDD1762 where the Labour Court stated:

"*The Court is of the view that failure to properly and fully investigate allegations of misconduct or to afford an employee who was accused of*

misconduct a fair and sufficient opportunity to advance a defence would generally take the decision to dismiss outside the range of reasonable responses which will probably render any resulting dismissal unfair."

It is very helpful that the AO had reset out this decision of the Labour Court. In this case the AO found that the procedures were unfair and awarded compensation.

A further useful decision issued from the WRC in ADJ-12053.

In this case the AO helpfully set out a number of relevant pieces of legislation relating to fair procedures. The AO pointed out that in the case of Gallagher -v- Revenue Commissioners, 1995 E.L.R. 108 (2) [1995] that an employee was entitled to fair procedures and a fair hearing.

In C -v- The Midwestern Health Board 2000 E.L.R. 38 that an employee had a right to know the full case against him.

The AO pointed out that where the principles of natural justice were not complied with the decision to dismiss has been deemed unfair as determined in the case of Vitalie Vet -v- Kilsaran Concrete Kilsaran International Limited 2016 27 E.L.R. 237.

It is helpful that this decision has set out the relevant case law.

In ADJ-6644 the AO in that case quoted the case of McStone Systems Limited -v- Tyka and held in that case that the Labour Court was of the view that a failure to properly fully investigate allegations of misconduct or to afford an employee who is accused of misconduct a fair and sufficient opportunity to advance a defence will generally take the decision to dismiss outside the range of reasonable responses which will probably render any resulting dismissal unfair.

Unfair Dismissal - Dismissal for Lack of Qualifications

Case ADJ-10011 is a case where the issue arose as to the dismissal of the employee which it was claimed was due to the fact that the employee did not have the relevant qualifications to undertake the

work. In this case a FETAC 5 level qualification in childminding was required. The employee did not have it and therefore the AO found that it was a legitimate termination of employment under Section 6 (4) (a).

Pregnancy Related Dismissal

In the case of Western Brand Group Ltd and Aneta Petrova UDD1819 which is a case which has been commented on a lot in the press, there are some interesting legal issues which arise.

The Court pointed out that the effect of Section 6 of the Unfair Dismissal Act is to identify a dismissal which relates solely or mainly to a person's pregnancy is unfair. In this case the employee had less than 12 months service but falls within the protections offered in Section 6 (2a) of that Act. This is sometimes overlooked by some employers.

In this case the employee was awarded €17,000.

The Court in this case rightly pointed out that the employee was medically unfit to carry out her job from January to June of the year of her dismissal. The Court took account of the lack of detailed evidence of the Claimant to secure employment and also the details of her unavailability to work following her dismissal.

This case could equally have been brought under the Employment Equality Legislation.

In some circumstances the Labour Court in assessing compensation would not have needed to look at the issue of the employee seeking to mitigate her loss or her availability for work.

This is an important decision of the Court. It sets out the protections which the Court gives to those who are dismissed because they are pregnant. The issue sometimes in these cases is which is the best Act to go on, namely the Equality Legislation or the Unfair Dismissal Legislation. A decision has to be made in all cases but it would appear to us that where there is an issue of an employee being ill or not being

in a position to mitigate loss that a claim under the Equality Legislation is the better course of action for an employee to take.

That is just of course our opinion. There will be other opinions.

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Constructive Dismissal

Normally, an employee who does not raise a grievance and bring it through the internal grievance procedures will not be able to pursue a claim for Constructive Dismissal. There are exceptions to this rule. In case ADJ5732 the AO in this case helpfully pointed out two relevant cases being the case of New Era Packaging -v- a Worker 2001 ELR 122 and the case of Liz Allen -v- Independent Newspapers.

Generally speaking however an employee to bring a claim for Constructive Dismissal needs to go through the internal grievance procedure and needs to have raised the grievance with their employer before resigning.

Terms of Employment (Information) Act

The Labour Court in case TE/17/48 being a case of Felix Guerrero -v- Merchants Arch Restaurant Company Ltd is a case where this office represented the employee. The case has been reported in the Irish Independent, the Irish Times and the Herald relating primarily to the Equality case. However, the case involving the Terms of Employment (Information) Act is, we believe, extremely important for setting out the law in relation to contracts.

The Labour Court in this case, took the time to set out the full provisions of Section 3, Section 7 and S.I. 49 of 1998.

In this case it was submitted that the document furnished did not contain the name of the employer, failed to identify the statutory leave year as set out under the Organisation of Working Time Act, failed to make reference to a Pension Scheme, failed to comply with Statutory Instrument 49 of 1998 setting out Sections 11, 12 and 13 or the Organisation of Working Time Act and failed to specify the hours of

work. The employer through their representative Peninsula Business Services (Ireland) Limited contended that the breaches were technical in nature and had no adverse effect.

The Court set out that the omissions were admitted. €250 had been awarded by the Adjudication Officer. The company contended that this was reasonable and proportionate.

