RGA | Richard Grogan & ASSOCIATES

KEEPING IN TOUCH - JANUARY 2019

Welcome to the January 2019 issue of our Newsletter*

2018 was a very eventful year for this firm. We won the Employment Law Firm of the Year 2018 from Irish Law Awards. As a boutique specialist law firm, we were both delighted and honoured to receive this award.

2018, from an Employment Law perspective, went out with a bang. Two important decisions from the CJEU, which we have covered in this newsletter, have effectively provided in Employment Law cases and effectively in every other area of law that the WRC, the Labour Court and any Judge and tribunal in Ireland has power to set aside Irish Legislation and put in its place an EU Directive. In addition, in an earlier case in November the CJEU have held that in certain circumstances Directives will now have direct effect against private employers and not just against State entities. These are sea changes in Irish jurisprudence. It will be interesting to see how these are going to be applied.

In the area of Personal Injury litigation there are significant stresses now arising in relation to the level of awards for soft tissue injuries. The Courts have changed their attitudes, quite significantly, in relation to claims which are exaggerated. Those who exaggerate claims are not simply going to have that exaggeration set aside. We now have a situation where any exaggeration is likely to result in claims being simply dismissed for exaggeration. We are also seeing the Courts very clearly setting out that individuals must apply common sense for their own safety and that where they fail to do so, even if they suffer injuries, they may not recover as was seen in the case of Vincent O'Mahony -v- Nicola McCarthy Hanlon and Waterford and Wexford Training and Education Board 2018 IEHC 657 being a judgment of Keane J.

In March we expect the Employment (Miscellaneous Provisions) Act to come into effect. It is being talked about as a very significant piece of Employment Legislation. It is significant. However, we have been critical of some provisions. Particularly, in relation to the Banded Hours provisions. We are of the view that these provisions can easily be frustrated if an employer wishes to do so. We also have the Gender Pay

Gap Bill which is going through the Oireachtas at the present time. We had made submissions to the Minister for Justice in respect of same.

Finally, and probably most importantly, we would like to thank all our clients for their support in 2018 and look forward to their continuing support in 2019 along with the support we have received from colleagues and also to wish everyone a peaceful and healthy 2019.

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Employment Law in Turmoil

This may sound a strange heading. However, case C-378/17 being a case of Minister for Justice and Equality, Commissioner of An Garda Siochana v. Workplace Relations Commission, and Notice Parties Ronald Boyle and Others being a Decision of the CJU has completely and totally reversed our understanding of employment law and how it will apply in Ireland.

Recent case C-684/16 which we have written about and which issued on 7th November indicated to employment lawyers that various claims would have to be brought to the High Court because the Directive had not been properly implemented and that the CJEU had effectively provided that these claims have direct effect against private employers. This was ground breaking for any employment lawyer in Ireland. However, the Decision which has issued now under case C-378/17 is even more profound.

This case has determined that the principle of primacy of EU law, must be interpreted as precluding national legislation, which in this case was the Employment Equality legislation prescribing that the WRC, automatically by implication that the Labour Court lacks jurisdiction to decide to disapply a rule of National Law that is contrary to EU law.

The effect is that the WRC and the Labour Court now will be obliged as from 4 December to disapply Irish legislation and apply EU legislation.

This will apply in all cases against private employers, certainly under the Organisation of Working Time Act where there is also a treaty provision. This is a sea change in the law as it applies in Ireland and across all 28 EU countries currently. It means that the WRC and the Labour Court will have the same jurisdiction of the High Court.

There are difficulties. The Labour Court would have the right to refer a matter to the CJEU or to the High Court to get an interpretation on a particular piece of legislation. This will not apply in the WRC as they do not have this power. The WRC was not set up as an entity which would have the power to disapply Irish legislation. It was set up on the basis that it would have to follow decisions of the High Court and the Labour Court. Now it will be in a position as being the body of first instance where challenges to Irish legislation not complying with a Directive will be heard.

This changes the WRC from what was intended to be a cheap and simple system for anybody to use whether represented or not into one where there are going to be some of the most complex legal arguments that could possibly apply. The resources as regards access to referring cases to the High Court or the CJEU are not. There the resources for having access to specialists in the area of EU Law, the interpretation of legislation, possible Constitutional Law issues and a myriad of other matters have not been provided for in the resources. There is going to have to be significant retraining of Adjudication Officers. This is a significant cost. They are now going to be taking on roles equivalent to that of a High Court Judge as regards the interpretation of legislation as regards a Directive being properly transposed into Irish Law.

This Decision has far greater impact than just the area of Employment Law. It will apply to any quasi-judicial body established in the State.

However, there is a problem with the WRC. In the WRC they are an inquisitorial entity. This means that even if an issue relating to the proper transposing of a Directive into Irish Law is not raised the person hearing the case will have to effectively look at every piece of legislation, which derives from a Directive to see if there is an issue. This will not apply in the Labour Court. The Labour Court is an adversarial process. The legislation is quite different for both the WRC and the Labour Court. In the Labour Court unless the issue is raised they will not need to address the issue. This creates huge additional costs and requirement for resources in the WRC.

Immediate action is going to be needed by the Department of Business Enterprise and Innovation to address this new jurisdiction of the WRC. Significant additional resources by way of personnel and back up is going to be required as a matter of urgency.

Because of other Decisions which have issued by the CJEU the issue of cases being heard and disposed of very quickly is now going to leave the WRC with this new jurisdiction which it has open to claims for compensation by employees and probably employers also if matters are not disposed of very quickly. This is a huge challenge for the WRC. It is a huge challenge for Employment Solicitors and those who practice in the area of Employment Law.

The whole jurisprudence of our Court system has effectively been turned on its head by one Decision from the CJEU. This issue is going to be one which will need significant input, from solicitors, barristers, the WRC, the Labour Court and the Judiciary, I would expect over the coming weeks and months.

This new Decision will create turmoil at least in the short term.

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Unfair Dismissal CCTV

In the case of Bond Retail Limited and Floyd UDD1861 the Labour Court has helpfully set out the position relating to CCTV footage where it is not provided.

The Court pointed out that the case was not complex. They held that the employer did not dispute that the employer relied on the CCTV footage. It was relied on for the investigation. The employer confirmed that when they received the CCTV footage back from the Gardai they neither provided access to the employee nor advised the employee that they had possession of same. The Court pointed out that in the interest of fairness the complainant was entitled to have access to all the material that the respondent was relying on before being asked to respond to the allegations. The Court stated that they could not see how this dismissal could be deemed to be fair.

