Case-Law Review 2019

2019 Review

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1 INTRODUCTION

1.1 The Workplace Relations Commission (the **WRC**) Annual Report 2018 (the **WRC Report**) indicated a 343% increase in the number of age related discrimination claims.

1.2 The WRC Report noted an average waiting time of six to nine months from the date of filing a claim to the hearing of that claim by an Adjudication Officer. 75% of postponement applications are successful although the WRC remains committed to tackling turnaround times for hearings.

1.3 The Labour Court Annual Report for 2018 confirms that in 2018 the Labour Court received 1,169 referrals under the various statutes within its jurisdiction – a 7% increase compared with the 1,093 referrals received in 2017. The level of referrals in industrial relations cases increased from 382 in 2017 to 399 in 2018 (a 4% increase) and the level of referrals in employment rights cases increased by 8% from 711 in 2017 to 770 in 2018. Of the 770 employment rights appeals received by the Court, 57% were in respect of appeals under the Unfair Dismissals Acts 1997-2017, the Employment Equality Acts 1998-2015 and the Organisation of Working Time Act 1997 (as amended).

1.4 During 2018, the Labour Court scheduled 945 hearings and issued 504 Recommendation/ Determinations/Decisions. 175 cases were investigated and settled prior to or at hearing. In addition, 51 cases were found to be outside the statutory time limits.

1.5 While the Labour Court Report identified an increase in appeals to the Labour Court (specifically 399 in 2015 to 770 in 2018), this increase reflects the bringing together of all appeal avenues to a single appeal route, rather than a trend of increased disputation between employers and employees.

1.6 This paper aims to identify and analyse the key cases that have been reported within the last 12 months in the context of Irish employment law. It will provide a thematic overview of case-law in selected topics ranging from reasonable accommodation and the Supreme Court's decision in the seminal Nano Nagle v Daly case, to key learnings to be gleaned from a number of injunctive applications that came before the High Court and Court of Appeal in 2019.

2 REASONABLE ACCOMMODATION

Marie Daly v Nano Nagle School [2019] IESC 63 – Supreme Court

2.1 The Supreme Court, weighing in on the legal saga that is the case of *Daly v Nano Nagle School*, has clarified the extent of an employer's duty to reasonably accommodate a disabled employee. Rowing back from last year's Court of Appeal decision, the Supreme Court appears to have imposed a more onerous burden on employers.

2.2 Significantly, the Supreme Court has confirmed that, when considering reasonable accommodation, there is no distinction to be made between core "duties" and non-core "tasks" attached to a particular role. Rather, a reasonable employer will be required to demonstrate that all "appropriate measures" to facilitate such a disabled individual were taken - limited only by the extent to which such a measure would constitute a "disproportionate burden" on that employer.

2.3 So where are we now? Just how far is far enough when it comes to an employer's duty to reasonably accommodate a disabled individual in the workplace?

What does the law say?

2.4 Section 16 of the Employment Equality Acts 1998 - 2015 requires employers to take "appropriate measures" to facilitate persons with disabilities in accessing and participating in employment. The only caveat to this obligation is that such measures should not place a "disproportionate burden" on that employer by considering the cost involved in implementing the measure, alongside the resources of the employer and the possibility of public funding being provided.

2.5 However, employers are not required to recruit, promote, retain or train an individual who "is not capable of undertaking the duties attached to that position" [emphasis added].

What did the Court of Appeal decide?

2.6 The Court of Appeal overturned a decision of the High Court that a school had failed to reasonably accommodate a paraplegic Special Needs Assistant (SNA).

2.7 The key takeaway of the Court of Appeal decision was its focus on the distinction between non-core "tasks" and core "duties". In assessing the extent of an employer's duty to reasonably accommodate, the Court concluded that an employer must consider the redistribution of non-core tasks but is not required to consider redistributing core duties of the role.

2.8 In short, the Court concluded that an employer is not required to retain a disabled employee who is not capable of performing the "essential duties" of the position concerned. The fact that the employee might, with reasonable accommodation, be in a position to perform some but not all of the essential duties was not sufficient.

2.9 The Court of Appeal determined that, because the SNA could not perform the "*essential duties*" of her role, regardless of the accommodations put in place, the school had *not* failed to reasonably accommodate her.

What did the Supreme Court decide?

(1) Should a distinction be drawn between non-core tasks and core duties of a role?

2.10 In a fundamental about turn, the Supreme Court did not agree with the Court of Appeal's distinction between non-core tasks and core duties (or essential functions), when considering whether an employer had discharged its duty to reasonably accommodate. Instead, the Supreme Court held that all "appropriate measures" were to be considered and a decision by the employer not to implement any such measure could only be on the basis that it constituted a "disproportionate burden" – not whether the measure impacted the essential duties of the role under review.

2.11 Despite initial appearances, this decision does not require employers to exceed the realm of reasonableness. Significantly, and of some reassurance to employers, the Court held that an employer "cannot be under a duty to entirely re-designate or create a different job". The Court went on to state that to create a new job would "almost inevitably raise the question as to whether what is in contemplation is a disproportionate burden."

(2) Is employee consultation required?

2.12 The Court of Appeal's decision indicated that, in the context of reasonable accommodation, engagement and consultation with the affected employee is not legally required. The Supreme Court has somewhat stepped back from this view and re-endorsed the seminal position set out in Humphries v Westwood. Although the Court did not definitively require employers to engage and consult with employees, the judgment provided that "a wise employer will provide meaningful participation" as part of the consideration of appropriate measures.

Key Takeaways for Employers

2.13 In considering reasonable accommodation of a disabled individual in the workplace, a prudent employer should:

2.13.1 Objectively evaluate what, if any, appropriate measures could be put in place to facilitate that individual. An employer should be able to demonstrate that any decision not to implement a particular measure is on the basis that it would represent a disproportionate burden.

2.13.2 Consider the redistribution of both core duties and non-core tasks.

2.13.3 Be fully informed by up-to-date expert medical advice. The Court in Nano Nagle referred to the Occupational Therapist report as "one of the evidential keystones of the case".

2.13.4 Though not necessarily mandatory, engage and consult with the affected employee.

2.14 The Supreme Court's judgment rows back from the Court of Appeal decision, which means employers are required to consider a redistribution of core duties as well as more tangential tasks associated with a role, but that an employer does not need to create a new role.

2.15 While clarity on the extent of an employer's obligation to reasonably accommodate individuals with disabilities is welcomed, it may be difficult for an employer to draw a line between implementing appropriate measures and ultimately creating a new role. The issue to be addressed will be at what point the extent of an employer's duty tips the balance from the provision of reasonable accommodation to becoming a disproportionate burden. There is no one-size fits all approach and employers will need to approach each scenario on a case by case basis.

3 INJUNCTIONS

3.1 2019 was an interesting year from the perspective of applications for injunctive relief before the High Court and Court of Appeal. Three cases in particular are worth reviewing – the first two cases (*Byrne Wallace v Kearney* and *Powers v HSE*) re-affirmed key principles from a jurisdiction perspective, while the third case (*Grenet v Electronic Arts*) explored the potential pitfalls of a no-fault dismissal and enunciated some key lessons for multinational corporations when it comes to ostensible authority.

Byrne Wallace v Kearney [2019] IECA 206 – Court of Appeal

3.2 In July 2019 the Court of Appeal weighed in on the crucial question of precisely where an employee can legally seek to challenge the redundancy of their role. The Unfair Dismissals legislation provides a statutory framework within which employees can bring such a claim to the Workplace Relations Commission (the **WRC**). However, in the *Kearney* case, the question asked was whether, notwithstanding this statutory route of

redress, an employee could challenge their redundancy before the High Court to secure injunctive relief.

3.3 The Court of Appeal has confirmed that it is "*entirely satisfied*" that it would be "*entirely inappropriate*" to grant such injunctive relief given the existing statutory route of redress available to employees.

What happened?

3.4 The plaintiff, Mr Kearney, was employed from 2006 until his termination of employment in August 2017. Mr Kearney experienced bouts of lengthy certified sickness absence during the course of his employment. In 2016, during a period of unpaid leave, the employer referred Mr Kearney to an independent medical practitioner to assess his fitness for work. Both Mr Kearney's own psychiatrist and the independent practitioner concluded Mr Kearney was fit to return for work. However, Mr Kearney's requests to return to the office were, Mr Kearney submitted, "*ignored*".

3.5 The employer subsequently wrote to Mr Kearney in August 2017 to advise that Mr Kearney's "*previous role is not available and in fact it no longer exists*". The letter confirmed that his employer had been "*unable to identify another suitable role*" and confirmed Mr Kearney was "*redundant*". He was paid all contractual and statutory entitlements.

3.6 Mr Kearney ultimately instituted High Court proceedings against his employer to restrain his dismissal. His employer resisted this application, arguing that "*no right of action exists at common law arising from an alleged unfair selection for redundancy and that the cause of action derives from the statutory redress scheme*" under the Redundancy Payments legislation and Unfair Dismissals legislation. In turn, Mr Kearney argued that his claim was not "*properly characterised*" as a claim for statutory unfair dismissal but rather a common law breach of contract claim on the basis his employer had failed to "*observe fairness of procedures*" before dismissing him.

What did the High Court decide?

3.7 The High Court confirmed that "*the primary issue in the hearing was one of jurisdiction*". In circumstances where Mr Kearney could take an unfair dismissal claim to the "*more informal setting*" of the WRC, is he barred from seeking injunctive relief before the High Court?

3.8 The High Court focused on the 2009 case of *Nolan v Emo Oil Services* which "*had the most similarity*" to Mr Kearney's case – i.e. Mr Nolan sought injunctive relief to prevent his dismissal on grounds of redundancy. Laffoy J in the *Nolan* case found that it was not for the "*courts now to expand a common law principle into the same field and produce an outcome inconsistent with that created by the statutory code*". It was held that Mr Nolan's remedy arose under statute and he had "*not otherwise acquired a cause of action for breach of contract*". Where the Oireachtas provided "*specific*

remedies for unfair dismissal and specific procedures for obtaining such remedies, the common law had no role to play".