The Court importantly stated:

"The Court finds that the Act imposes an obligation on an employer to provide a worker with basic information regarding the terms of their employment. The requirements set out in Section 3 of the Act are not complex matters. A simple attention to detail would enable any reasonable person to comply with its terms. A failure to do so therefore requires a clear and understandable explanation as to why a worker has not been provided with such basic information about the terms under which s/he is employed."
The Court went on to state:
"The Respondent relies on its assertion that breaches were of a technical nature only and argues that the Complainant suffered no adverse consequences arising out of its misfeasance."

The Court went on to find:

"*The Court finds no merit in that argument. The Court finds that the Statute imposes obligations on an employer and confers corresponding rights on a worker to have the basic terms of employment set out in writing in accordance with Section 3 of the Act."*

In this case the employer contended that contracts have been updated but no actual contracts were furnished. The Labour Court in this case increased the award to approximately 3 weeks remuneration.

This case is important for restating the law and for the Labour Court setting out in some detail the issues.

The argument has been arising recently in cases that breaches are of a technical nature. The Labour Court in this decision has very clearly rejected that as an argument.

Redundancy

In the case of G4S Secure Solutions (Ireland) Ltd and Stanek RPD186 being a Redundancy Payment Act claim the case involved an employee who had been placed on lay off. The employee was placed on lay off on 3 November 2016. This continued for a period of more than 4 weeks. On 14 December 2016 he served notice in writing upon the employer under Section 12 (1) (b) of his intention to claim statutory redundancy. The employee submitted that on 21 December he wrote to the Respondent to advise that no counter notice had been received in accordance with Section 13 (1) (b).

The employer contended that efforts have been made from 15 November onwards to contact the employee by phone to offer him work but such efforts were unsuccessful because he was uncontactable. The employer accepted that a notice of intention to claim had been received on the 14 December 2016. They also accepted that no counter notice in writing had been issued to the employee as specified in Section 13 (2) or at all.

The Labour Court in this case set out that the Act is very clear in respect of matters before the Court. The Court stated that it was common case that the employee had complied with the requirements of Section 12 (1) (b). The Court also held that it was common case that the employer did not comply with the requirement of the Act in Section 13 (2).

In those circumstances the Labour Court overturned the decision of the AO and decided that the employee was entitled to redundancy.

This case is a timely reminder of the importance of the employer serving the counter notice. It is not sufficient to phone the employee.

The counter notice must be served on the employee.

Redundancy Payment Acts Claims

There has been an issue which we have been raising with the WRC in relation to the format of decisions under the Redundancy Payment Acts.

We are very pleased to note that in the vast majority of cases now the AO's are invariably setting out the decisions as the EAT used to do. It is absolutely imperative that this is done so that an employee if necessary can make a claim against the Social Fund. It is also necessary so that once a decision is made it is possible using the Redundancy Calculator which issues from the Department of Employment Rights and Social Protection and is on their website to calculate the exact amount due to the employee.

We do commend those AO's who are setting out the decisions in this way. We are pleased to note that our submissions to the WRC have been accepted in respect of the format of the setting out of decisions.

Pregnancy Related Discrimination

In the case of Doctor Enda Loftus and Martine O'Sullivan EDA1825 the Labour Court issued a very helpful decision in relation to this issue.

The Court helpfully set out the provisions of Section 6 of the Act and quoted the case of Dekker ECJ 177/88 where the Court of Justice held that unfavourable treatment because of pregnancy is by definition direct discrimination on the grounds of sex. The Court also referred to the Court of Justice decision in Webb and EMO Cargo case C-32/93 which held that employees may not have their employment terminated from the beginning of their pregnancy to the end of Maternity Leave save in exceptional circumstances not connected with the condition. The ECJ has held that dismissal during pregnancy is largely incapable of being justified. The Court then set out the issue

concerning the burden of proof and set out the case of Mitchell -v- Southern Health Board 2001 ELR 201.

The Court in this case quoted the case of Dekker ECJ177/88 and Browne - Rentokil 1998 ECRI4185 and Webb and EMO Cargo case C-32/93 that the treatment of the employee in this case amounted to direct discrimination. The Court stated they were satisfied that the Claimant had established a prima facie case of discrimination and that the employer had failed to discharge the burden upon him to prove that the dismissal was for exceptional reasons unconnected with the employee's pregnancy.

This case is important in confirming that the protection for an employee is from the start of her pregnancy until the end of her Maternity Leave.

In this case an award of €27,500 was made.

Employment Equality Acts 1998-2015 - Burden of Proof

In the case of GGL Security IRE and Kelly Lee EDA1832 the Labour Court helpfully set out the law relating to the initial burden of proof. The Court has set out the provision of Section 85 (a) (1) of the Act of 1998 which provides that where in proceedings facts are established from which it may be presumed that there has been discrimination it is for the Respondent (employer) to prove to the contrary.