An award of €10,000 was made.

This is an important Decision from the Court in relation to the issue of fairness as effectively an employer must ensure that an employee has access to CCTV and effectively all other documentation before being asked to respond to any matter.

Unfair Dismissal/Retirement Age/New Contract

An interesting case arose in UDD1862 being a case of Kirkwood Enterprises Limited and Pearse O'Brien. The employee in this case it was accepted worked under a contract stating that the retirement age was 65 but the company reserved the option to offer time limited extensions to the contract beyond the 65th birthday. The employee was retired at the end of the month of his 66th Birthday but was offered a fixed term contract commencing on 1 January 2017. The complainant complained that he was unfairly dismissed. The employer contended that he had not been dismissed.

It was accepted that the contract was extended to his 66th birthday and subsequently received a contract for a one-year fixed term.

The Court pointed out that Section 1 of the Unfair Dismissals Act defines termination as being,

"*Termination by the employer of the employee's contract of employment with or without notice.*"

The Court pointed out that Section 6 of the Minimum Notice and Terms of Employment Act provided that the continuous service of an Employee shall not be broken by the dismissal of the employee by the employer followed by the immediate re-employment of the employee. The Court pointed out that the manner that the employer approached the retirement of the Complainant was less than satisfactory. The Court held that the employee had available to him a fixed term contract for one year commencing the next day on 1st January 2017 offering the same basic pay and a similar role to the one he had. They pointed out that it was his choice not to take up that role. They stated that for a dismissal to occur the employment relationship had to terminate. The Court stated that while in this case the employment relationship may have changed it did not terminate and therefore no dismissal occurred.

This case is extremely interesting for those involved in employment law. The exact term of the new contract was not set out in the Decision. If it

was a fixed term contract which provided, for example, that the provisions of the Unfair Dismissal Acts would not apply merely by the expiration of the fixed term contract then clearly there would have been a significant change in the contractual terms. If such a clause was there then the decision of the Court does leave open potential opportunities for employers.

It would now appear probably advisable in such cases that not only is an unfair dismissal claim brought but also a constructive dismissal claim. If a contract does not have provision, for example, that it can expire simply by a fixed term expiring and the employer then proposes to provide a contract which would expire then in those circumstances the employer may be able to rely on the contract test as in the case of Higgins v. Donnelly Mirrors Limited 1985 IRLR240.

The alternative in these cases is to bring an equality claim.

This is an important Decision. It would have been helpful if the decision had set out whether this was a contract being the subsequent contract as one that had the provision which would have been materially different namely that the Unfair Dismissals Act would not apply merely by the fixed term contract coming to an end. If such a clause was in the contract then the employee is in a very difficult position that they effectively can only get the one-year extension as when it extends and when it finishes the employee will be dismissed under a provision where the employer has a full Defence. The alternative is of course they need to accept that contract then at the end of that term and bring not an unfair dismissal case but an equality claim based on age.

As we said this was an important case and it is probably an issue which is going to arise into the future.

Unfair Dismissal – Value of Claims

In case UDD1860 involving the Sisters of Charity of the Incarnate Word Houston Texas and Aneis Brock the Labour Court helpfully set out the issue relating to the level of compensation which can be awarded.

The Court helpfully reviewed Section 7(1)(c) and Section 7(2) of the Act and stated,

"*It is clear from the foregoing that an award of compensation for unfair dismissal is to make reparation for financial loss actually incurred in consequence of the dismissal and not for consequences which may have flowed from her employment status prior to her dismissal. The latter are not matters that allow the Court to award compensation under the Act beyond the financial loss attributable to the dismissal".*

It is very helpful that the Labour Court have restated the law on this issue.

Unfair Dismissal

Normally when dealing with unfair dismissal cases we only cover those where there is a substantial or important piece of law referred to. There are exceptions. The case ADJ14669 is a case which we would encourage practitioners to read. It is a very well set out decision dealing with the factual background where the AO in great depth set out the lack of insight, sense of proportion, fairness and justice and the detachment from the normal principles applicable in a disciplinary process in awarding €35,000. This is an excellent decision dealing with facts and is an extremely good guideline as to what an employer should not do.

Dismissal due to incapacity

In case ADJ-11070 the AO quoted a case of Dunnes Stores Limited -v- O'Brien UDD1714. It was pointed out that in this case the Labour Court concluded that there was no prospect of the Complainant returning to work from her absence on sick leave in the foreseeable future. The Respondent have been entitled to dismiss her on the grounds that she was incapable of performing the duties for which she had been engaged. In coming to this conclusion, the Labour Court declared itself satisfied the Respondent had afforded the claim a fair notice regarding the possibility of her dismissal. The Claimant had not been in a position at any stage to provide an indication of a return to work date and lastly the Claimant had been afforded the opportunity to be heard by the Respondent.

These cases are arising at the present time. It is important employees engage fully with employers. It is necessary for employees to produce medical evidence giving a return date to work. This is only that they need to give an indication of a likely return date and that this would be reasonable in all the circumstances.

Equally, employers must produce all medical documentation to the employee. The employer must give an employee an opportunity to challenge same and for the employee to produce their own medical documentation.

Equally, the employer must give due regard in respect to the medical evidence from the employee.

Fair Procedures in Unfair Dismissal Cases

An excellent overview of the practical issues which an employer must undertake before dismissing an employee can be seen in the case of ADJ12695. In this case an award of €24,000 was made. The case involved a butcher. The case is one well worth reading for the litany of defects in the procedures which the AO found made the dismissal unfair. Rather than going into this case in this newsletter it is one we would recommend those advising employers, to read as it shows what should not be done in a disciplinary process.

Unfair Dismissal Acts

In case ADJ9486 the employee in this case worked for a logistics company. The alleged act of gross misconduct which was the basis for the Dismissal was that the employee had lodged a third personal injury claim.

The AO in this case rightfully pointed out that an individual cannot be dismissed for lodging a personal injury claim.

In this case an award of €10,000 was made.

Unfair Dismissal and Gross Misconduct

In case ADJ12837 the AO in this case looked at the issue as to gross misconduct and quoted the Labour Court in the case of Kilsaran Concrete and Vet UD1611. That is a case where the Labour Court referred to a previous EAT case of Lennon v. Breddin where the Labour Court stated,

"*Summary Dismissal is the nuclear weapon in the employer's arsenal of disciplinary sanctions. Section 8 of the Minimum Notice and Terms of*

Employment Act 1973 saves an employer from liability, (under that Act) for statutory minimum notice where the dismissal is for certain forms of various serious misconduct."