3.9 The High Court concluded, based on the above, that Mr Kearney had not made out a "*strong case that would justify the granting of an injunction"*. Mr Kearney appealed to the Court of Appeal.

What did the Court of Appeal decide?

3.10 As part of his appeal, Mr Kearney argued that his redundancy was a "*sham*" and, as a result, there had been a breach of an implied term of his employment contract – i.e. breach of mutual trust and good faith. Mr Kearney alleged that the decision by his employer to dismiss him was "*capricious and arbitrary*" since his position was "*demonstrably*" not redundant. It was submitted that simply because Mr Kearney's employer "*described the dismissal as one based on a redundancy does not mean that this is correct*" and asked the Court of Appeal not to be "*influenced by the label attached to the dismissal*" but rather to "*look at the substance of the dismissal*". On this basis Mr Kearney asserted that *Nolan* should be distinguished or even declared to be "*wrongly decided*".

3.11 The employer, in defence, maintained that the *Nolan* decision was "*correct in principle*" and a "*statutory scheme*" had been introduced by the Oireachtas for the "*very purpose*" of addressing any claim that a redundancy situation was a "*sham*". The employer submitted that Mr Kearney's attempt to contend there had been a breach of an implied term of trust was "*contrived*" and was not "*sufficient to bring the present case within the now restricted ambit of the common law in employment maters".* The employer further contended that to do so would "*open the floodgates to many applications for injunctions*" of this kind and would "*ignore the express and clear intention of the Oireachtas*" that such disputes be dealt with under the statutory framework before the WRC.

3.12 The Court of Appeal confirmed that the decision in *Nolan* was an "*insuperable obstacle*" to Mr Kearney obtaining injunctive relief to restrain his dismissal and have his salary paid in the meantime. He concluded that the High Court decision in Mr Kearney's case was "*perfectly correct*" and there was no "*strong case*" to be heard. The Court held that an implied term of trust and good faith does not deprive an employer of the right to terminate the employment contract with proper notice and, for example, where it is based on a redundancy. The Court found that Mr Kearney had not established that the employer had acted in bad faith in reaching a decision to terminate his employment on the basis of a redundancy and, accordingly, Mr Kearney could not "*escape the clutches of the decision in Nolan*".

3.13 The Court of Appeal, accordingly, dismissed Mr Kearney's appeal.

What does this mean for employers in Ireland?

3.14 This case is a welcome endorsement of the ten year old High Court decision in *Nolan*; clarifying that all roads lead to the WRC when it comes to challenging the legitimacy of a redundancy dismissal. The Court of Appeal categorically confirmed that it is "*entirely satisfied*" that the correct route of redress for such claims (the WRC) has been clearly identified by the legislature and it would be "*entirely inappropriate*" to ignore this path in favour of knocking on the door of the High Court. This case serves as a salutary lesson for employees of the risks posed when challenging a dismissal outside of the statutory framework.

Power v Health Services Executive [2019] IEHC 462 – High Court

What happened?

Maurice Power, the plaintiff, sought orders from the High Court to prevent his removal from the position of CEO of Saolta University Healthcare Group by his employer, the Health Service Executive (**HSE**), the defendant. Mr Power had been employed by the HSE since 1999 and held a number of roles within the organisation. He was appointed to a permanent position of Chief Financial Officer for HSE West in 2012. In October 2014, he was asked to fill in as interim CEO of Saolta University Healthcare Group. Mr Power was employed in this role on a series of fixed-term contracts. The HSE notified Mr Power that it intended to hold a competition to appoint a permanent candidate to the CEO role. While Mr Power took part in the competition, his application was unsuccessful.

Mr Power made a complaint to the WRC claiming to be entitled to a contract of indefinite duration for the role of CEO. Before the WRC had determined his complaint, the Plaintiff sought an injunction in the High Court to prevent the Defendant from removing him from his role as CEO and from further proceeding with the competition to appoint a permanent replacement.

What does the legislation say?

Section 9 of the Protection of Employees (Fixed-Term Work) Act 2003 (the **2003 Act**) provides that where a fixed term employee is employed by his or her employer on two or more continuous fixed-term contracts, the aggregate duration of such contract must not exceed four years unless there are objective grounds justifying the renewal of any such fixed-term contract..

High Court Determination

The High Court concluded that it has no jurisdiction to make interim or interlocutory orders in cases in which the court has no jurisdiction to decide the substance of the dispute. The Court found that the rights created by the 2003 Act were statutory rights to be upheld and enforced under the relevant statutory procedures and remedies.

The High Court also held that it had no jurisdiction to supplement the statutory remedies made available by the Oireachtas to administrative tribunals for the enforcement of statutory

rights. In short, the Court noted that Mr Power was seeking an order that would shape the remedy that might be ordered by the WRC if his claim were to be successful.

Finally, the Court observed that even if the substantive issues were heard, the Plaintiff's delay in bring the action would have disentitled him to the relief sought.

Key takeaways

1. The High Court will not provide injunctive relief to employees in respect of statutory rights that are exclusively within the jurisdiction of the WRC to uphold and enforce.

2. Delay on the part of an employee commencing proceedings may be fatal in an action for interim or interlocutory relief.

Jean-Philippe Grenet v Electronic Arts Ireland Limited [2018] IEHC 786 – High Court

3.15 A recent application before the High Court to prevent the dismissal of a senior employee, fired for allegedly making an offensive comment to a female co-worker, captured the media's attention. In the case of *Grenet v Electronic Arts Ireland Limited* (**EA**) a number of significant employment law issues for global employers were explored. In particular, the circumstances in which an employee can be terminated, with or without fault; and who within the business has the requisite authority to lawfully effect a dismissal.

3.16 A cautionary tale for employers, this High Court decision highlights the important steps to be taken by an employer *before* triggering a dismissal process and confirms that termination of employment on notice is not as simple as it may sound.

So what happened? A tale of two dismissals

3.17 Jean-Philippe Grenet, a senior director within video game company EA, was dismissed in November 2018 after allegedly making an inappropriate comment to a female colleague during a one-on-one video conference. The precise specifics of the remark were in dispute, but Mr Grenet conceded that the comment was *'"clumsy, inelegant and ill-advised"*. Suspended shortly after this comment, Mr Grenet was dismissed on grounds of gross misconduct in the absence of any investigation or disciplinary process (the First Dismissal).

3.18 Mr Grenet secured an ex-parte injunction on 6 December 2018 preventing EA from (i) taking further steps to implement his dismissal; and (ii) appointing anyone to else to his role, pending the substantive hearing of his claim.

3.19 EA subsequently sent Mr Grenet a letter signed by Mr John Pompei, Head of Player Experience Operations within EA's US parent company. This letter represented a *second* attempt to dismiss Mr Grenet and recast the basis for his dismissal – on the one hand withdrawing the original fault-based dismissal while, on the other hand,

terminating Mr Grenet on a "no-fault" basis "*in accordance with [your] contractual entitlements"* (the Second Dismissal).

What's the legal position?

3.20 Employers in Ireland are permitted to terminate an employee's employment on notice. Such dismissals will, however, be "*unfair*" under the Unfair Dismissals Acts. The existence of performance or conduct issues may, depending on the facts, undermine an employer's ability to simply serve such notice and effect a *"no fault*" dismissal. In such circumstances, the employee may seek to "*injunct*" or prevent the purported dismissal on the basis that he or she was not afforded fair procedures in respect of the particular performance or conduct issue i.e. that their employer effectively short-circuited the applicable process and opted for the seemingly more straightforward option of a no-fault dismissal.

3.21 In a 2014 case, *Bradshaw v Murphy*, the High Court refused to grant an injunction to restrain a "no-fault" dismissal of a chef/restauranteur - despite the existence of allegations of gross misconduct that had not been investigated. At the hearing of the interlocutory motion, the employer gave various undertakings to the Court, including that it would not dismiss the plaintiff for misconduct pending the determination of the claim. The employer argued that in light of this undertaking, the fair procedures principles did not apply to the injunction application. Justice Finlay Geoghegan agreed, finding that the employee had failed to raise a serious issue in relation to whether the employer had an entitlement at common law to terminate his employment in accordance with the relevant contractual terms. The application was dismissed.

3.22 Notwithstanding the Bradshaw decision, the recent *Grenet* case pivots in favour of the employee seeking to injunct the purported "no fault" dismissal – but, in our view, on the basis of the unusual facts of that case.

What arguments were made?

3.23 EA argued that it could lawfully "*abandon the earlier process and opt for the no-fault dismissal*", provided (i) Mr Grenet's employment was terminated in accordance with his contract; and (ii) EA's reason for his dismissal was not linked to any alleged misconduct. In short, provided Mr Grenet's contractual notice period was complied with, there was no entitlement to fair procedures or prior consultation where misconduct was *not* the reason expressly relied upon to justify the dismissal.

3.24 Mr Grenet's position focused on a clause within his contract of employment entitling Mr Grenet to a grievance and disciplinary procedure. It was argued that the Second Dismissal was a "*sham…cloaked in a new and relatively see through clothes*".

What did the High Court decide?

3.25 The Court was persuaded by Mr Grenet's "see through clothes" argument and held that employees can challenge a no-fault termination which is "dressed up to avoid unlawful conduct such as a breach of contract or a breach of a constitutional right to vindicate

one's own name". The Court concluded that the Second Dismissal was, on the balance of probabilities, a "cynical contrivance" equating to a "deliberate decision to gloss over the serious impact" on Mr Grenet's reputation.

3.26 Mr Grenet secured a second injunction preventing EA from dismissing him (or appointing any replacement) and requiring EA to continue to pay his salary and benefits pending the substantive hearing of the matter.

3.27 Another focal point in this decision was the authority of Mr Pompei, the signatory of the Second Dismissal letter, to actually effect Mr Grenet's dismissal. Mr Pompei, an employee of EA's US parent company, was not an employee or officer of the Irish EA entity and no evidence was submitted that he had been authorised by the board of EA to effect the termination of Mr Grenet's employment.