The Court in this case helpfully set out the case of Southern Health Board -v- Mitchell 2001 ILR 201 which held:

"*The first requirement is that the claimant must establish facts from which it may be presumed that the principle of equal treatment has not been applied to them. This indicates that a claimant 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 these primary facts are established to the satisfaction of the Court, and they are regarded by the Court of 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 principle of equal treatment.*"

The Court helpfully set out the case of Cork City Council -v- McCarthy EDA21/2008 where the Court set out the fact that the type or range of facts which may be relied upon by Complainant may vary significantly from case to case. The Court pointed out that it is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts. The Court had also pointed the case of Melbury Developments Ltd -v- Valpeters 2010 ELR64 where the Court stated that mere speculation or assertions unsupported by evidence cannot be elevated to a factual basis upon which an inference of discrimination can be drawn.

Requiring Manicured Nails is Probably Unlawful

This might appear an unusual heading for a piece in our newsletter. However, there is a serious site to this. The UK Government Equalities Office has issued guidance entitled "Dress Code and Sex Discrimination. What you need to know?"

The nine page document sets out that dress codes can be legitimate as part of an employer's terms and conditions of service. However, employers are advised to avoid gender specific rules. They advise that for example a requirement to wear makeup, have manicured nails, wear hair in certain styles or to wear specific types of clothing may be unlawful assuming there is no equivalent requirement for men, the guidance says.

Listing examples the guidance says that requiring female employees to wear high heels but not having footwear requirements for men is likely to constitute direct discrimination. It can also amount to indirect discrimination against disabled employees as heels can exacerbate mobility difficulties or increased risk of falling for those who are visually impaired. However, the code has a lot of common sense. Requiring receptionists to dress smartly to portray positive public face and image is quite lawful because it is not gender specific. Requiring all employees to wear smart shoes will also be lawful because it is not gender specific.

The guide does not intend to be specific as it uses such phrases as "it is best to" or "likely to be". The law is not clear on all of these issues but the guide gives its best to assist employers.

It would be very helpful if the WRC introduced such guides.

The area of discrimination in the workplace is a significant issue for both employers and employees. Guidance for employers is very important to avoid discrimination claims in the workplace. Of course they are going to come with a significant health warning but the very fact that they are put together and some guidance is given can assist in creating a positive working environment for everybody.

The approach of the UK Government is to be commended as regards the number of guides that they produce. This particular guide came as a result of one of the recommendations of a Women's Committee in the House of Commons.

Disability Discrimination

In a case of Kerry County Council and Pat O'Sullivan, case EDA1826, an issue of disability discrimination arose. The Court in this case held that as regards the interview of the employee that no evidence was put forward which showed a prima facie case that the employee had been discriminated against on the basis of his disability during the course of his interview.

However, what is really important about this case is that the Labour Court set out that the Complainant's declaration of his disability was included along with the pack submitted to members of the interview board. The Court pointed out that this practice is not consistent with best practice required under the Employment Equality Acts 1998 to 2011. The Court awarded the Complainant €5,000 as compensation which was not subject to tax.

This case is a very important decision as a guideline for those involved in the interviews that should a perspective employee disclose a disability this should not be disclosed to those undertaking the interview.

Racism in the workplace

In case ADJ00008313 the employee in this case was represented by this office and was awarded €7,000.

The AO in this case held that there were three complaints and upheld the complaint as regards the third issue of racism and held that the response to same being the imposing of an informal warning did not amount to a sufficient reaction to what was a third incident or racism. The AO found that while in previous incidents staff had been brought together, in this case only managers and supervisors were, it was not a sufficient response and found that the company had failed to take adequate steps to ensure that acts of racism would not reoccur. The AO in this case importantly also directed the employer to put in place proper training in the workplace relating to discrimination preferable by an external independent body.

This is the case we cannot comment on to any great extent as the employer has appealed the decision to the Labour Court.

Employees who are breastfeeding

Case of Isabel Gonzalez Castro being a case C-41/17 relates to the issue of the protection of safety and health of workers in respect of Directive 92/85/EEC and whether night work covers shift work where the worker concerned performs her duties during the night and the worker is breastfeeding.

The Court in this case ruled that a worker who does shift work and performs some of her duties at night is capable of falling within the scope of Article 7 (1) of Directive 92/85/EEC. The Court said that subject to her submitting a medical certificate stating it was necessary to take measures to avoid a risk of her health or safety in accordance with Article 7 (2) it is for the referring Court to verify whether the employee provided or was placed in a position where she could provide such a certificate. The Court ruled that Article 90 (1) of the Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women shifts the burden of proof to an employer where a breastfeeding worker within

the meaning of Article 2 (c) of Directive 92/85 demonstrate that an employer has failed to carry out a risk assessment in accordance with Article 4 (1) of that Directive. Where a worker within a meaning of Article 2 (c) of Directive 92/85 considers herself wronged because the principle of equal treatment has not been applied to her and demonstrated that her employer has not carried out an assessment under Article 4 (1) of that Directive to evaluate risks to her safety and health or that any such assessment was not conducted in accordance with the guidelines referred to in Article 3 of that Directive in those circumstances create a presumption of direct discrimination within the meaning of Article 19 (1) of Directive 2006/54.