In the case of Lennon v. Breddin MN160/1978 the EAT in that case had stated,

"We have always held that this exemption applies only to cases of very bad behaviour of such a kind that no reasonable employer could be expected to tolerate the continuance of the relationship for a minute longer; we believe the legislator had in mind such things as violent assault or larceny or behaviour in the same serious category".

The AO also quoted the case of Kunceviciene and Elder Nursing Home Limited UD97/2015 where is it was stated,

"*Breaches of any policy vary along a scale of seriousness. It is not reasonable to prescribe the same and ultimate sanction of dismissal for each and every breach irrespective of the nature of the breach. Indeed, the respondent's action in allowing the claimant to continue on the employment without any sanction or restrictions in her duties for almost three months following the incident is inconsistent with its position that the breach was of such a nature as to constitute gross misconduct and justify dismissal".*

In this case an award of €7500 was made.

Unfair Dismissal/Gross Misconduct

In case ADJ14020 being a case involving a bank official and a bank an issue arose relating to a cheque being endorsed. It appears that the employee advised a customer to sign her ex-husband's name on the back of the cheque. The AO in this case set out various reasons as to why it was an unfair dismissal awarding a sum of €10,000. The AO pointed out that the punishment of dismissal did not fit the crime and that the employee was not motivated by personal gain.

An interesting issue that was pointed out that the employee was dismissed for gross misconduct yet the employee did not suspend the employee pending the investigation and disciplinary investigation and that the employee was allowed to continuing working in the same section for two months after the incident came to light.

If a serious issue arises which could amount to gross misconduct then it is vitally important for an employer to act immediately and this means placing the employee on paid suspension while an investigation takes place. It is equally important for an employer to consider various options other than dismissal. It would in our opinion be very hard to justify gross misconduct where a person is allowed to continue in a position for a period of two months.

Constructive Dismissal

In case ADJ15105 the AO in this case helpfully set out the tests for constructive dismissal

The AO set out that the burden of proof is a high one. The AO pointed out that as set out in Western Excavating ECC Limited v. Sharp the legal test to be applied is firstly, for the Tribunal to look at the contract of employment and establish whether or not there has been a significant breach going to the root of the contract where it was held,

"*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 of more the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance."*

The AO pointed out that if the AO was not satisfied that the contract tests had been proven then they are obliged to consider the "reasonableness" test. This is,

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

The AO helpfully pointed out that there is a general obligation on an employee to exhaust the internal grievance procedures as set out in McCormack v. Dunnes Stores UD1421/2008 where it was held,

"the notion places a high burden of proof on the employee to demonstrate that he or she acted reasonably and had exhausted all internal procedures formal or otherwise in an attempt to resolve her grievance with his/her employers. The employee would need to demonstrate that

the employers conduct was so unreasonable as to make the continuation of the employment with the particular employer intolerable."

The importance of exhausting the internal grievance procedures was highlighted in Terminal Four Solutions Limited v. Rahman UD898/2011 where it was held,

"Furthermore, it is incumbent on any employee to utilise all internal remedies made available to her unless she can show the said remedies are unfair".

It is very useful that the AO in this case has taken the time to set the tests out at some length and in a comprehensive manner. In addition, this is a Decision that is set out in an easy to read format.

Unfortunately, a significant number of employees are simply resigning and are doing so without getting legal advice and without understanding the legal tests which are there to justify them bringing a constructive dismissal claim.

It would certainly be our experience from those coming to us that the number of individuals who bring constructive dismissal claims who can show to us that they would pass either the contract test or the reasonableness test and in particular utilise the company grievance procedures is extremely small.

Before any employee resigns they should get legal advice, unfortunately, very few do.

Employment Equality Act 1998

In case ADJ11959 the issue of reasonable accommodation was dealt with. The AO looked at the case of Nano Nagle Centre v. Daly 2018 IECA11 as regards reasonable accommodation. The AO in this case rejected that case as being relevant as there was not a sufficient parallel correspondence between the facts of the case to justify this fundamental reliance on that case by the respondent being the provisions of Section 16(1) and 16(3). In this case the AO held that the Complainant was fully fit for all her duties except that she had to have a shorter working week or at best reasonable breaks between periods of work. It was pointed out that this was not a case of a fundamental

inability to carry out essential duties as considered in the Nano Nagle case.

The AO held that the failure to adequately address this work break issue was a key factor in the discrimination over reasonable accommodation. The AO held that as the Respondent was able to facilitate a shorter week initially rising to four days in 2017 the AO could not see any realistic argument put forward as to why this could not continue. It was pointed out that the position that a finance manager supporting a sales force who was open to a more detailed examination in terms of rostering of staff to provide the necessary cover. It was argued that the additional cost was prohibitive. The AO held that this was not a disproportionate burden. An award of €65,000 was made.

This case is a useful case in dealing with the issue of reasonable accommodation.

It is becoming an issue particularly where there is an employee who has an illness in being able to provide reasonable accommodation to them because of their illness. It is a full Defence for an employer if the employer can show there was a disproportionate burden or that it was not feasible for the employer to accommodate the employee. There is also a full Defence where an employer can show that the employee was not capable of performing the functions.

Discrimination Legislation and Constructive Dismissal

In case ADJ9631 the AO in this case quoted the case of a worker and an employer 2005ELR132 where the Labour Court observed that the dismissal under equality legislation was similar to that under the 1977 Act in relation to the concept of Constructive Dismissal. This review was applied in the case of Stone v. Maloney & Sons Limited DECE2010 196 where the Equality Officer stated:

"The Labour Court, in the case of a worker v. an employer 2005 ELR132 has addressed the issue of Constructive Dismissal under the Acts comprehensively it has set out the main applicable test, these being "contract test" and "the reasonableness test" and has held that these tests may be used either in combination or in the alternative.... This test assesses whether the employer's conducts its affairs in relation to the employee so unreasonably that the employee cannot be expected to put up with it any longer. What can be regarded as reasonable or

unreasonable and depends on the circumstances of each case. However, it is an important element of the reasonableness test that the employer has an opportunity to address an employer's grievance or complaint."

Effectively, this case confirms that in a case where an employee resigns on the ground that they are claiming that they have been discriminated against they must go through the same tests as would apply in an Unfair dismissal claim as Constructive Dismissal.

Disability Discrimination

This is an issue which is arising regularly. A Decision issued under DJ7638 and 9592. This is a very useful Decision for colleagues to read. There is a significant review of the legislation relating to disability discrimination. It is one of those Decisions we would encourage colleagues to read.