3.28 EA argued that Mr Pompei, to whom Mr Grenet reported, had "ostensible delegated authority" to manage the majority of the employees at EA's Irish site "including the power to terminate their employment". The Court was highly critical of this position, stating that Mr Pompei "somewhat arrogantly…takes upon himself the authority to act on behalf of the defendant without recognising that an ultimate parent corporation and a subsidiary company are separate legal entities." The Court noted that EA is an Irish entity subject to Irish law, and that the global nature of the group's business and management structure did not "trump" those obligations.

3.29 Although the Court did not make a binding determination on the point, Justice O'Connor was satisfied that Mr Grenet had not agreed that his employment contract could be terminated by anyone other than the Irish EA entity acting in accordance with its Constitution and the Irish Companies Act.

Key take-aways

3.30 There is well-established case-law that confirms employers are entitled to dismiss employees (with notice) on a "no-fault" basis. However, the specific facts of the Grenet case are a useful reminder to employers of the court's ability to look behind the "see-through clothes" of a "dressed-up" no-fault dismissal.

3.31 In this instance the employer's efforts to "*change tack*" and seek to effect Mr Grenet's dismissal on a no-fault basis were totally undermined by its prior gross misconduct dismissal. In connecting the dots between the two dismissals and highlighting the potential irreparable damage to Mr Grenet's reputation, Mr Grenet successfully demonstrated (i) a strong case to be tried; (ii) that damages would be an inadequate remedy; and (iii) that the balance of convenience favoured granting the injunction.

3.32 On a practical note, the decision also serves as a warning for global businesses with Irish subsidiaries and the need to ensure that I's are dotted and the T's crossed when it comes to effecting "no fault" dismissals if they are to survive High Court scrutiny in an injunction scenario.

4 IMMIGRATION

4.1 Last year more than 10,000 people were granted Irish citizenship. In light of developments in the High Court in July 2019, many of these people may count themselves lucky. In the recent and unexpected decision of *Jones v Minister for Justice and Equality*, the High Court severely curtailed an applicant's prospects of successfully securing Irish citizenship, which has resulted in major disruption and uncertainty for many.

4.2 While the Department of Justice initially promised urgent legislation to reverse the decision, that legislation has not materialised and an urgent appeal of the case was heard in the Court of Appeal on 8 October. It appears that the Department of Justice is now awaiting the outcome of that case prior to deciding whether new legislation will be necessary. In the meantime it's not clear that any citizenship applications are being processed and all citizenship conferral ceremonies have been cancelled until further notice. It is clear that this situation must be resolved quickly either by the Courts or the legislature.

Jones v Minister for Justice and Equality [2019] IEHC 519 – High Court (pending Court of Appeal decision)

How to secure Irish citizenship

4.3 In order to be eligible for Irish citizenship via "*naturalisation*", an applicant must be able to demonstrate they have lawfully resided in Ireland for a defined period of time. Generally speaking, anyone who has resided in Ireland for five of the eight years preceding their application (including "*one year's continuous residence*" immediately prior to applying) may apply for Irish citizenship and, in turn, an Irish passport.

4.4 The hullabaloo following this High Court decision related to the requirement to be continuously resident in Ireland for a full year prior to the application being lodged. While the Irish Nationality and Citizenship Act 1956 requires *"continuous residence"* in that final year, the Department of Justice and Equality had permitted absences from Ireland of up to six weeks per year to enable applicants travel abroad for work and recreational purposes, without scuppering their ability to subsequently secure Irish citizenship. The High Court decision has, however, brought that practical flexibility to a shuddering halt. Perhaps unsurprisingly, an appeal to the Court of Appeal was lodged within a matter of days. This case was heard in October 2019 and the judgment is anxiously awaited.

What did the High Court find?

4.5 The High Court controversially applied a very literal interpretation of the phrase *"continuous residence"*, concluding that no applicant could be granted citizenship where they had spent even a single day outside of Ireland in the year preceding their application. This judgment understandably caused widespread concern, not only from individuals awaiting decisions on their own citizenship applications, but

from those planning to apply. The primary and valid concern is that this decision renders it extremely difficult, if not impossible, for applicants to lead a "normal" life, in that it serves as an effective ban on all foreign travel, regardless of the reason or duration.As things stand, the Department of Justice and Equality must determine citizenship applications in line with this decision. But how feasible is this in practice? Does this mean a stag weekend to Belfast or a business trip to London in that final year renders a subsequent citizenship application doomed to fail?

Questions that need answers

4.6 Following the High Court decision immigration lawyers have been grappling with the numerous issues raised, from "known knowns" to "unknown unknowns". Will formerly eligible applications now be rejected in line with this decision? Will the Department of Justice continue to apply its well-established practice of permitting applicants to have engaged in ad hoc travel abroad or fall in line with the High Court's interpretation of a law that is over 60 years old? Or is it possible that the entire citizenship decision making process will be paused pending the outcome of the appeal or a change in legislation?

4.7 Similar questions are being raised by individuals intending to submit applications in the coming 12 months. Do they need to cancel any foreign holidays? Should they advise their employers that they can no longer attend a conference or sales trip to New York?

4.8 From an employer's perspective, will employees need to cancel proposed business trips at potentially short notice? Are employers entitled to take disciplinary action against employees who fail to carry out their duties due to being "grounded" in Ireland?

4.9 Certain sectors of our economy rely on the recruitment and retention of key talent from a global workforce. Do we want to run the risk of potentially deterring such individuals from choosing to come to Ireland for work due to concerns over an overly rigid pathway to citizenship?

What happens next?

4.10 It appears that the Government agrees that the requirement for citizenship applicants to physically reside within the 26 counties for 365 consecutive days is impractical and overly rigid. The Department of Justice has this week confirmed plans to introduce urgent legislation to "*resolve the issue*" when the Oireachtas reconvenes in September.

4.11 It remains to be seen exactly what form the new legislation will take. The requirement for residence to be "*continuous*" might be removed or the Department could also legislate for the flexibility it previously applied in practice. Either way, the Department must ensure that normal business and personal travel does not disentitle anyone to Irish citizenship.

4.12 The silver lining is that it is clear that the Department does not intend for this decision to adversely impact past, current or future naturalisation applications. Notably, the

Department is advising individuals to continue to submit applications in the normal course without explicitly stating that applications will be ruled ineligible if an applicant has been out of Ireland in the preceding year.

4.13 While we await the introduction of amending legislation, the Department is sending strong signals of support for pending citizenship applicants. For that reason, applicants should operate on the basis of business as usual when it comes to making citizenship applications, and not to expect undue disruption to the processing of applications pending the expected legislative clarity before the year is out.

5 FAIR PROCEDURES

5.1 A topic of debate for some time is to what extent employees are entitled to be accompanied by a lawyer during internal disciplinary hearings. While the Code of Practice on Grievance and Disciplinary Procedures (the **Code**) provides that employees can be accompanied by a colleague or trade union official, 2017's High Court decision in *Lyons v Longford Westmeath ETB* appeared to permit lawyers into workplace investigations and hearings as part of the employee's right to fair procedures.

5.2 At the very end of 2018, the Court of Appeal brought some much needed clarity to this topic in its decision in *Irish Rail v McKelvey*. Significantly, it unequivocally endorsed the original Supreme Court position in *Burns and Hartigan v Castlerea Prison*, which found that legal representation need only be permitted in "*exceptional circumstances*".

McKelvey v Iarnród Éireann [2018] IECA 346 – Court of Appeal

What happened in Irish Rail v McKelvey

5.3 Mr McKelvey, an Inspector with Irish Rail, was suspended on pay to facilitate an investigation into allegations of "theft of fuel through the misuse of a company fuel card". On being notified that Irish Rail was commencing a formal disciplinary inquiry into the matter, Mr McKelvey asked to be represented by a solicitor and counsel at the disciplinary hearing. When this request was refused by Irish Rail, Mr McKelvey sought injunctive relief from the High Court to halt the disciplinary process on the basis that he was not being afforded fair process.

What did the High Court decide?

5.4 The High Court agreed with Mr McKelvey and granted the order restraining Irish Rail from proceeding with the disciplinary process without letting Mr McKelvey be accompanied by his lawyer. In particular, the Court was guided by six factors (the Six Factors), identified in Burns as the "*starting point*", when reaching this decision:

(i) The seriousness of the charge and the proposed penalty

(ii) Whether any points of law were likely to arise during the disciplinary hearing

(iii) The capacity of Mr McKelvey to present his own case

(iv) Procedural difficulty

(v) The need for reasonable speed in making the adjudication; and

(vi) The need for fairness between the different categories of people involved in the process.

5.5 The High Court concluded that the charges involved were serious and could not only lead to Mr McKelvey's dismissal, but could adversely affect his employment prospects and potentially significantly impact his reputation. The Court formed the view that multiple points of law were likely to arise during the disciplinary process and, given what the Court regarded to be a "*complex*" case, it would be "*ridiculous*" to consider that Mr McKelvey could "*navigate*" the disciplinary process "*unaided*". The Court was satisfied that Mr McKelvey "should be entitled to retain lawyers should he desire to do so".

5.6 Irish Rail appealed to the Court of Appeal.

What did the Court of Appeal decide?

5.7 Significantly, while the Court of Appeal agreed that the Six Factors should be considered in determining whether Mr McKelvey had the right to be accompanied by his lawyer, the Court disagreed with the High Court's conclusions in respect of the Six Factors.

5.8 In particular, the Court found that the High Court had "*ascribed undue weight*" to the "*seriousness*" of the charge on the basis that it might result in criminal prosecution at a later date. Taking the opposite approach, the Court of Appeal was of the view that there was *"nothing particularly unusual or exceptional about an inquiry into an incident of theft in the workplace" and, in fact, the charge was "relatively straightforward".*

5.9 In addition, the Court of Appeal commented that "the sanction of dismissal is hardly an exceptional or unusual feature of disciplinary hearings in the workplace". On this basis, the simple fact that Mr McKelvey may or may not face dismissal following the disciplinary hearing was not, in the Court's view, sufficient to elevate the situation to one of "exceptional circumstances" justifying the attendance of a lawyer during the hearing. Similarly, the Court was not persuaded that the potential for "adverse consequences" for Mr McKelvey's future employment prospects or good name justified his demand for legal representation.