Insofar the assessment of further action pursuant to Article 5 of Directive 92/85 is part of the main proceedings the burden of proof under Article 19 (1) of Directive 2006/54 remains with the employer.

This is an important case for those employers who are dealing with workers who are breastfeeding. It must be remembered that a "worker" is a far wider definition than that of an "employee". A "worker" would include a partner for example in a law firm and self-employed contractors. If the worker produces a certificate stating that a risk assessment is necessary then in those circumstances an employer should carry out a risk assessment. Failure to do so can result in the employer being held liable for direct discrimination against the employee.

Protection of Employees (Fixed-Term Work) Act, 2003 - Legitimate Reason for Refusal of a Contract of Indefinite Duration.

In case ADJ-9932 the AO in this case had to deal with the issue of an employee who had refused a further contract. The AO in this case helpfully referred to the case of Clare County Council -v- Rionach Power FTD0812 (being a decision of the Labour Court). The employer accepted that the non-renewal of the Complainant's Fixed-Term Contract constituted dismissal for the purposes of Subsection (1) (d). Accordingly, that case turned on whether the purpose of avoiding a Fixed-Term Contract being transmuted to one of Indefinite Duration was an influential factor operating undermined the decision maker. In

finding that it was, the Labour Court awarded the employee compensation.

In the case before the AO the employer confirmed that both staff whose absence from the workplace created a temporary vacancy returned to their positions. Accordingly the AO did not find that the non-renewal constituted dismissal for the purposes of Subsection (1)(d).

This is a very useful decision for those acting for employers to read.

Retirement and Fixed Term Contracts

On the 30th April the Irish Human Rights and Equality Commission which is an independent body which accounts to the Oireachtas produced a very useful guidance document on retirement and fixed term contracts. This document can be obtained directly from the Commission on their website. It deals with the issue of those of compulsory retirement age or moving an employee on to a fixed term contract at a compulsory retirement age in the company. This is an extremely useful document for those advising employers and those advising employees to read. It is not necessary for us to go through it in details here but simply to alert you to its availability.

Protected Disclosures

In ADJ8429 the AO in this case helpfully set out that there was a difference between raising a grievance and a protected disclosure. The AO in this case held that what had been made was not a protected disclosure. As the employee had less than 12 months service, the AO held that the employee did not have a right to bring a claim under the Unfair Dismissal Act.

It would be our view and I think it is worth commenting on that where an employee has made a protected disclosure then the 12 month service requirement to bring a claim under the Unfair Dismissal Acts does not arise.

There is, in our view, also an issue that many employees fail to distinguish between what is a grievance and what is a protected

disclosure. Protected disclosures are very specific under the legislation.

It would be our view that where an employee is considering making a protected disclosure, because the legislation is complex, advice from a Solicitor should always be obtained as to how to make a protected disclosure properly and whether what they are proposing to disclose is in fact a protected disclosure.

Pension Rights and Insolvent Companies

In the case of Grenville Hampshire -v- The Board of the Pension Protection Fund case C-17/17 the case concerned the rights of employees where a company has been placed in liquidation. The European Court ordered that pursuant to Article 8 of Directive 1008/94 that every individual employee subject to specific cases of abuse within the meaning of Article 12 of the Directive is entitled to compensation of at least 50% of the total value of his or her accrued rights or entitlements to old age benefits in the event of the insolvency of his employer. The Court ruled that Article 8 of Directive 2008/94 concerned an obligation on Member States which is unconditional and sufficiently precise with the result that may be relied on directly by an individual against the body such as the Pension Protection Fund.

This case has significant potential benefit to employees where a company has gone into liquidation.

Right to an Effective Remedy - Charter of Fundamental Rights of the European Union

In case C-34/17 the case dealt with the issue of tax assessment. However, the case has some significant issues which could be relevant to employment law. The case involved Eamonn Donnellan and the Revenue Commissioners.

In this case the Court stated that Article 47 of the Charter concerning the service and notification of judicial documents that in order to ensure respect for the rights laid down in Article 47 of the Charter it is important not only to ensure that the addressee of a document actually receives the document in question but also that he is able to

know and understand effectively and completely the meaning and scope of the action brought against him so that to be able effectively to assert his rights. The Court referred to the case C-519/13 being Alpha and Bank Cuiprous.

This does raise the issue then of whether documentation needs to be translated for employees who do not have English as their first language. This is obviously an issue that is going to arise in the future.

Bias in employment matters

A recent Court of Appeal case under 2018 IECA 79 being a case of Heinz - Peter Nasheuer - Respondent/Plaintiff, and National University of Ireland Galway - Appellant/Defendant being a judgment of Ms Justice Irwine delivered on the 21st March 2018 is extremely useful.

In that case the High Court referred to the case of Goode Concrete -v- CRH Plc and others being a decision of 2015 IESC 70 where Denham C J stated

"The test to be applied considering the issue of perceived bias is objective. It is whether a reasonable person, in all the circumstances of the case, would have a reasonable apprehension that there would not be a fair trail from an impartial judge. It is an objective test, it does not invoke the apprehension of a judge, or any part; it involves the reasonable apprehension of a reasonable person, who is possessed of all the relevant facts."