Penalisation

Again, we would refer to the very useful decision in case ADJ10853 where this issue was addressed. The case of Patrick Kelly T/A Western Insulation and Girzdzius HSD081 where the Labour Court stated,

"*It is clear from a plain reading of Subsection (3) of this Section that penalisation is rendered unlawful under the Act when it is perpetrated on an employee for having performed or committed one or more of the Acts referred to in the succeeding paragraphs of that subsection. Thus, it is perfectly plain that in order to succeed in a cause of action grounded on the section, a Claimant must establish not only that he/she suffered a detriment of the type referred to at Subsection (2) but that the detriment was imposed because, or was in retaliation for the employee having acted in a manner referred to at Subsection (3).*"

It was pointed out that a causal connection must be established between an employee exercising their rights under Section 27(3) and the employer's subsequent action. In Aidan and Henrietta McGrath Partnership v. Monaghan PDD 162 followed the "but for" test laid out in O'Neill v. Toni and Guy Blackrock Limited HSD095 in relation to penalisation under the 2005 Act as follows,

"*The detriment giving rise to the complaint must have been incurred because of or in retaliation for the complainant having committed a protected Act. This suggests that where there is more than one causal factor in the chain of events leading to the detriment complaint of the commission of a protected Act must be an operative cause in the sense that "but for" the complainant having committed the protected act he or she would not have suffered the detriment. This involves a consideration of the motive or reasons which influenced the decision maker in imposing the impugned detriment."*

This Decision of the AO is one which is well worth reading.

Discrimination

In case ADJ8096 the AO in this case has helpfully set out the Decision of the Labour Court in the case of Offaly Personal Assistant Services v. McNamee EDA1841 in relation to the test where it was held,

"That, that test requires the complaint prove the primary facts upon which he or she relies in seeking to raise an inference of discrimination. It is only if this initial burden is discharged that the burden of proving that there was no infringement of the principal of equal treatment passes to the respondent. If the complainant does not discharge the initial probative burden which he bears, his case cannot succeed."

It is very helpful that this has been restated by the AO in this particular case.

Redundancy

The case of Drumcondra Childcare Limited and Szumera RPD1814 is an interesting case concerning the application of the Redundancy Payments Act 1967. The facts of this case are interesting and were agreed by the parties. The employee was employed as a part time cleaner. She was placed on temporary lay-off on 25 August 2017 until 1 January 2018. After a period of 4 weeks on temporary lay-off the employee wrote to the respondent terminating her employment with effect from 1 January 2018. The employee contended that pursuant to Section 12(2) of the Act she was entitled to Statutory Redundancy. The employer contended that it served a counter letter on the complainant offering her a period of continuous employment but this was not done

within the time frame of 7 days from the date of receipt of the employees' intention to claim provided for in Section 13(2) of the Act. The Court set out the provisions of Section 12 and 13. The Court helpfully set out the case of Industrial Yarns Limited v. Leo Greene and Another 1984 ILRM15 at page 20 where Costello J (as he then was) stated,

"the S.12 procedure was amended by S.11 of the 1971 Act. After the employer had served the S.11 notice of lay off, the employee could now serve one of two notices;
Either (a) A Notice of Intention to claim redundancy
or
(b) A notice terminating his contract (which is deemed to be a notice to claim a redundancy payment). He cannot serve both".

The Labour Court held that as the claim fell squarely within the meaning of Section 12(2) of the Act. The letter sent by the employee to the employer informing the employer, after she had been on a period of enforced lay off of longer than 4 weeks, is to be deemed in accordance with Section 12(2) of the Act to be a notice of intention to claim a redundancy lump sum payment. The Court held that the claim was not defeated by the Respondent within the meaning of Section 13 of the Act by serving a counter notice within the relevant time period. The employee had commenced employment on the 1st March 2012. The Court held that the relevant termination date for the purposes of redundancy was 1 January 2018 and set out her weekly rate of pay. We would comment that normally an employee in such circumstances will serve a notice of intention to claim redundancy payment. That form, as produced, provides for the counter notice. By using the alternate method of simply sending a letter terminating the contract some employers may not then be aware that this is in fact, pursuant to Section 12(2) deemed to be a notice to claim a redundancy payment.

Redundancy Payment Acts

In case ADJ11958 the AO had to look at the provisions of Section 7(2)(e) of the Act which provides for redundancy where,

"*The fact that his employer has decided that the work for which the employee had been employed (or had been doing before his dismissal) should henceforward be done by a person who is capable of doing other work for which the employee is not sufficiently qualified or trained".*

The AO in this case referred to Employment Law Second Edition by Murphy and Regan at pages 784/785 where the authors cited the Decision in St. Ledger v. Frontline Distribution Limited 1995 ELR160 where the EAT stated,

"*Definition (e) must involve partly at least work of a different nature, and, that is the only meaning we can put on "other work" more or less work of the same kind does not mean "other work" and is only a quantitive change".*

This case was an equality case. The Decision covers in some depth the law relating to discrimination where an employer would have sought to get rid of an employee on the basis of redundancy. In this case an award of €25,000 was made. The AO in this case in setting an award of €25,000 took into account that a redundancy payment of a little over €9000 had already been made.

This case is interesting both in the area of Equality Legislation and Redundancy.

Redundancy

In case ADJ16132 the AO in this case helpfully quoted the Second Eddition of Employment Law at 19.123 where it was stated,

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

In executors of Everest v. Cox it was found that,

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

The English EAT case of Hudson v. George Harrison Limited shows that the arbiter of fact, before making a decision on the reasonableness of the employee's decision to refuse to take up an alternative position can look at the employee's personal circumstances. Before quoting the above mentioned quotation from the Executors of Everest, the EAT stated that,

"*The S141(2) question involves taking into account the personal circumstances of the employee. The test is wholly subjective but it includes taking into account those personal circumstances".*

The relevant Irish sections are Section 7(2)(a) and Section 15(2)

All claims should be dealt with in one set of proceedings

In case ADJ10853 the AO in this case looked at this issue. The AO referred to the case 1843 Henderson v. Henderson which gave a common law rule,

"*that there should be finality in litigation and that a party should not be twice vexed in the same matter".*

The AO also referred to the case of Woodhouse v. Consignia PLC 20021WLR2258 where it was stated,

"*The rationale for the rule in Henderson v. Henderson (1843) 3 Hare100 that, in the absence of special circumstances, … a Defendant should not be oppressed by successive suits when one would do".*

The AO also quoted the case of Cunningham v. Intel Ireland Limited 2013IEHC207 where Mr. Justice Hedigan stated,

"*Thus, all matters and issues arising from the same set of facts or circumstances must be litigated in the 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."*

It is very useful that the AO in this case has set out this issue as it is one that does arise.