What about the Lyons decision?

5.10 The Court briefly referred to last year's decision in Lyons, in which the High Court held that where an investigative process can lead to dismissal or adversely impact the employee's reputation, a refusal to allow the employee to be accompanied by a legal representative was in breach of the employee's constitutional rights.

5.11 However, the Court of Appeal observed that the Lyons decision "*departs to a significant extent from the jurisprudence of Burns*" in which the Supreme Court stated: *"it is wholly undesirable to involve a legal representative unless in all the circumstances it would be required by the principles of constitutional justice".*

5.12 The Court of Appeal stepped back from situations identified in cases like Lyons - where the outcome of the hearing may i) result in dismissal, ii) adversely impact the individual's future employment prospects; or iii) negatively impact their reputation. The Court concluded that such outcomes were not "*unusual*" and were "disconnected" from the key issue – whether or not the employee can be assured of a fair hearing without legal representation at the disciplinary hearing.

5.13 The Court concluded that lawyers at disciplinary hearings "*should be the exception rather than the rule*". The fact that Mr McKelvey had the right to be accompanied by an experienced trade union official also influenced the Court's conclusions in this regard.

What about the Code?

5.14 The Code identifies key features of a robust disciplinary process for employers in Ireland. It expressly provides for a right of an employee to be represented by a fellow colleague or a registered trade union representative, but not any other person or body. In line with this wording, the traditional approach for employers in Ireland (pre-*Lyons*) had been to (almost always) refuse an employee's request to involve their lawyer during an internal workplace process.

5.15 Helpfully, the Court of Appeal has now endorsed this approach, noting that "*the fact that the Code is silent on legal representation is perhaps indicative of the view that it should be possible for organisations to carry out inquiries into alleged misconduct on the part of employees on an "in house" basis without the need to involve lawyers"*.

What does this mean in practice?

5.16 It is clear from the Court of Appeal's detailed judgment that an employee who wishes to be legally represented in a disciplinary process has a very high bar to clear. It is no longer sufficient for the employee to advance good reasons as to why they should be legally represented; they must now be able to point to "exceptional" circumstances justifying their need to be represented.

5.17 Given the potential impact of involving lawyers at an early stage in an internal HR process, ranging from i) delaying the process, ii) increasing the cost, iii) escalating

litigation, and iv) fracturing relationships between employer and employee, this decision is a welcome development.

5.18 While this decision undoubtedly bolsters the position of employers who do not wish to permit their employees to be legally represented, employers still need to tread carefully when dealing with such requests from employees. While the rule of thumb – allowing lawyers only in "*exceptional circumstances*" - has helpfully been confirmed, the key point going forward will be stress-testing the specific facts of each case. This is necessary to ascertain whether they may ultimately justify an exception to that rule and considering whether the alternative representation options (e.g. a colleague or trade union official) are appropriate in the circumstances.

Beechside Company Limited t/a Park Hotel Kenmare v A Worker LCR 21798 – Labour Court

5.19 A recent Labour Court recommendation (towards the end of 2019) serves as a useful reminder to employers that they do not enjoy a *carte blanche* when it comes to dismissing employees on probation. This case has attracted widespread media coverage as it concerns the Park Hotel Kenmare, which is owned and operated by the Brennan brothers of RTE's 'At Your Service' fame.

5.20 In *Beechside Company Limited T/A Park Hotel Kenmare v A Worker* the Labour Court found that the former general manager of the Park Hotel Kenmare had been unfairly dismissed while on probation and recommended he be paid a compensatory award of €90,000. The former employee claimed that he was dismissed without warning after being called to a meeting with John Brennan, the Managing Director of the hotel, who informed him that it was *"not working out"*. The hotel argued that it was entitled to dismiss the employee during his probationary period by the giving of notice, as this was provided for in his contract of employment.

5.21 The Labour Court accepted that an employer has a right to decide not to retain an employee in employment during their probationary period. However, it stated that *"this can only be carried out where the employer adheres strictly to fair procedures".*

5.22 The Court concluded fair procedures were not applied in this case as the employee:

(i) was not provided with details of any performance issues

(ii) no warning was given that his employment was in jeopardy

(iii) he was not afforded the right to representation

(iv) he was not provided with the reasons for his dismissal; and

(v) he was not afforded an opportunity to reply.

5.23 As the former employee had less than 12 months' service, he could not challenge his dismissal by way of an unfair dismissal claim. For that reason, he brought a claim

under the Industrial Relations Acts, for which there is no length of service requirement. The downside of such a claim is that the Labour Court's recommendation in his favour is not legally binding.

Fair procedures during probationary dismissal?

5.24 It is relatively common for employers to provide in contracts of employment that a company's disciplinary procedure does not apply to employees during their probationary period. This combined with the fact that employees typically require 12 months' service in order to bring a claim under the Unfair Dismissals Acts often lulls employers into a false sense of security when it comes to dismissing probationary employees.

5.25 The Labour Court has consistently affirmed an employee's right to natural justice and fair procedures – as outlined in the Code of Practice on Grievance and Disciplinary Procedures (S.I. No. 146 of 2000) – prior to being dismissed from their employment, regardless of their length of service and whether or not they are on probation. As this recent Labour Court case demonstrates, a failure to do so can result in a significant adverse award being made. While such awards are not legally binding, they can result in adverse publicity and have the potential to create broader employee relations issues.

Other Avenues of Redress

5.26 Employers should be aware that there are other avenues of redress available to employees dismissed during or at the end of their probationary period. For example, an employee may argue that the dismissal was linked to a discriminatory ground (e.g. gender, age, race) and challenge the dismissal under the Employment Equality Acts on that basis. While undoubtedly rarer in practice, it is also open to a probationary employee to apply to the High Court to restrain their dismissal where they can establish they are to be dismissed in breach of their right to natural justice and fair procedures.

Key takeaways

5.27 While case law confirms that due process must be followed in effecting a probationary dismissal, that does not mean that the full rigours of a company's disciplinary procedure must be followed prior to dismissing an employee on probation. It is however important that an employer can demonstrate a procedurally fair process has been followed.

5.28 If an employer has a probationary policy, it should be adhered to. If an employer does not, it should put in place a probationary review process, in the course of which an employee's suitability for continued employment is assessed. An essential part of such a process is a mid-probation review, whereby a probationary employee is informed of their progress on probation, notified of any performance concerns and afforded a reasonable opportunity to address those concerns prior to a decision being made on their continued employment. An end of probation review should also be held, at which an employee should be advised whether they are to be confirmed in their position,

dismissed on notice or have their probationary period extended. In all cases, it is important a paper trail is kept.

5.29 Finally, employers should ensure they have communicated their probationary decisions prior to an employee accruing 12 months' service, as the ramifications of effecting a procedurally unfair dismissal after this threshold has been reached are much greater.

Annette Hughes v Irish Blood Transfusion Service [2019] IEHC 439 – High Court

What happened?

5.30 Ms Hughes was employed as the Assistant Director Nursing at the Irish Blood Transfusion Service (**IBTS**) before her dismissal following complaints by four staff members about Ms Hughes management style. She was granted leave to apply for judicial review and sought an order of *certiorari* from the High Court, quashing the decision of the IBTS to dismiss her. Ms Hughes also sought a declaration that the IBTS erred in law and acted in breach of fair procedures.

5.31 A complaint was made by four of Ms Hughes' subordinates to the Director of Nursing (**DON**). The complaints were in relation to the Ms Hughes behaviour and managerial style which they stated caused huge distress, due to the alleged constant negative remarks, lack of appropriate consultation, micromanagement and insinuations. Ms Hughes' manager advised her of these complaints and directed her to not speak to the staff individually but to indicate that she was aware of the complaints and she was allegedly told to apologise. IBTS submitted that Ms Hughes failed to comply with this direction. This gave rise to disciplinary action taken against her in accordance with IBTS' Disciplinary Procedure and ultimately resulted in her dismissal.

5.32 An external investigation was carried out. The investigation report found that "*a clear and unambiguous instruction*" was given by the DON to Ms Hughes and she "*failed to carry it out*".

5.33 Subsequently, a disciplinary hearing was held and the disciplinary officer found that Ms Hughes' behaviour constituted gross insubordination and that the relationship of trust and confidence between employer and employee was irreparable. This was found to amount to serious misconduct. It was also noted that Ms Hughes had lied in respect of her interactions and she failed to acknowledge her wrongdoing. The disciplinary sanction imposed was dismissal. The decision was upheld on appeal.

What did the High Court decide?

5.34 As this case was brought by way of judicial review, the High Court's decision only addresses the lawfulness of the decision making process rather than looking at the merits of the decision imposed by the employer.

5.35 Ms Hughes claimed that the decision to dismiss her was unfair as the decision maker: 1) failed to observe the IBTS' Disciplinary Procedure in any material way; 2) proceeded to a disciplinary hearing without a full investigation having taken place; 3) permitted the impermissible conflation of the role of the HR manager which at various times acted as

a person directing an investigation, a witness in the investigation, a person making an allegation of serious misconduct and a witness in the disciplinary hearing; and 4) acted disproportionately in imposing a sanction of dismissal.

5.36 Ms Hughes claimed that, as a matter of fair procedures, the employer had a duty to furnish her with notice of the precise allegations made against her. She submitted that the allegation of her "*failure to comply*" with an "*unambiguous instruction*" was reformulating the allegation into one of gross insubordination. The High court concluded that it was appropriate that the precise allegation was formulated after the investigation report was considered by senior management and that Ms Hughes was given notice of the allegation and a hearing was convened.

5.37 Following the conclusion of the investigation, the HR manager was tasked with determining whether the disciplinary procedures should be invoked. The Applicant submitted that the HR manager contaminated the process and prejudiced the independent decision making process as he had forwarded detailed findings of fact to the Applicant made by him rather than merely allegations requiring investigation. The Court was satisfied that the HR manager exercised his role under the Disciplinary Procedure in accordance with his duty and function in the managerial hierarchy and the disciplinary process. It was held that it was appropriate for the HR manager to draw inferences for the limited purpose of determining whether the matter to process to disciplinary hearing.