The Court in this case also then referred to the case of O'Callaghan and others -v- McMahon and others (2) 2007 IESC 71 at paragraph 80 where Fennelly J stated:

"The principles to be applied to the determination of this appeal all thus, well established

(a) Objective bias is established, if a reasonable and fair minded objective observer, who is not on duly sensitive, but who is in

possession of all the relevant facts, reasonably apprehends that there is a risk that the decision/maker will not be fair and impartial;
(b) The apprehension of the actual affected party are not relevant;
(c) Objective bias may not be infered from legal or other errors made within the decision-making process; it is necessary to show the existence of something external to that process;
(d) Objective bias may be established by showing that the decision-maker has made statement which, if applied to the case and issue, would effectively decide or show prejudice, hostility or dislike towards one party or his witnesses."

This case is a very important restatement of the law relating to the issue of bias. There is an interesting issue as to whether this would apply in the WRC. If there is an Adjudication Officer which is a part-time job but also say runs a HR/IR practice or is a Trade Union Official is there any perceived bias. While I have full confidence personally in them the test to be applied might disclose bias. This issue may well arise.

Managing an Alcohol Dependent Employee

There are a number of problems associated with alcohol abuse in the workplace. These would include alcohol related absenteeism, the effect on productivity, the effect on safety, the potential possibly for an employee coming back from lunch having had too much to drink creating difficulties in the workplace from equality to health and safety issues.

There are some mistakes which employers can make when manging an alcohol dependent employee.

1. Testing without justification.

Alcohol testing is an invasive procedure. It is advisable that employers should be cautious and avoid testing employees unless it is required on clear evidence that the employee is under the influence of alcohol at work. Ad hoc tests without reason are something employers should be wary of.

2. Obtain written consent.

If testing an employee, the employer should set out a clear justification for the testing. There may be times when random testing is appropriate but this needs to be clearly shown to be required. For example, you may have employees who are driving heavy goods vehicles or other vehicles or involved in a particularly hazardous or safety sensitive job. If there is going to be random testing then this should be set out in the staff handbook, the reason for same, the grounds and frequency of testing should also be set out. It is necessary in such circumstances to have an alcohol and substance abuse policy.

The policy should clearly set out what will happen if an employee refuses to consent. A number of policies will provide that refusal will be deemed to be a positive result.

3. Be wary of a disability.

The abuse of alcohol may disguise an underlying disability. This would include such things as long time depression. Depression caused by dependency in alcohol can still be a disability.

Employers need to be careful to look behind the alcohol use to see if there is a genuine disability before taking disciplinary action.

Dismissing an employee

Again, if an employee is going to be dismissed, it is important that fair procedures are applied. There must be a fair investigation. There must be a fair disciplinary hearing. There must be a fair appeal process. The employee must be advised as to what the grounds of the disciplinary action are. The employee must have an opportunity to defend themselves. The employee must have a right to representation.

Have an alcohol and substance abuse policy in place.

To dismiss an employee or to take disciplinary action or to have them tested, it is absolutely vital to have an alcohol and substance abuse policy in place.

Conclusion

Alcohol like any other substance abuse is something which can cause serious harm in a workplace. Employers have a legitimate interest in having a safe workplace. However, employers must remember that in putting in place a safe workplace the employer must also have regard to the rights of the employee. An employer who does not have an appropriate policy in place and does not apply fair procedures relating to a dismissal can cause significant problems for themselves and potential claims for Unfair Dismissal or possibly an Equality claim on the grounds that the employee may have a disability.

We would point out that all such policies currently in place need to be reviewed in light of the GDPR so as to ensure compliance with same as regards testing, an analysis of any test and what is to be done with the result when received.

Stress levels at work are rising

A recent CIPD/Simply Held Survey in the UK has found that levels of presenteeism have tripled since 2010. However, what is interesting is that fewer employers are taking steps to tackle it.

The issue presenteeism in medical journals is associated with increases in mental health conditions and stress related absences.

The UK survey has indicated that steps to tackle presenteeism have fallen in the last 2 years to 25% from 48%.

The report has highlighted an increase in common health condition such as anxiety and depression and an alarming 55% compared to 41% 2 years ago.

Only a quarter of employers who experiences presenteeism say the organisation have taken steps to discourage it in the last 12 months. This compares with 48% in 2016.

There are some positives. 60% say the organisation has a supportive frame work in place to recruit and retain people with a disability or long term health condition.

Unfortunately, we have a culture in the UK and that culture is also here, that a "good employee" is one who is forever present in the workplace or is available to be contacted on a 24 hour/7 days a week/365 days a year basis. The reality is that such employees are more likely to become sick. They are more likely to suffer depression.

They are more likely to suffer stress. They are more likely to be involved in claims against their employer.

There is an issue as to just how effective an employee can be if they are forever present in the workplace.