It would be our view that in reality there are going to be times when the same issue or set of circumstances can give rise to different claims which have to be litigated in different forums because of the way our system is set up.

For example, there may be a case where an employee contends that they have to work excessive hours and that would be brought in the

WRC. They may at the same time be bringing a personal injury claim on the basis that an injury was sustained because they had to work excessive hours. There is no method by which both claims could be heard by the WRC. One is going to be heard in the Courts. The other is going to be heard in the WRC. Of course, they would have a bearing on each other but that is a separate matter. There is then of course an issue, which is not relevant to this particular case but which we feel we should comment on as to which set of proceedings goes first. A personal injury claim is a personal injury claim. A claim for working excessive hours relates to a fundamental right as it derives from a Directive provision. In reality up to now where these issues arise normally a case before the WRC or the Labour Court will be held over pending the outcome of Court proceedings. That may no longer be a feasible proposition where we are dealing with rights which derive under Irish Law as opposed to ones which oppose to laws which arise under European Law.

In principle we would agree that all cases should be heard at the same time where this is possible but because of the way the Irish legal system is set up this is not always possible.

Payment of Wages during lay-off

In case ADJ-10983 the AO helpfully referred to the case of John Lawe -v- Irish Country Meats (Pig Meat) Limited 1988 ELR 266 where the issue of payment during lay off was considered by Mr Justice White. In that case the Court referred to the legal position that is summarised in Forde Employment Law, page 81, where it is stated:

"Absent a term in the contract to the contrary, the employer's fundamental obligation is to pay the agreed remuneration for the time of work during which the employee is prepared to work (Hanley -v- Pearse and Partners). Ordinarily, an employer is free to lay off workers for any reason, provided he continues to pay them. A lay off without paying the normal agreed remuneration can be treated by the employee as a dismissal."

In this case there was no clause in the contract stating the employer had the right to lay off without pay in quiet business periods.

The AO held that the effect of same was that the employee was dismissed.

In this case the AO awarded one week's pay of €520 plus the difference in the hourly rate for a 26-week period which amounted to €3,640 being a total of €4,160.

We would point out that in the alternative, if you had an employee that had been on long service, an employee may have been able to bring a redundancy payment claim. In some cases that may be more beneficial for a long serving employee.

Right to be Paid

In case ADJ10853 the issue of wages and the entitlement to be paid wages was raised. Section 1 of the Interpretation Act Subsection 1 describes "Wages" in relation to an employee as meaning any sum payable to the employee by the employer in connection with his employment… payable under his contact of employment or otherwise.

A useful case is that of O'Donovan v. Allied Irish Banks PLC 1988 9ELR209, where Mr. Justice Smithwick referred to the Judgments of the House of Lords and the speech of Lord Brightman in Miles v. Wakefield Metropolitan District Council 1989 1AC539 where he said at 552,

"*I agree that the Plaintiff's action was rightly dismissed by the trial Judge. It was rightly dismissed because in an action by an employee to recover his pay, it must be proved or admitted that the employee worked or was willing to work in accordance with his contact of employment or that such service was given the employee, it falling short of his contractual obligations, was accepted by the employer as a sufficient performance of his contract.*"

Non-Payment of Bonus

In ADJ12613 the AO in this case had to deal with a claim, by a solicitor, that a firm of solicitors had refused to pay her a bonus.

The AO looked at the definition of wages in the Payment of Wages Act and confirmed that a bonus payment is included in the definition of wages.

In this case an issue had arisen relating to the salary of the solicitor. Negotiations took place as a result of which it was agreed that the employee as a solicitor would receive an agreed bonus together with a percentage of the fees which she obtained over a target figure. The employee exceeded target by over €100,000 and the bonus which she expected to receive was in the region of €46,000. An offer of €6000 was made when the employee advised, after she had completed her maternity leave. When she advised her employer that she was moving to a HR company.

The AO in this case awarded a figure of €26,000 gross. The AO was critical of the fact that there had not been minutes of various meetings but accepted that the meetings had taken place and that it had been agreed that a bonus would be paid.

Where there is to be an agreement relating to a contractual bonus it is advisable always that it is put in writing. Where a bonus is going to be paid, it should also be clearly specified whether it is discretionary or not and in addition whether it would run on a year to year basis or just for the particular year.

Protection of Employees (Part-Time) Work Act 2001

In case ADJ12481 the AO in this case dealt with the issue of a stage hand who brought proceedings against a concert venue.

In this case it was contended on behalf of the employer that as the employee was engaged as a casual/part-time worker with the right to refuse work meant that the employee had no claim under the Act. It was argued that there was no full-time person with whom the employee could compare his rate of pay. In making this argument the employer relied on a ruling of the Court of Justice of the European Union in the case of Wipple v. Peek Cloppenburg GmbH case C-313/02. The employee in this case identified as a comparator a full-time employee of the employer who worked set hours and a named person who worked alternative shifts of 9am to 5pm and 3pm to 11pm. That person was contracted to work hours and had no discretion to refuse or work any shifts.

In the case of the CJEU paragraph 62 of that Decision concluded,

"*In the circumstances of the main proceedings, there is therefore no full-time worker comparable to Ms. Wipple within the meaning of the Framework Directive 97/81"*

In this case the employer referred to Section 7(1) and Section 7(3).

The employer contended that the employee could not show that he performed the same work under the same or similar conditions and there was an argument that there was reduced mutuality of obligation.

In this case the AO referred to the case of Barry v. Minister for Agriculture 2009 1IR215 where Mr. Justice Edwards found that where a "mutuality of obligation" exists between an employer and employee then the employee clearly has a contract of service. In that case however, Mr. Justice Edwards did state,

"*The requirement of mutuality of obligation is the requirement that there must be mutual obligation on the employer to provide work for the employee and for the employee to perform work for the employer".*

There is no doubt as the AO held that mutuality of obligation existed between the employer and the employee. However, because the employee had the freedom to decide how many hours each week he wanted to work and because the employer had the discretion to decide how many hours to offer him the degree of obligation on both parties was less than which would exist in a relationship between the employer and a full-time employee. The AO in this case held against the employee.