5.38 McDermott J was satisfied that the EAT was the appropriate forum for the determination of matters of fact under the Unfair Dismissals statutory code. The Court found that the Applicant acquiesced in the core procedures applied during the disciplinary process to an extent that disentitled her to the relief claimed in the proceedings in the exercise of the Court's discretion.

5.39 The Court held that it was satisfied that the Applicant was given full notice of the allegation of serious misconduct and the potential sanction of dismissal was known by her. McDermott J stated that "*it would be most unusual, unrealistic and indeed unfair if the consideration of the appropriate sanction did not involve a consideration of any mitigating or other factors relevant to the carrying out of her functions…*" In this context the exchanges about her prior history and staff relationships were explored and considered. There was no want of notice on the part of Applicant nor should a further investigation have been carried out, as claimed by the Applicant.

5.40 McDermott J held that the sanction of dismissal was the most severe available but that in the context it was proportionate sanction for the employer to make. The Applicant's inability as a senior manager to accept her misconduct as a difficulty in the workplace was a matter which a reasonable employer could take into account in considering whether dismissal was the appropriate sanction.

5.41 This is a welcome decision for employers. However, the comments should be distinguished from those that would be made by an adjudication officer of the WRC where the case would be considered under the Unfair Dismissals statutory code.

6 WORKING TIME AND THE RIGHT TO DISCONNECT

6.1 Earlier this year the European Court of Justice (the **CJEU**) handed down a landmark decision focusing on an employer's obligations to have a suitable system in place to accurately record employees' working time – on both a daily and weekly basis. The practicalities of such a requirement, in today's digital workplace where the lines between working time and leisure time are more blurred than ever, caused quite a stir among commentators

6.2 As Ireland's working time legislation *already* requires employers to keep such records, this case may not have the same impact in this jurisdiction as it will likely have in other European Union jurisdictions. However, notwithstanding our legislative position, the reality is that many employers are not even aware of their record keeping obligations, never mind in compliance with them. Furthermore, the trend towards more remote and flexible working, reflective of the "digital" workplace, raises a number of issues for employers – not least of which the question of precisely how to keep proper records of employees' working time.

6.3 Below we have explored the CJEU case and referred back to last year's Labour Court decision in Kepak v O'Hara in which an employer was held accountable for not keeping track of its employee's working hours.

Federación de Servicios de Comisiones Oberas (CCOO) v Deutsche Bank SEA C-55/18

What was the case about?

6.4 While Spanish working time legislation requires employers in Spain to keep a record of monthly overtime hours, employers are not required to record daily or weekly hours worked. In the case of Federación de Servicios de Comisiones Oberas (CCOO) v Deutsche Bank SAE C-55/18, a Spanish trade union (**CCOO**) sought a declaration from the Spanish High Court that Deutsche Bank was required to keep a record of the actual number of hours worked by its staff. CCOO argued that such records were necessary to enable CCOO to verify that working time limits (set down by the EU Directive on Working Time and EU Charter of Fundamental Rights) (the EU law) were being adhered to.

6.5 The Spanish High Court referred a question to the CJEU as to whether Spain's working time legislation, which purported to implement the relevant EU law; should require employers to keep records of daily and weekly working hours.

What did the Court decide?

6.6 The CJEU determined that the EU Working Time Directive must be interpreted *"having regard to the importance of the fundamental right of every worker to a limitation on the maximum number of working hours and to daily and weekly rest periods"*. Accordingly, the CJEU observed that the Directive is intended to "*guarantee better protection of the*

safety and health of workers" by ensuring they are entitled to "*adequate beaks*" and by imposing a "*ceiling on the duration of a working week*".

6.7 The Court then addressed what steps employers should take to ensure that these fundamental rights are adhered to. The CJEU held that member states are required to "*take the measures necessary*" to ensure workers receive their relevant rest breaks (each day and week) and that there is a cap on the maximum weekly working hours.

6.8 The CJEU emphasised the onus is on employers to put in place a "*system*" to record daily (and weekly) hours worked. The Court confirmed that it would be "excessively difficult, if not impossible in practice" for workers on their own to ensure compliance with their rights under the EU law. Rather, it is for employers to put in place an "*objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured*".

6.9 Finally, the Court commented that any "*economic considerations*" or costs associated with putting such a system in place cannot undermine the "*effective protection of the safety and health of workers*".

What's the Irish law position?

6.10 Ireland has implemented the EU Working Time Directive by way of the Organisation of Working Time Act 1997 (as amended) (the **OWT**).

6.11 When it comes to keeping records of employees' hours of work, section 25 of the OWT is read alongside the OWT (Records) Regulations 2001. In short, employers are required to:

- keep records of "*the days and total hours worked in each week by each employee;*
- where no "*clocking in*" facilities are utilised or electronic records kept; record such hours via a template form (Form OWT1); and
- retain records at the employee's place of work for a period of 3 years.

What does this mean for employers in Ireland?

6.12 As Ireland's working time legislation already requires employers to record employees' working hours, we do not anticipate any immediate action being taken by the Irish government to amend the OWT in light of the CCOO case.

6.13 However, this decision is likely to bring into focus the fact that many employers in Ireland do not have systems in place to ensure they are complying their existing obligations. It could also result in increased inspections by the Workplace Relations Commission of employers in sectors where it is identified there is a deficiency in working tie record keeping practices.

6.14 It's noteworthy that there have been a number of cases in recent years identifying failures on the part of employers to keep adequate records which have resulted in technical (and culpable) breaches by employers of the OWT. Last year's Labour Court

decision Kepak v O'Hara (summarised in full below), resulted in an award of €7,500 to an employee. In that case the Court was particularly critical of the employer's failure to monitor the employee's working pattern and keep proper records of her working hours. The failure to keep working time records gives rise to an evidential problem for employers when looking to defend statutory working time claims (for example, employees were not afforded requisite breaks etc.). There is also potential exposure to a criminal conviction and fine of up to €2,500 for failure to keep such working time records.

6.15 Accurate record-keeping of employees' working hours is a complex task given today's fluid and flexible working arrangements which can result in blurred lines around the concept of "*working hours*". However, this recent CJEU decision copper-fastens employers' obligations when it comes to recording working hours. In circumstances where the CJEU has already poured cold water on any concerns around the cost to employers of putting in place an "*objective, reliable and accessible system*" to record working hours, prudent employers are advised to review their approach to record-keeping and, where it does not comply with the OWT, consider taking corrective action now.

Kepak Convenience Foods v Grainne O'Hara [2018] 7 JIEC 1901

6.16 In August 2018 the Labour Court awarded €7,500 to an employee who, by sending and receiving work-related emails outside normal work hours, had exceeded her statutory maximum working hours. Significantly, the Court found that the employer, in failing to monitor and curtail her working pattern, as well as failing to keep proper records of her working hours, had "*permitted*" the employee to work excessively, in breach of the Organisation of Working Time Act 1997 (the **OWT Act**).

6.17 In today's society the traditional concept of structured 9 to 5 working hours is giving way to the more fluid models of remote working and more flexible working arrangements. In addition, many employers are engaging with employees across multiple time-zones and conference calls are routinely set up outside of core hours to facilitate all participants. With this in mind, the need for employers to ensure a work-life balance and minimise the plague of the "*perpetual plug in*" in today's "*digital workplace*" is evident.

The facts

6.18 Briefly, the complainant was employed as a Business Development Executive with a 40 hour working week, as per her contract. However, the nature of her role required her to record her activities and engagement with customers on a computerised system which, she submitted, resulted in her working over 48 hours per week. In support of her claim under the OWT Act, the complainant produced copies of emails sent both before her normal start time and after her normal finish time and asserted that she worked approximately 60 hours a week.

6.19 In defence, her employer argued that the complainant should have "*comfortably completed*" her work within her contracted 40 hours a week but she had chosen to "*adopt a less efficient procedure for completing her administrative tasks"* which may have increased her working hours. Significantly, the employer had kept no record of the complainant's worked hours.

The law

6.20 Section 15 of the OWT Act provides that an employer must not "*permit*" an employee to work in excess of an average of 48 hours a week. Section 25 of the Act requires an employer to keep records to demonstrate compliance with the Act for at least 3 years from the date the record was created.

The decision

6.21 The Labour Court found the employer had breached sections 15 and 25 of the OWT Act by permitting the employee to work in excess of the statutory maximum weekly working hours and by not keeping records of her working hours.

6.22 The Court was also guided by the fact that the employer was "*through her [the complainant's] operation of its software and through the emails she sent it, aware of the hours the complainant was working and took no steps to curtail the time she spent working*". The Court concluded that such a situation demonstrated that the employer had "permitted" the complainant to work in excess of the 48 hour week and, therefore, contravened its statutory obligations under the OWT Act.

6.23 This case can be contrasted with a separate Labour Court case from 2008. Here a similar claim by an IBM telesales specialist failed because her employer had, on a number of occasions, taken steps to dissuade her from working excessive hours. In that case it was held that the employer "*did not willingly breach the Act as the claimant greatly contributed to the situation*". The Court found that the employer "*made a bona fide effort to bring about a state of affairs in which the claimant would cease working in excess of the permitted hours*". In such circumstances the Court was satisfied that the breach was *"technical and non-culpable in nature and that the claimant was herself primarily responsible for what occurred*".

6.24 Back in 2012, Volkswagen blocked all emails to employees' smartphones after-hours. Daimler operates a scheme called "*mail on holiday*" that automatically deletes employees' emails while they are on holiday. More recently, Porsche has indicated it may follow suit and is considering a new approach whereby any emails sent between 7pm and 6am are "*returned to sender*". The rationale behind this email curfew is to respect leisure time and reduce work-related stress associated with staying "*switched on*" and "*plugged in"* even after the working day has ended.