Presenteeism is a problem. It is a health and safety problem and it is a problem which needs to be addressed.

Absenteeism from work

In ADJ10131 the AO in this case has held that absenteeism does not amount to gross misconduct.

However, the AO in this case found that the failure of the employee to attend a meeting which her employer had requested she attend was a factor where there was a contribution of 50% by the employee to the dismissal.

It would be our view that a single incident of absenteeism would certainly not be gross misconduct. However, if an employee has taken unauthorised leave and has received a warning and there is a subsequent incident within the time limit specified in the warning then that may well be a stronger ground for an employer to dismiss without having to run the risk of an Unfair Dismissal claim being successful against them.

The Rule in Henderson -and- Henderson

In the case of Top Security Ltd and Dan Bolger, case RPD184, the Labour Court had to address this issue.

In this case the employee made a claim under the Unfair Dismissal Legislation which was successful. He subsequently issued a redundancy claim. The Court was of the view that the redundancy claim was based on the same set of facts and legal arguments as were decided in case ADJ-2052 which disposed of his Unfair Dismissal claim.

The Court helpfully set out the case of In Re Vantive Holdings [2010] 2IR where Chief Justice Murray cited with approval of the following summary of the Rule in Henderson -v- Henderson:

"The Rule in Henderson -v- Henderson is to the effect that a party to litigation must make its whole case when the matter is before the Court for adjudication and will not afterwards be permitted to re-open the matter to advance new grounds or new arguments which could have been advanced at the time. Save for special cases, the plea of res judicata applies not only to issues actually decided but every point which might have been brought forward in a case. In its more recent application this Rule in somewhat mitigated in order to avoid its rigidity by taking into consideration circumstances that might otherwise render it imposition, excessive, unfair or disproportionate. Viewing it through the prism of estoppel the res judicata the Rule in Henderson -v- Henderson strictly speaking applies to proceedings between parties where those proceedings determine the rights or obligations between those parties. It is intended, inter alia, to promote finality in proceedings and to protect party from being harassed by successive actions by another party when the issue between them either were or could have been determined with finality in the first proceedings."

The Court quoted the case of Cunningham and Intel Ireland [2013] IEHC207 where Hedigan J stated:

"All matters and issues arising in the same set of facts or circumstances must be litigated in one set of proceedings save for special circumstances. This is a rule that is of benefit to both plaintiffs and defendants, to the Courts themselves and thus to the public interest."

This is a very useful setting out of the law by the Court.

It would be our view that if an employee has an issue as to whether a termination is an Unfair Dismissal or a Redundancy then in those

circumstances it is quite legitimate for the employee to issue a claim under the Unfair Dismissal Legislation and under the Redundancy Legislation at the same time. The employee in the claim can set out that the dismissal was "either an Unfair Dismissal under the Unfair Dismissals Acts or a Redundancy under the Redundancy Payment Act".

It is then a matter for the AO to decide. There will of course be cases which may look like the Rule in Henderson -v- Henderson would apply. However, it would not in certain circumstances. For example if an employee was being underpaid from say January 2018 the employee could issue a claim before the end of June seeking the underpayment. If the underpayment continues a further set of proceedings could issue in December for the period from December back to July. This can go on effectively forever if the deduction continues. If however a claim was brought for the first period and was unsuccessful before the WRC and subsequently before the Labour Court on the basis that there was no deduction, then the same facts cannot be litigated upon for the second period. If however, the AO and/or the Labour Court on appeal upheld that the deduction has been an illegal deduction then the employee is effectively free to bring claims effectively forever. This case is an important reminder of the issue of issuing all relevant proceedings where the same set of facts are going to be argued at the same time. Often employees or their representatives can be unclear as to whether a termination was a redundancy or a dismissal.

Workplace Sexual Harassment & Personal Injuries

Sexual harassment in the workplace is prohibited by the Employment Equality Acts. The legislation places responsibility on an employer to prevent the sexual harassment of its employees. Employers will be legally responsible for the sexual harassment of its employees by other employees, it's customers/clients and/or its business contacts.

The Employment Equality Acts offer a high level of protection and have significant scope. An employee does not need to have any minimum term of service to be protected. The legislation can also cover agency workers and self employed persons. The sexual harassment need not be confined to the workplace. The legislation

extends to work related social events such as work parties, training events and working away from the usual place of work. Sexual harassment does not have to be a series of events. It can include a once off incident. It also does not matter if the harasser did "not mean any harm" or was only engaging in "banter" at the time. What matters is the effect that the behaviour had on the person.

Sexual harassment is discrimination on the gender ground in relation to an employee's conditions of employment. It is defined in Section 14 (A)(7)(a)(ii) of the Employment Equality Acts 1998 – 2011 as any *"form of unwanted verbal, non-verbal or physical conduct of a sexual nature"*. The unwanted conduct must have the *"purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person"* in accordance with Section 14A(7)(b) of the Employment Equality Acts 1998 – 2011. Behaviour of a sexual nature can be physical, e.g. inappropriate touching, patting, pinching, brushing up against a person or assault. Behaviour of a sexual nature can also be non physical, e.g. suggestive remarks, sexual advances, inappropriate emails, display of pornography or perhaps even dress policies where they require an employee to dress proactively or in a way that is not equivalent to the opposite gender. The Employment Equality Acts will also cover scenarios where a person has been treated differently in the workplace because of rejecting and refusing to accept the sexual harassment, e.g. salary increases, access to training, promotion.