This case is extremely important for employers seeking to avoid the issue of paying employees the same rate of pay who are part-time workers as a full-time worker. Effectively this case has confirmed that employers can quite easily avoid the legislation by simply providing, in the case of part-time workers that they can refuse any assignment. Provided it is on the basis that they will not be penalised for doing so and particularly where the employer does not specify any set hours the employer can avoid having to pay part-time workers the same rate of pay as a full-time worker even though while working the part-time worker would perform substantially the same roles. It would be vitally important in any such scheme that there is no full-time employee who would have the same degree of flexibility.

It will be interesting to see the approach of the Labour Court if such a scheme came before them. We currently would not be advising corporate clients to utilise such a scheme.

Protection of Employees (Fixed-Term) Work Act 2003

The issue of what is and is not a fixed term contract arose in a case of University of Limerick and Eimear Connolly FTD187. The Court in this case held that the employee was employed at all material times under a 2010 contract of employment. No further additional contracts of employment issued. The Court pointed out that although the duties were varied over the course of the variation was consistent with Clause 7 of the 2010 written contract. The Court held that this could not be construed as having the effect of bringing a new fixed term contract into being between the parties. The Court held that the employment lasted for the duration of the permanent staff member's absence. The specific purpose contract to cover same was terminated. The Court dismissed the claim by the employee on the basis that she had not established that she had been employed on two or more successive contracts. The Court held that she was employed on one specific purpose contract only. The Court held that Section 8 was not proved that there had been no contract renewal in her case.

This case is important in identifying that for employers it is important to have properly structured contracts in place. Equally for employees it is important to understand that to come within the terms of the Act there must be two or more successive contracts. If there are not then the protection of the Act is not obtained.

Unfair Dismissal Act 1977 – 2015

The issue of whether an employee can bring a claim for Unfair Dismissal where they have a fixed term contract which was not renewed was reviewed by the Labour Court in the case of Department of Employment Affairs and Social Protection and Noreen McRedmond case UDD1858.

In this case the employee had a contract which had the usual clause which stated,

"*The Unfair Dismissal Act 1977 – 2005 will not apply to the termination of your employment by reason only of the expiry of this fixed term contract without it being renewed".*

This is a waiver provision that is set out in Section 2(2)(b) of the Act and therefore the Unfair Dismissal Acts does not apply to a termination of a contract solely by the fixed term expiring and the contract not being renewed.

It is interesting that the Court pointed out that it was not disputed that the contract had been signed by both parties. It is a condition for this exemption to apply that employers ensure that the employee has signed the relevant contact.

In this case there was a seven-week period between the ending of the fixed purpose and the termination of the employment. The Court pointed out that four of these weeks were a notice period and that the actual period in question is three weeks. The Court pointed out that the Act does not state that the ceasser of the purpose and the termination must coincide. The Court held that the employee had not shown that there was any factor other than in the decision to termination the contract other than it had expired. The Court pointed out that it was clear that the employer once they became aware that the purpose of the contract has ceased acted with reasonable endeavour to bring the contract to an end in a reasonable manner.

In this case it was one where there would be a large number of employees and that the employer on a monthly basis would review matters to determine whether a fixed purpose contact should continue. They stated that as part of this review they had ascertained that the person whom this person was covering for had returned to a permanent position and once they became aware of this they placed the employee on notice. They pointed out that they did not have to give her notice. It took them about three weeks to ascertain same.

We would be of the view that this case very much turns on its facts. It was a large employer. They at any stage would have 500 – 600 people on fixed term or fixed purpose contracts and therefore a certain degree of flexibility would be required. For smaller employers it may not be a Defence if they cannot show that the termination occurred at the first reasonable opportunity.

What may be reasonable for one employer may not be for another. It is better practice to review such fixed term or specific purpose contracts in advance always.

Organisation of Working Time - Holiday Pay

The CJEU in Case C-385/17 Torsten Hein -v- Albert Holzkamm GmbH & Co. KG is a case where the issue of Holiday Pay was being dealt with.

The case has held that during minimum periods of Annual Leave guaranteed by EU Law, which is four weeks, workers are entitled to their normal remuneration in spite of periods of short time working.

The CJEU however held that the length of that minimum period of Annual Leave depends on the work actually performed during the reference period. Therefore, periods of short time working may reduce that minimum period of leave to less than four weeks.

The CJEU have held that every worker is entitled to paid Annual Leave of at least four weeks but that single rights consists of two aspects being the entitlement to Annual Leave and the entitlement to payment of that leave.

The Court held that as the employee did not perform actual work for 26 weeks in the leave year that he was only entitled to two weeks leave. However, the Court pointed out that National Legislation may give workers a right to a longer period of paid Annual Leave. However, the Court has held that while the employee is on Annual Leave they must be paid their normal remuneration for the period of the rest. They quoted cases C-131/04 and C-257/04.

In respect of the pay, the Court found that for the days of Annual Leave guaranteed by EU Law remuneration which does not correspond with the normal remuneration the employee receives during period of actual work is contrary to EU Law.

This case is interesting in relation to the issue of overtime. The Labour Court has consistently held that overtime, unless it is rostered overtime, is not to be taken into account in calculating Holiday Pay. It has already been decided by the CJEU in earlier cases that a bonus has to be taken into account in calculating an employee's normal remuneration.

This most recent case from the CJEU does raise the issue that possibly overtime does have to be taken into account in calculating what the normal remuneration was.

Organisation of Working Time Act

In the case of Sprint Coatings Limited and Warzycha DWT1831 the Labour Court in this case dealt with a situation where the average hours worked were 48.04. The Court pointed out that the breach was a de minimis breach of Section 15 and did not award compensation. This case was heard before two recent cases before the CJEU. The language of Section 15 provides that,

"An employer must not permit".

The provision of Article 6 of the Directive provides that,

"*Member States shall take the necessary measures to ensure".*

The issue is going to be and it does not appear to have been argued in this case whether there can be a de minimis of a fundamental right where the Directive provides that the period of time should not exceed 48 hours averaged.

It is going to be interesting to see how the case law develops in this area.

Payment of Annual Leave in advance

In case DWT1817 being a case of Candlevale Limited and Gorczyca – Gebicka DWT1827 an interesting issue arose in relation to the issue of Section 20 of the Organisation of Working Time Act as regards payment of holiday pay in advance. The Court in this case held that there was no decision from the AO and therefore there was no appeal to the Labour Court. This issue and this would be our commentary does arise at times and therefore it is important to be able to show that a particular claim was before the AO. In those circumstances matters can be sent back to the AO. It is also important to check Decisions to make sure that issues that were before an AO are actually covered in Decisions particularly where there is a multiple of claims.