6.25 Last year France introduced a new law requiring employers with more than 50 employees to set hours when staff should not send or answer work-related emails. A similar approach has been adopted in Germany and Italy. More recently, in March

2018, the "Right to Disconnect" bill was proposed in New York to ban private companies with more than 10 employees from requiring their workers to respond to emails outside work hours. While this bill is still under consideration, it is proposed that businesses would be fined $250 for each instance of non-compliance with increased fines envisaged for repeat offences.

6.26 Notwithstanding the culture shift being seen in other jurisdictions to recognise this "*right to disconnect*", employers should take note that the decision in the recent *Kepak* case is slightly different. This case was not an example of an employer contacting its employee after-hours. Rather it was the employee herself who was sending emails outside normal working hours. Here the nail in the coffin of the employer's defence was a failure to keep records of the complainant's working hours, coupled with a pattern of permitting the employee to continue emailing out of hours, without any steps being taken to address this.

6.27 Accurate record-keeping of employees' working hours is a complex task given today's fluid and flexible working arrangements which can result in blurred lines around the concept of "*working hours*". But, as the law currently stands, a failure to keep such records and allow employees to work beyond "*normal*" working hours will likely be fatal.

7 MATERNITY LEAVE AND PREGNANCY DISCRIMINATION

7.1 There have been a number of cases before the WRC and Labour Court in 2019 that focused on the question of gender discrimination in the context of a woman's return to the workplace after a period of maternity leave – i.e. the extent to which there is no role (or suitable alternative) for her to return to. One Labour Court case in particular, *G4S Secure Solutions v Kelly*, resulted in a maximum award of compensation being granted to the claimant employee. Such a high award will no doubt act as a deterrent for future employers in circumstance where the quantum of award is not limited to financial loss, but can be at such a level so as to be "*effective, proportionate and dissuasive*".

G4S Secure Solutions Limited v Kelly EDA1919

What happened?

7.2 Ms Kelly's contract of employment expressly stated that she would be "*primarily based on the Bristol-Myers Squibb (**BMS**) site in Swords*". Ms Kelly commenced maternity leave in August 2017 and was due to return in March 2018 to her existing post in the BMS site. However, on 3 March 2018, Ms Kelly was advised by her employer not to attend the Swords site but to attend the employer's heads office in Ballymount for a meeting. At the meeting she was informed that she would not be able to return to the BMS site in line with their client (a third party) instructions. By way of alternative, Ms Kelly was offered a fixed-term position (a three month contract) working in the head office in Ballymount. No other efforts were made by the employer regarding suitable alternative positions.

7.3 At the WRC Ms Kelly alleged that she had been discriminated against on gender grounds under sections 26 and 27 of the Maternity Protection Acts 1994 (as amended) (the **Maternity Protection legislation**). In short, Ms Kelly claimed that her employer breached its statutory obligations by refusing to allow her to return to her job or a suitable alternative position following her maternity leave.

7.4 Ms Kelly argued that the alternative role proposed to her meant a change in her employment status (from permanent to fixed-term) and necessitated a four hour round trip daily commute (rather than a 30 minute commute). It was argued that such an alternative could not be regarded as "*suitable*" within the meaning of the Maternity Protection legislation.

7.5 Ms Kelly also submitted that, where dismissal is based on one of the discriminatory grounds, the Court is not just obliged to take into account the manner and effects of the dismissal, but to also ensure any award is "*effective, proportionate and dissuasive*".

7.6 By way of defence, Ms Kelly's employer focused on the fact that it was the third party client, not the employer, who refused to allow Ms Kelly back on site and that the client had a contractual entitlement to decide who they would accept on site. Accordingly the employer argued that the treatment of Ms Kelly had nothing to do with her pregnancy or maternity leave and, as such, could not constitute discrimination. Simply put, the client wanted to retain the male employee provided to the client by the employer to cover Ms Kelly's maternity leave.

What did the Labour Court decide?

7.7 The Court did not accept the employer's argument that the clause in its contract with a third party (i.e. the client) was "*superior to any statutory rights*" that Ms Kelly had.

7.8 The Court conclude that, in line with section 27 of the Maternity Protection legislation, where an employee returning from maternity leave cannot return to the same job, the alternative proposed must be "*suitable and appropriate for the employee, the terms or conditions of the contract relating to the place where the work is to be done and the capacity in which the employee is to be employed are not less favourable than those of her previous contract*".

7.9 The Court held that Ms Kelly had been discriminatorily dismissed. In seeking to ensure that the award of compensation was proportionate, effective and dissuasive, the Court awarded Ms Kelly €51,168, the maximum amount the Court could award. This award was for the effects of discrimination (not remuneration).

A Financial Administrator v A Telecommunications Provider ADJ-00015172

What happened?

7.10 The employee was employed as a financial administer by the respondent, a telecommunications provider. The employee's job included the day to day running of the telecommunications antennae, masts and support structures and the employee

regarded her role as "*integral to the smooth running of up to 1800 telecommunication mast sites"*. During the employee's absence on maternity leave, her workplace underwent "*major changes*" and all employees of the subsidiary company (**M**) – including the complainant employee – had their roles re-absorbed into the Head Office building. The complainant employee was given assurances that her position as Finance Administrator would continue to exist.

7.11 While absent on maternity leave there were redundancies in M and on her return the employee's financial administer role was no longer available to her. Although efforts were made to re-integrate the employee back into the workplace, she was unhappy to return to the circumstances proposed. The employee remained out of the workplace on certified sick leave.

What did the WRC decide?

7.12 The Adjudication Officer (**AO**) noted that *"there is no question but the Complainant was excellent at her job, highly thought of and was answerable to the top level of management"*. While the AO also observed that the business had undergone significant changes during the employee's absence on maternity leave, the AO did not accept that the *"full extent of the diminution of her role"* was ever fully explained to the employee.

7.13 Rather, the AO noted that the complainant had been *"directed to move to an entirely new team, on a different floor and under an entirely different Manager"*. The AO noted that, to the complainant's mind, *"this was not her job and bore no resemblance to her job and did not amount to suitable alternative employment as it had nothing to do with the skillset she had crafted in nine years of employment"*.

7.14 The AO noted that the complainant employee was not provided with a *"job description which would afford her any comfort"* and noted an "attitude" that the employee "*should be glad to have an assurance that she would be retaining her terms and conditions and that the nuts and bolts of her day to day work would be worked out over the course of time*". In the AO's view, the complainant's return from maternity leave was treated as *"a problem that needed to be solved*".

7.15 The AO concluded that *"very little thought was given to the Complainant in her absence on what was a recognised protected leave. Her return to the workplace was met with a series of meetings and vague descriptions of what her employer now deemed acceptable employment for her*". In the AO's view, the employee's absence from the workplace *"mitigated against her ability to fight her corner and/or move or adapt with the changing times"*. In such circumstances she concluded that the complainant had been treated less favourably than a person who remained in the workplace and was thus discriminated against by reason of taking maternity leave (gender ground discrimination).

7.16 It was held that the employee had been unlawfully discriminated against and she was awarded €20,000 under the Employment Equality Acts and an award of 10 week's

remuneration (€6,100) for the employer's breach of sections 30 and 31 of the Maternity Protection legislation.

A Director of Marketing v A Telecom and Electronic Communications Infrastructure Support Company ADJ-00019756 – Workplace Relations Commission

What happened?

7.17 The complainant was employed as Director of Marketing before her redundancy on 14 November 2018. She was 5 months pregnant at this date, having notified her employer of her pregnancy on 1 November 2018. The complainant had taken an earlier Maternity Leave in 2017 and had returned to work in February 2018. During her first Maternity Leave she had been replaced by a Mr. X. Mr. X continued in employment post the complainant's return from her maternity leave and remained employed by the respondent following the complainant's redundancy.

7.18 The complainant argued that she was given no notice or offered any consultation in regard to her redundancy and there was no published selection process. The complainant submitted that Mr X "*supplanted*" her role - carrying the same job title and doing the same work as done formerly by the complainant. The complainant supplied detailed organisation charts to support her case.

7.19 It was accepted that an internal reorganisation took place during the early part of 2018 with a lot of job departmental title/role changes. However, in the final analysis the work of the complainant remains and is being done by Mr. X. who now styles himself Director of Marketing - the identical job title of the complainant.

7.20 The respondent submitted that, during mid to late 2017 and especially during 2018, the trading position had deteriorated sharply. The industry the respondent was in was undergoing significant flux and a number of re-organisations had to take place in the respondent. In October 2018 the overall Board of Directors directed the local management to reduce operating costs by some € 10 million. This necessitated a further round of redundancies and the complete closure of some business units. A total of some 63 redundancies took place globally - 15 of which were in Ireland -including the complainant.

7.21 The respondent submitted that there was no suggestion that the complainant's pregnancy had any impact on the redundancy decision - the decisions had all been taken in late October prior to the receipt of the pregnancy notification on the 1st November.

7.22 In legal submissions, the respondent argued that Art 10 of the EU Pregnancy Directive allowed for an "*exceptional case not connected with her condition"* argument to be advanced. The *exceptional case* here was the need to ensure the company's survival and the redundancies were to this end. The pregnancy of the complainant was never an issue.

7.23 Regarding the continued employment of Mr. X it was the respondent's position that he had been initially employed on a fixed term contract. He had proven himself to be making a valuable contribution to the overall business. He was absorbed into the organisation doing demonstrably different work from the complainant. It was submitted that it was *"absolutely not a sustainable argument that he was directly replacing the Complainant in any way*".

What did the WRC decide?

7.24 It should be noted that this case was taken under the Employment Equality Acts 1998-2015. It was not taken under the Unfair Dismissals legislation and, as such, the focus of the case was whether a prima facie case of discrimination arose – not whether the redundancy situation was genuine or fairly implemented.

7.25 The first consideration is whether the complainant can establish a prima facie case that discrimination occurred. The AO held that "*mere assumptions are not sufficient*". Relying on the Labour Court decision in *Southern Health Board v Mitchell*, the AO set out the extent of the evidential burden which a claimant must discharge before a prima facie case of discrimination can be made out:

"*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 a 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 as being of sufficient significance to raise a presumption of discrimination, that the onus shifts to the Respondent to prove that there is no infringement of the principle of equal treatment*."