The legislation places an onus on an employer to act in a preventative way. It will be a defence for an employer to show that they took reasonably practicable steps to prevent an employee from being sexually harassed. This is done by having a good policy in place, ensuring that the policy is properly communicated to all employees, ensuring that employees have proper training and that there is a very clear complaints and review procedure for dealing with any sexual harassment in the workplace. Overall, an employer should have a strong commitment to ensuring that it's employees have a safe working environment free from sexual harassment. Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI 208/2012) sets out very helpful information in relation to policies for employers.

The remedies for victims of sexual harassment under the Employment Equality Acts 1998 – 2011 is compensation up to the value of two years remuneration or €40,000.00, whichever is the greater.

Compensation under the Employment Equality Acts is for having suffered the sexual harassment. It is not compensation for the effect of the sexual harassment on a person's health. Sexual harassment can be traumatic and can have a damaging effect on a person's health. It can cause a lot of stress and anxiety which can lead to a person becoming very ill. It can cause a person to develop depression or post traumatic stress disorder. It can lead to a person having to take time off work and this brings it's own financial difficulties. This can be a difficult time for a person and he/she may be under the care of a General Practitioner and/or a Psychiatrist. If you have suffered a recognisable psychiatric injury, it may be appropriate to submit a claim to the Personal Injuries Assessment Board to claim for compensation for the injuries, any out of pocket expenses for medical expenses and any loss of wages. However, such cases would not be the usual type of personal injuries case. Accordingly, it is very important that an employee would seek the appropriate legal advice before embarking on a case.

There are strict time limits within which to bring a case for sexual harassment and / or for injuries as a result of the sexual harassment. A claim for sexual harassment before the Workplace Relations Commission under the Employment Equality Acts must be brought within 6 months of the most recent incident of sexual harassment. Any negligence claim for personal injuries must be brought within 2 years of the first incident of harassment, if each incident of harassment is to be included.

Sexual harassment is unlawful. It is wrong. It is inexcusable. Unfortunately, it does happen and it can be a very difficult time for a person. For any employee who is being sexually harassed, it is important that they go to their GP, if necessary, raise a grievance with their direct line manager at work and speak with a specialist employment law solicitor.

Open Offers of Settlement

A good strategy behind an offer of settlement can have a big impact on legal costs for both plaintiffs and defendants. While offers of settlement are usually done under the without prejudice rule, there are merits to putting offers in open correspondence. In ideal circumstances, it will result in the matter being resolved. However, if it does not result in the matter being resolved, it is fair game in a court hearing and will allow the court to take it into consideration when awarding costs. This tactic had a significant impact on the plaintiffs in the case of Shane and Antoinette O'Reilly –v- Seamus Neville & Ors [2017] IEHC 554. This case involved the O'Reilly's seeking damages for breach of contract for a defective house which they purchased from the Defendants. Approximately 9 months prior to the matter coming on for hearing, the Defendants put a very detailed offer of settlement in open correspondence to the Plaintiffs. The offer included a mechanism for identifying defects in the property, measures to rectify the defects, the involvement of the Plaintiff's own engineer and for an independent expert to resolve any dispute between the parties. The offer was rejected. The matter went to trial for 11 days in the High Court. Mr. Justice Binchy said that the offer should have been accepted. He also pointed out that by failing to accept the offer, the Plaintiff's incurred most of the legal costs themselves. The Defendants were awarded all costs incurred from the date of the offer save for the alternative accommodation costs incurred by the Plaintiffs. The Plaintiffs were only awarded one day of costs for an eleven day hearing in the High Court. These are a very expensive 10 days out! This case should be a reminder to both Plaintiffs and Defendants to consider all offers of settlement and the advice of their legal representatives carefully before deciding to reject. Rejecting an offer of settlement that has been strategically put forward could result in the Plaintiff not only receiving the same amount of damages in court but considerably less if a significant contribution to the legal costs is required.

Cervical Cancer Misdiagnosis

What emerged in April 2018 in relation to our national cervical screening programme is truly shocking, appalling and, quite frankly, horrific.

A very brave woman by the name of Vicky Phelan brought a case to the High Court which shone a bright light on all of the failures in Cervical Check Ireland. Ms. Phelan is a mother of two children from Limerick. In 2011, she was given a smear test result of normal. In 2014, her smear test was re-examined and it showed signs of squamous cell carcinoma. In the meantime, she was diagnosed with cancer in 2014. However, she was only told of the earlier 2011 false negative smear test result in September 2017. At this stage, her cancer was 3 years old. She is now terminally ill. Her case settled for the sum of €2.5 million in April 2018.