In this case while stating that there was no appeal the Court pointed out which would very much be an obiter comment that the employer had confirmed to the Court that in the event of a request for payment in advance of annual leave there would be no difficulty in facilitating employees in this regard.

This is an issue which will arise in other cases. The legislation provides that the employer shall pay the employee in advance. There is absolutely no requirement for an employee to request it. The obligation is on the employer to pay it.

Article 7 of the relevant Directive provides that Member States should take the necessary measures to ensure that workers are entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to and the granting of such leave laid down by national legislation or practice. The legislation is therefore very specific in Ireland that it is to be paid in advance therefore taking into account the Directive and now the Charter which was referred to in case C-684/16 it is a matter of construction of the Irish legislation that it would be in line with the Directive and that it is prescriptive on employees to pay the leave in advance.

At times it can be more beneficial for an employee who is a monthly paid employee, for example, to be paid every month. In such circumstances there is provision in Section 21 of the Act to allow for time and pay to be varied. For employers to protect themselves it is advantageous and beneficial to put a specific clause in a contract to provide that by agreement the payment dates are varied to be payable for monthly employees on a monthly basis but giving the employee a right to withdraw that variation at any stage. It would not be a waiver because the Act does not allow waivers of rights, except in very limited circumstances. However, there is nothing to stop a variation if the employee agrees that it is more beneficial to them.

The Unforeseen Consequences of Case C-378/17

Minister for Justice and Another v. Workplace Relations Commission and Ronald Boyle and Other Notice Party.

We have commented in relation to this case as to its impact on the WRC and the Labour Court.

The effect of this Decision goes much further.

Up until the 4th December 2018 only the High Court or on a subsequent appeal to the Court of Civil Appeal or the Supreme Court could the issue of setting aside Irish Legislation as not being in conformity with an EU Directive was limited to the High Court or the higher superior Courts on appeal.

The case has been identified as one which gives particular rights to the WRC and the Labour Court. However, the effect of the Decision is that the District Court and the Circuit Court now have this power to disapply Irish Legislation where it is in conflict with an EU Directive. Equally any Quasi-Judicial Body will have the same power.

It is understandable where the CJEU came to this decision. In most EU countries those in what we would term in Ireland Quasi-Judicial Bodies are in fact Judges. In some jurisdictions these Judges train to become Judges. Some may never have been involved in private practice and would have left University or, studied to be a Lawyer and then studied to become a Judge. Sometimes having to work for a State Body for a number of years before moving on to become a Judge.

Our system being a Common Law system does not work this way. Only before the Superior Courts can issues relating to the interpretation of the Constitution or the setting aside of legislation that has been contrary to the Constitution has until now been now totally limited to the superior Courts. The new jurisprudence which has now been applied by the CJEU is extending this power away from that which has up until now been the standard position in Ireland.

This creates huge practical issues for the administration of justice in Ireland.

The basis of limiting the powers to the Superior Courts was that once a Judge was appointed except in the most limited of circumstances that Judge has security of tenure until their retirement age. While the same applies to the District Court and the Circuit Court and the Labour Court, this does not apply in the WRC where those hearing cases are there for a limited period of time.

There is now an argument that if this power is going to apply to Quasi-Judicial Bodies there does need to be checks and balances. The District Court, the Circuit Court or the Labour Court, as simply examples, all

have the power to refer the matter to the High Court to get an interpretation on a particular issue of law. That power does not apply to Adjudication Officers. The Labour Court and all its members are completely independent of control. Yes, they are subject to a certain level of control by the Chairman of the Labour Court who is currently Mr. Kevin Foley. However, the Labour Court operates on a collegial basis. Members of the Labour Court are there until their retirement age as set by the current rules relating to the Labour Court and its composition. They are full time on the Labour Court and cannot be involved in other activities. This must be contrasted with the WRC. Adjudication Officers in the WRC are not full time. Some are but most are not. Adjudication Officers can be involved in other businesses. Some are involved in HR advisory companies. Some practice as solicitors or barristers, these are just examples. Their appointment is for a limited period of time. Adjudication Officers take instruction, if we can call it that, from the Director General. Many Adjudication Officers are of the highest standard and have a significant knowledge of the law. They are obliged to follow Decisions of the Labour Court or the superior Courts. However, when it comes to challenging a Directive, they will now be the party of first instance.

With the change to jurisdiction, there is a significant argument that can be made that because the powers are effectively, of a Constitutional nature in that they can set aside legislation of the Oireachtas that those hearing cases should have the status of a Judge. They should be solely involved in hearing cases and not involved in other businesses. They should be full time. They should have the independence and security of tenure of a Judge. There is also the issue that they should be trained up to a particular level. This would be a significant cost to the WRC. Equally it may mean that some very talented individuals may not be prepared to take up the positions unless the payment scales increase significantly. There is therefore an alternative. The alternative is that where an issue arises, in any case before the WRC relating to the interpretation of Irish Legislation and whether it is in conformity with an EU Directive that unless there is a determination of the High Court, or one of the other superior Courts ruling on that issue that the WRC should have the power but also to refer the matter by way of a case stated to the High Court to be adjudicated on.

This is not being set out simply to create problems, far from it. Issues such as the interpretation of Irish legislation and possibly the disapplication of a particular piece of Irish Legislation has the potential always to end up ultimately going on a Point of Law appeal from the

Labour Court. Such cases are extremely expensive. Whether they are taken by the employer or the employee. Whether or not the party who does not appeal takes part in the proceedings if the person bringing the Point of Law wins the costs go against the other party. In the case of an employer, being a small employer, this can effectively put them into liquidation. In the case of an individual the level of costs are such, that only very highly paid employees could afford to discharge them and it could mean that people will lose their homes where costs orders are obtained. If there was an automatic referral unless there had been a prior determination by the High Court then there would be no appeal on a point of law. The only appeal could possibly be by way of the Judicial Review of the Labour Court or possibly the WRC but in those circumstances the party not bringing the claim does not have to take part in the proceedings and if they do not they are not caught or subject to any legal costs.