7.26 The AO turned to the second consideration – the question of the burden of proof in a pregnancy discrimination case. Here the AO relied on an extract from Bolger, Bruton and Kimber in Employment Equality Law:

"The case law on burden of proof in cases of alleged pregnancy dismissal has developed in a singular manner due to the particular provisions of the Equal Treatment and Pregnancy Directives. It is now well established that the existence of the pregnancy itself is sufficient to shift the burden of proof to the employer to prove that a dismissal of a pregnant employee was not on grounds of the pregnancy.(Ref to the Trailer Care Holdings case EDA128). In other words the rules of burden of proof have been moulded in a manner to take specific account of the jurisprudence on pregnancy."

7.27 In short, the AO noted that the burden of proof shifts to the employer to provide the alleged discriminatory dismissal was not in any way related to the complainant's pregnancy.

7.28 The AO referred to the Labour Court case of *Teresa Cross (Shanahan) Croc's Hair and Beauty v Helen Ahern EDA 195* and quoted in full as follows:

"*It has been made clear by the European Court of Justice that since pregnancy is a uniquely female condition less favourable treatment on grounds of pregnancy constitutes direct discrimination on grounds of gender - decision in Case C-177/88 Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) [1990] ECR 1-3941.*

Since the decision in Dekker the protection afforded to pregnant women in employment has been strengthened considerably in the case law of the CJEU and in the legislative provisions of the European Union. Equality on grounds of gender is now expressly guaranteed by Article 23 of the Charter of Fundamental Rights of the European Union.

The Charter is now incorporated in the Treaty on the Functioning of the European Union (the Lisbon Treaty) and has the same legal standing as all preceding and current Treaties. It can thus be properly regarded as part of the primary legislation of the European Union.

The jurisprudential principle that discrimination on grounds of pregnancy constitutes direct discrimination on grounds of sex is now codified in Directive 2006/54/EC on the Principle of Equal Treatment of Men and Women (the Recast Directive). This Directive provides, at Article 2. 2 (c), that any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of Directive 92/85/EEC constitutes unlawful discrimination for the purpose of that Directive.

In Case 406/06 Paquay v Société d'architectes Hoet + Minne SPRL[2007] ECR 1-8511, the Court pointed out that in accordance with its case law the prohibition of less favourable treatment, on grounds of pregnancy comes within the ambit of both the Equal Treatment Directive and the Pregnancy Directive.

The importance of providing real and effective redress in cases where the rights of pregnant workers are infringed was emphasised by the Court at pars 45 -47 of its judgment in Paquay. Here the Court said: -

> *45 However, the objective is to arrive at real equality of opportunity and cannot therefore be attained in the absence of measures appropriate to restore such equality when it has not been observed. Those measures must guarantee real and effective judicial protection and have a real deterrent effect on the employer (Marshall, paragraph 24).*
>
> *46 Such requirements necessarily entail that the particular circumstances of each breach of the principle of equal treatment should be taken into account. Where financial compensation is the measure adopted in order to achieve the objective previously indicated, it must be adequate, in that it must enable the loss and damage actually sustained as a result of the discriminatory dismissal to be made good in full in accordance with the applicable national rules (Marshall, paragraphs 25 and 26).*

> *47 It is necessary to recall that, in accordance with* Article 12 of Directive 92/85*, Member States are also bound to take the necessary measures to enable all workers who consider themselves wronged by failure to comply with the obligations arising from that directive, including those arising from its Article 10, to pursue their claims by judicial process.* Article 10(3) of Directive 92/85*specifically states that Member States shall take the necessary measures to protect pregnant workers or those who have recently given birth or are breastfeeding from the consequences of dismissal which is unlawful by virtue of paragraph 1 of that provision.*

At paragraph 49, the Court continued: -

> *49 While recognising that the Member States are not bound, under* Article 6 of Directive 76/207*or*Article 12 of Directive 92/85*, to adopt a specific measure, nevertheless the fact remains, as is clear from paragraph 45 of the present judgment, that the measure chosen must be such as to ensure effective and efficient legal protection, must have a genuine dissuasive effect with regard to the employer and must be commensurate with the injury suffered.*

It is abundantly clear from these authorities, and from the legislative provision of the European Union, that women are to be afforded special protection from adverse treatment on account of their condition, from the commencement of their pregnancy until the end of their maternity leave. The entitlement to that protection is to be regarded as a fundamental right within the legal order of the Union which the Courts and Tribunals of the Union must vindicate within the limits of their jurisdiction. It seems equally clear that where a pregnant woman is treated adversely because of her condition during this period of special protection the employer bears the burden of proving, on cogent and credible evidence, that such treatment was in no sense whatsoever related to her pregnancy. This is a matter that the Court will consider further in addressing the application of the burden of proof in cases such as the instant case".

7.29 Focusing on the current case, the AO found that the fact of being pregnant is sufficient grounds for a prima facie case to be made. It does not mean that a case of discrimination is being finally proven but simply that the burden of proof moves to the respondent employer.

7.30 The AO was of the view that the oral evidence provided by the manager of the respondent employer was "*heartfelt*" and that the company was in "*financial turmoil*" such that he "*has to make some very tough calls"*. The AO noted the manager's comment that he did not have the "*bandwidth*" to be considered with the pregnancy of a single employee when the entire business was at stake.

7.31 The AO concluded that the manager was a "*very credible witness and his version of events certainly had a convincing ring to them*". However, the AO found that in "*weighing the evidence*", the fact that the complainant was "*expensive*" i.e. highly paid

(€94,000 salary) could not be ignored. The AO commented that the complainant "*would have been a considerable overhead to be carried in a period of radical financial retrenchment*". The AO was not convinced that the manager was "*completely unaware/indifferent*" to the costs likely to arise from a period of extended maternity leave.

7.32 The AO held that: *"an employer is perfectly entitled to choose which ever employees he wishes to engage and the decision to offer Mr. X, a permanent contract was perfectly legitimate. However, when later in the same year a round of redundancies takes place resulting in a much longer serving female pregnant employee being made redundant it cannot but to a reasonable observer, raise some fairly direct Discriminatory questions. I felt that this issue was never satisfactorily answered. From the Organisational Charts presented and extensively discussed it was clear that the Complainant and Mr. X were effectively almost interchangeable."*

7.33 The AO concluded that the respondent had not sufficiently established that there was no link to the complainant's pregnancy in her inclusion on the list of staff exits. It was held that "*the respondent CEO was quite clearly under considerable pressure to keep the company afloat, but this is not an acceptable excuse in a pregnancy discrimination case".*

Quantum of Award?

7.34 The AO relied on the Labour Court decision in *Lee t/ Peking House v Fox EED036* when assessing the level of award to be "*effective, dissuasive and proportionate"*. In that case the Labour Court held that an award had to have regard to "*the effects which flowed from the discrimination which occurred. This includes not only the financial loss suffered by the complainant arising from the discrimination but also the distress and indignity which she suffered in consequence thereof*".

7.35 The AO took account of the following factors when determining the quantum of the award:

- The complainant was a high profile director of marketing on a substantial annual salary.
- The industrial sector was not large and her redundancy would have quickly become common knowledge in the sector.
- The complainant lost her entitlement to statutory maternity leave by reason of the date of redundancy – which the AO felt was "*clearly quite distressing in a well advanced pregnancy situation".*

7.36 The AO ordered the respondent to pay the complainant:

7.36.1 €50,000 by way of compensation for breach and infringement of a statutory right (pregnancy discrimination); and

7.36.2 €5,000 by way of compensation for the distress and upset caused to the complainant.

8 CONSTRUCTIVE DISMISSAL

8.1 There have been a number of claims of constructive dismissal before the WRC and the Labour Court in 2019. Detailed decisions provide useful guidance on the scenarios in which an employee may look to successfully bring such a claim, given that, unlike the case in unfair dismissal claims, the burden of proof rests on the employee in the first instance. The tests applied in claims of constructive dismissal are stringent and often difficult to make.

8.2 In short, to succeed in a claim of constructive dismissal, an employee must demonstrate either a fundamental breach of the contract of employment or such untenable conduct on the part of the employer that no reasonable person would be expected to continue in employment. Unlike a claim for unfair dismissal, the burden of proof will rest on the employee to establish facts to prove that the employer's behaviour justified the employee terminating his or her employment. Finally, a failure on the part of the employee to raise the concern, whether in accordance with the employer's grievance procedure or otherwise, will likely be fatal.

Ryan, Cannon and Kirk Accounting Services Limited v Violeta Kneite UDD1910 – Labour Court

8.3 In another example of the high bar to be reached by claimant employees in constructive dismissal cases, the Labour Court upheld the decision of an Adjudication Officer and reaffirmed the onus on an employee to exhaust all internal grievance procedures before resigning.

What happened?

8.4 Ms Kneite, a Bookkeeper/Accountants' Assistant, refused to comply with the Officer Manager request that she perform a task which Ms Kneite said was not part of her role. The Manager complained to one of the directors about Ms Kneitre's conduct and the director sought to set up a meeting with Ms Kneite and the Manager which ultimately did not take place. However, the following month the director sent Ms Kneite a letter listing a range of problems he had with her and her performance. A number of meetings followed where Ms Kneite's work was criticised and Ms Kneite alleged that the director *"shouted at her that she was making errors".* Ms Kneite felt "*humiliated and useless*" and went absent on stress leave. She subsequently made a formal complaint of bullying and harassment against the director. This allegation was investigated by an independent investigator but no findings of bullying or harassment were made, although the investigator recommended mediation take place.

8.5 Significantly, Ms Kneite did not appeal the findings or raise a formal grievance under the employer's grievance procedure. When questioned by the Court, Ms Kneite accepted that she had *"no interest in being involved in the mediation process*

recommended by the independent investigator". Ms Kneite adopted the position that there had been a breakdown of trust and confidence between her and her employer such that she could not return to the workplace. Ms Kneite resigned.

8.6 The employer argued that its conduct "*did not meet the tests for a constructive dismissal" as it "did not amount to behaviour which undermined the relationship of trust and confidence between the parties in such a way as to go to the root of the contract".*

What did the Labour Court decide?