A review found that 208 women have been affected. 162 of these women were not informed of a delay in their cancer diagnosis. 17 of these women have died.

What is really horrific about these cases is the concealment and deceit surrounding the misdiagnosis. In July 2016, Cervical Check had spent 1 year of deciding how to communicate this information to clinicians around Ireland. They ultimately wrote to these clinicians and indicated that where a woman has died simply ensure that the result is recorded in the woman's notes. This concealment is an indication of why Ms. Phelan's case was fought so hard. Despite assurances that subsequent cases would not be fought in this manner, we have recently seen how the HSE are not turning over the requested medical records to Plaintiffs in current litigation in a timely manner. These Plaintiffs were even obliged to motion the HSE and seek a court order for their medical records despite the HSE knowing that these women are sick and dying.

Concerns had been raised previously regarding sending test results to the US for examination. Apparently, the winning tender was 1/3 cheaper than having our testing carried out in Ireland. In April 2018, we learned that women paid the price.

On Saturday 28th April 2018, the director of cervical check stepped down. She did not have to go through an investigation. She was not suspended. She was not disciplined. There has been no accountability to date. The corporate world of these directors has no place in our public health system.

Vicky Phelan is to be commended for her courage, for exposing the omissions and shortcomings of Cervical Check and for continuing to campaign for women's health to ensure that this does not happen again in future. Thank you, Vicky.

For women looking to take legal action over their misdiagnosis, while our courts system is not an appropriate forum to deal with this issue, it is sadly the only forum available. Litigation will not result in any justice for these women or the families of loved ones that have been lost due to a misdiagnosis but this is the only available redress. These people need to seek the advice of a specialist medical negligence solicitor and/or fatal injuries solicitor.

Recent Judgements in Personal Injury Cases

The case of *Martina Fitzpatrick –v- Aldi Stores (Ireland) Limited* is a good reminder of the importance of obtaining legal advice from a solicitor. Ms. Fitzpatrick represented herself in court and claimed that she developed a fear of road and car park barriers since the entrance barrier of an Aldi car park had come down on to the roof, windscreen and bonnet of her car. She told the court that she often ducked when driving through barriers on motorways and had developed an anxiety about them. She did not suffer any physical injury. The damage to her motor vehicle had already been paid promptly by Aldi. Judge O'Sullivan in the Circuit Court dismissed the claim and made no order as to costs. While he did commend her for her honesty, Judge O'Sullivan said that anxiety as such was not actionable and damages could not be awarded for anxiety. If Ms. Fitzpatrick had taken legal advice from a solicitor at the beginning of her case, she would have been advised that she needed to have suffered a recognisable psychiatric injury as a result of the accident in order to bring a claim for personal injury.

The case of *Robert Whelan –v- Musgrave Retail Partners Ireland Limited* involved an accident at work. Mr. Whelan was loading a trailer when an insulated curtain became stuck. Mr. Whelan pulled the insulated curtain in an effort to release it and, in doing so, suffered an injury to the little finger of his right hand. He was obliged to undergo surgery and have a fracture fixed with wires. He then had to have a second

surgery approximately two months later as he could not bend the finger fully. He is at risk of developing arthritis. His injury also affects his work as a wood machinist. Judge O'Sullivan in the Circuit Court said that there was a clear breach of statutory duty on the part of the employer and awarded Mr. Whlean the total sum of €57,000.00, being €50,000.00 for the injury and €7,000.00 for lost wages. Interestingly, Judge O'Sullivan also said that what Mr. Whelan had done was "an act of foolishness" but that he could not be held to be contributory negligent, i.e. being responsible himself for part of the accident, as it would have to be shown that he acted in blatant disregard for his own safety which Mr. Whelan had not done. This is a very interesting comment and an argument that solicitors and barristers for claimants and plaintiffs will no doubt be arguing against any contributory negligent claims by respondents and defendants.

The case of *Theresa Cullen –v- Topaz Energy Limited and Ashjen Limited* involved a claim for compensation for injuries of post traumatic stress disorder and depression. Ms. Cullen was working as a cashier in a Topaz petrol station when two robbers confronted her. One robber was carrying a wheelbrace. They stole a small amount of money and left. Ms. Cullen's barrister pointed out to the court that a security guard had left the shop several minutes before Ms. Cullen's shift was due to finish at 11:00p.m. and had left the premises vulnerable to attack. Ms. Cullen suffered with post traumatic stress disorder and severe depression as a result of the incident. She was obliged to take anti-depressant medication. She could not leave the house for a long period of time and lived behind drawn blinds. She would only go outside if accompanied. She also lost weight as she could not eat. The case ultimately settled for an undisclosed figure with Topaz and, interestingly, the case against the security company was struck out with no order. These type of personal injury cases are very common. We have been successful in a number of similar type cases for employees. Employers should ensure a safe place of work. If a premises is vulnerable to attack or has a history of robberies or burglaries, then proper security personnel and security systems should be put in place to ensure the safety of employees.

***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.**