The WRC and the Labour Court both work on the basis that costs are not awarded. They are intended to be a cheap forum to which any employee can bring a claim and that neither the employer or the employee are liable for costs. Where cases will involve the issue as to whether a Directive has or has not been properly implemented there are going to be a significant number of cases. This is due to bad drafting of Irish Legislation. We have pointed these out before. However, now rather than having to bring a case to the High Court, which is expensive as previously set out, these issues are now going to be able to be litigated upon in the WRC and the Labour Court on appeal. This has the potential of creating significant extra costs for employee and employers. For the WRC it would involve, as many of the Adjudication Officers would not claim to be lawyers and are simply applying the law on the basis of previous Determinations and applying those to the particular facts of cases before them the new jurisdiction to be seen to be fairly applied and in a consistent manner will require a significant investment by the Department in the WRC to provide them with the relevant experts to assist in making Determinations which can have significant impacts on employers and employees. In addition, Adjudication Officers in the WRC are now going to have to in certain cases determine whether a Directive has direct effect as regards private employers. It is clear from a Decision of the CJEU on 7th November that certainly there is direct effect against private employers in respect of cases under the Organisation of Working Time Act and when that case is looked at it would appear that the same may apply as regards virtually all EU Directives with some exceptions.

This Decision is going to have a significant impact on how employment law and the law generally is applied in Ireland. There are political and practical issues including Constitutional issues which will need to be addressed sooner rather than later failure to do so could involve employers and employees in very expensive litigation the monetary value might be minimal compared to the cost of fighting a case. For example, and we will give just one, Section 12 of the Organisation of Working Time Act refers to an employer that an employer "shall not require an employee to work for more than four and a half hours". It then goes on to provide breaks that have to be provided. The Directive refers to an employer shall "ensure" that an employee gets breaks within six hours. Does this mean the same thing? without it. Equally the Directive applies as regards providing that more beneficial provisions can be applied. Therefore, if an employee brings a claim, are they bringing a claim where they did not get a rest interval at work under Section 12 within four and a half hours, under local legislation which has no Directive implications or are they limited to bringing claims where there would be a Directive implication where they work for more than six hours without receiving the rest period. In the alternative is the provision of providing for something more beneficial to an employee coming within the scope of the Directive one that an Adjudication Officer would have to determine as to whether the Irish legislation was in conformity with the Directive. It is possible to make arguments especially in relation to a rest interval after four and a half hours on both sides of the argument.

Because of the issue of Directives requiring to be proportionate and equivalent issues such as costs and discovery, to none but two, will have to be addressed. Equally because of case C-684/16 the issue of legal aid is now going to have to be addressed due to the issue of the equivalence.

Organisation of Working Time Act

The CJEU have held that the provision of the Working Time Directive does not apply to foster parents where the work performed by a foster parent under an employment contract with a public authority consists in taking in a child, integrating that child into his or her household, and ensuring, on a continuous basis, the harmonious upbringing and education of that child.

The CJEU referred to the Charter of Fundamental Rights of the European Union. The Directive allows for exemptions from the Directive. The Court referred to Article 31(2) of the Charter. The Court however held that the statutory limitations placed on foster parents' rights to periods of daily and weekly rest periods and paid annual leave that it was necessary for the achievement of the public service objective which was recognised by the EU namely the protection of the best interest of a child that this is enshrined in Article 24 of the Charter, and came within the limitations set out in Article 52(1) of the Charter.

This case is useful for setting out the circumstances in which an exemption can apply.

Terms of Employment (Information) Act

In case TED1819 being a case of Sprint Coatings Limited and Warzycha the Labour Court has very helpfully set out the issue of the time limit for bringing a claim.

In this case the employee issued complaints under Section 5 of the Act relating to breaches in 2014. The AO in this case held that the complaints were statute barred. The Labour Court set aside the Decision in this respect. The Court helpfully pointed out that the breaches were continuing in nature and were not statute barred when they were referred to the WRC.

This is an important issue as some AO's work on the basis of the six months effectively two months from the start of an employment or six months from the date of any change of conditions. It is very helpful that the Court has confirmed, in line with its standing policy that there is a continuing breach and in those circumstances a claim can be brought.

The Court in this case also then dealt with the issue of certain elements of the claim being merely technical breaches.

This case took place in September and again before the Decisions which issued from the CJEU in November and subsequently on 4th December.

Because of the case that took place on 4th of December where the Judgement issued there will be an issue of looking at Sections 3 and 5 in line with Article 2 of the relevant Directive which was implemented by the Terms of Employment (Information) Act. The Directive provides

that an employer shall be obliged to notify the employee of the essential aspects of the contract of employment relationship. Certainly, the Irish legislation does effectively provide for a de minimis provision in line with our common law rules. However, this has now been effectively set aside by the CJEU. Therefore, there is an issue as to whether under European Law a de minimis provision can apply where there is a breach of an essential aspect of the contract of employment relationship. Again, this is an issue which is going to be subject to legal arguments in the future.

We are simply mentioning this as the recent Decisions of the CJEU are going to have a significant impact on how employment legislation is applied in Ireland.

Keeping the WRC Advised of Change of Address

In AWD186 in the case of Staffline Recruitment Limited and Zawadzka the Labour Court had to deal with a situation where the employer it appears failed to keep the WRC fully informed of their address. As a result, notification of hearing did not arrive nor did the Decision and an appeal was lodged outside of the statutory time frame.

In this case the employer through the HR Director did write to the WRC notifying of their contact details and giving an email address. However, they were not notified of the change of address from Naas to Dublin.

The employer sought to rely on case EET034.

The Court in this case stated that the employer failed to follow a number of basic steps to ensure that the WRC was aware of the change of its business address from Naas to Dublin and that the employer was “very remiss” to limit its forwarding arrangement with An Post to a mere six months.

Consent to an extension of time was not granted.

There are difficulties, as we have seen, in the WRC with regard to hearing dates and notifications.

It is always important to notify the WRC of the fact as to who the representatives are if there are representatives.

If there are no representatives it is important that some basic steps are taken:

1. That the WRC is advised of the contact person, in the case of a company to contact.
2. That their address is provided.
3. If there is any change in personnel or address that this is also notified to the WRC

While the WRC guidelines state that hearings will take place within eight weeks of claims being lodged. The reality of matters is that this does not happen. Equally decisions issuing within eight weeks of a hearing date does not happen. Therefore, if an employer does change address or an employee changes address it is vitally important that:

1. Appropriate notification is sent to the WRC.
2. That the notification to An Post is a minimum of twelve months.

Exceptional Circumstances

Where a matter is being brought outside the statutory period the issue of being able to show exceptional circumstances justifying the delay is an issue which was looked at in the case of CH Marine Limited and O Connor DWT1829

The Court in that case set out that,

"The term exceptional is an ordinary familiar English adjective and not a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course or unusual or special or uncommon. To be exceptional a circumstance need not be unique or unprecedented or very rare; but it cannot be one which is regular or routinely or normally encountered (see R v. Kelly 1992 2All ER 1320 per Lord Bingham CJ)".

It is useful that the Court has again set out what exceptional circumstances are.

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