8.7 The Court, relying on the previous Labour Court decision in *Conway v Ulster Bank Limited* UDA474/1981, held that a complainant alleging constructive dismissal "*must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign".*

8.8 The Court also looked at the test set out by the Supreme Court in *Berber v Dunnes Sores Limited* (2009) ELR 61: "*the conduct of the employer complained of must be so unreasonable and without proper cause and its effect on the employee must be judged objectively, reasonably and sensibly in order to determine if it is such that the employee cannot be expected to put up with it*".

8.9 The Labour Court was persuaded by the employer's position that the employer had *"at all times behaved reasonably and expeditiously when dealing with the Complainant's complaints*" and that Ms Kneite had "*failed to exhaust all avenues available to her prior to her resignation*". The Court found that the employer had "*fully complied*" with its Dignity at Work Policy and noted that an appeal of the independent investigator's findings was made available to Ms Kneite but not availed of. The Court, while accepting there could be circumstances in which failure to raise a grievance would not be fatal to a claim of constructive dismissal, there were no "*factors present which might excuse the Complainant's failure to either avail of an appeal, to raise a grievance, to opt for mediation or to seek implementation of the investigator's recommendations".*

A Local Government Management Agency v Jim Connolly UDD1922 – Labour Court

What happened?

8.10 Mr Connolly was employed as a network engineer. Mr Connolly had downloaded 1,400 pornographic images during his working day. His defence was that he accessed porn "*as an antidote to his tendency to fall asleep at his desk*" during the day, as a result of his insomnia which, in turn, arose from stress caused by "*excessive workload*".

8.11 Prior to his resignation Mr Connolly had been the subject of a disciplinary investigation and hearing which resulted in a recommendation to the respondent's CEO that Mr Connolly be dismissed for gross misconduct. Significantly Mr Connolly was entitled to appeal this recommendation (and was advised of his right to do so). However, he chose not to appeal.

8.12 The Adjudication Officer in this case found that the conduct of the employer was not so unreasonable as to justify the employee's decision to resign – hence the claim failed. The employee appealed to the Labour Court.

What did the Labour Court decide?

8.13 The Labour Court upheld the decision of the Adjudication Officer. In particular, the Court held that the complainant "*has not pointed to a breach of contract or unreasonable behaviour… as the causative factor in his decision to resign his employment. His decision was motivated entirely by his desire to protect and prioritise his health"*.

An Accountant v An Accountancy Firm ADJ-00017674 – Workplace Relations Commission

What happened?

8.14 The complainant employee worked as a Senior Accountant and de facto Office Manager for the respondent employer. She advised the respondent of her pregnancy in October 2017 and, as she had previously suffered two miscarriages, her pregnancy was classed as high risk.

8.15 There were a number of telephone calls from the senior manager of the respondent (Mr X) to the complainant on 13 February 2018 during which Mr X allegedly barraged the complainant for over an hour and left her feeling upset and distressed. It was submitted by the complainant that her employer effectively ignored the complainant during the last two weeks of February 2017.

8.16 In March 2018 the complainant wished to discuss arrangements for her maternity leave with Mr X in private but Mr X allegedly insisted the conversation take place in the open plan office where other staff members were present. Additional situations arose in March 2018 where again the respondent shouted at the complainant and she felt threatened. There was a serious altercation where the complainant left a room and submitted that Mr X *"followed her up the stairs and put his face close to hers and she believed he might hit her".* The complainant left the office and was subsequently certified as unfit for work until her maternity leave commenced in April 2018. Her job was advertised in July 2018.

8.17 The complainant's health was adversely affected by the work situation and she notified the respondent via email in August 2018 of her intention to resign effective from the end of her maternity leave. In this email the complainant employee clearly set out the reasons for her resignation including Mr X's behaviour towards her in the months leading up to her maternity leave, the severe verbal abuse and the fact she had been *"ignored, isolated, unjustifiably criticised and humiliated by*" the employer in the months before her leave. She indicated that she could not see how the matter could be addressed internally given Mr X's position in the company.

8.18 During the hearing Mr X denied speaking to the employee in an aggressive manner and explained that the discussions that took place with the complainant were in relation to clients that were dissatisfied with the complainant's performance of her role. Mr X submitted that the complainant was "*rude and aggressive in both tone and language*". Mr X rejected any suggestion that he had been intimidating or abusive to the complainant.

8.19 Mr X also submitted that he wrote to the complainant in October 2018 asking her to withdraw her resignation and advising her that she was welcome to return to work. The option of a mediation service was also suggested by Mr X. It was submitted that the complainant made "*no attempt to raise a grievance and rejected the offer to engage an external professional to facilitate a mediated return to work*".

What did the WRC decide?

8.20 The WRC found the complaint of unfair dismissal to be well-founded. As the AO did not consider re-engagement or re-instatement to be an appropriate remedy as the employment relationship had broken down, the respondent employer was ordered to pay the complainant employee €16,500 compensation.

9 ANNUAL LEAVE

9.1 As the year draws to a close, many employers are re-setting their *"leave year"* clock and the natural question of what will happen to any untaken annual leave entitlement arises. While Ireland's Organisation of Working Time legislation entitles all employees to four working weeks of statutory leave in any given leave year (pro-rated for part-time staff), it is a matter for the individual employer whether to allow employees to carry over any part of their allotted holidays into the next *"leave year"*.

9.2 However, two decisions of the European Court of Justice (the **CJEU**) handed down in November 2018 shone a spotlight on an employer's ability to adopt a *"use it or lose it"* approach to an employee's accrued annual leave entitlement.

What happened in Kreuziger v Land Berlin and Max Planck v Shimizu?

9.3 Both cases concerned employees who sought payment in lieu of accrued but untaken annual leave on termination of their respective employments. In Mr Shimizu's case, he had accrued 51 days' annual leave over the course of two leave years. However, in both instances the relevant employer sought to rely on its *"use it or lose it"* annual leave policy, which, as permitted under national law, prohibited the carry-over of accrued annual leave into another leave year. The relevant German law only required payment in lieu of accrued leave where an employer had prevented the employee from taking their annual leave during the relevant year.

9.4 In considering the cases, the German court referred a question to the CJEU: whether an employee loses their right to be paid in lieu of accrued but untaken annual leave in circumstances where the employee failed to request such leave although they were in a position to do so (i.e. not prevented by their employer).

What did the European Court decide?

9.5 The CJEU confirmed that Article 7 of the European Working Time Directive expressly allows for an unconditional entitlement to payment in lieu of accrued but untaken annual leave – but only on termination of an employment relationship. Significantly, there is no scope for an employer to pay employees in lieu of accrued statutory annual leave unless their employment is ending. The Court confirmed that the objective of Article 7 is to ensure employees actually take the leave they are entitled to for the purposes of rest and relaxation to ensure *"effective protection of their health and safety"*.

9.6 While Article 7 allows member states to prohibit carry-over of annual leave into the next leave year (the *"use it or lose it"* approach), this policy can only stand where the employee has actually had the chance to exercise their right to holidays.

9.7 Given that employees are regarded to be the *"weaker"* party in the employment relationship, the CJEU confirmed that employers should not have carte blanche to impose restrictions on an employee's right to take their holiday entitlement. Consequently, it is the employer that must be able to show, *"specifically and transparently"*, that its employees were actually given the opportunity to take paid annual leave. The Court went a step further, finding that employers must be in a position to demonstrate that employees were *"accurately and in good time"* encouraged, *"formally if need be"* to take such leave.

9.8 It is only where an employer has discharged this onerous burden of proof, and the employee deliberately refrains from taking such annual leave *"in full knowledge of the ensuing consequences, after having been given the opportunity"* to take such leave, that the employer can rely on its *"use it or lose it"* approach.

What does this mean for employers?

9.9 Employers are not required to *"force"* employees to take holidays, but they must be able to show that they have *"exercised all due diligence in enabling"* the employee to take holidays.

9.10 This means that employees must be:

(i) fully informed of their holiday entitlements and

(ii) actively encouraged to take their holidays.

But how high a bar is that in practice?

9.11 The concept of *"active encouragement"* is not defined in legislation, nor was it expanded upon in great detail by the CJEU in the above cases. So what practical steps should employers take now if they wish to continue to rely on their "use it or lose it" annual leave policy?

1. **Annual Leave Policy:** As a necessary first step, employers should ensure they have a clear and comprehensive annual leave policy in place. This policy should expressly set out an employees' entitlement to paid annual leave, identify the relevant *"leave year"* period for the respective employer and accurately detail its approach to carry over of accrued but untaken leave. Any *"use it or lose it"* policy should be specifically and transparently highlighted – in bold and underlined. However, given the recent CJEU decisions, simply having a perfect policy is unlikely to fully discharge the high burden of proof resting on employers' shoulders. It is probable that additional steps must be taken to demonstrate active encouragement.

2. **Reminders:** One such step in showcasing *"encouragement"* may be to keep track of employees' utilisation of their annual leave entitlement and issue *"reminders"* to staff as the relevant leave year draws to a close. In certain circumstances, individual employee reminders are recommended, for example, when dealing with employees who are absent on maternity leave or long-term sickness where annual leave continues to accrue.

   In general, a company-wide approach, issuing a general *"reminder"* email to all staff each quarter, for example, and the month before the leave year expires, would likely *"tick"* the specific and transparent *"formal notification"* box. Whether it will sufficiently satisfy the *"encouragement"* test remains to be seen.

3. **Encouragement:** To actively encourage staff to take holidays, it may be advisable for employers, in tracking untaken leave, to meet with certain individual employees who have a substantial level of untaken annual leave days accrued. A record of such conversations should be maintained. Such discussions may give rise to other HR issues to be addressed separately, for example, where a workplace culture is revealed as a result of which staff may feel discouraged from taking annual leave.

9.12 The above cases may have significant implications for employers in Ireland who have traditionally adhered to a *"use it or lose it"* approach to annual leave. It seems clear that policy alone is no longer sufficient and more proactive measures to ensure fully informed notification and encouragement to actually take holidays is required.

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