Important Irish Case Law
2018 Review
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1 INTRODUCTION

1.1 A review of the recently published Courts Services Annual Report for 2017 indicates a significant decrease in "*employment and regulation of profession litigation*". In particular, there have been 56% fewer employment cases before the civil courts since 2016, likely due to the increase of cases being determined by the Workplace Relations Commission (the **WRC**) since the enactment of the Workplace Relations Act in 2015.

1.2 The Labour Court Annual Report for 2017 confirms the Labour Court received 1,093 referrals, held 708 hearings; issued 530 recommendations/determinations/decisions/orders and investigated 152 cases that were settled prior to hearing. It also informs that the average timescale for scheduling hearings in Dublin is approximately 13 weeks from the date of appeal. This reduced timeframe reflects the Labour Court's strong policy of only postponing cases in the most exceptional of circumstances.

1.3 While the Labour Court Report identified an increase in appeals to the Labour Court, 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.

1.4 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 fair procedures in the context of workplace investigations and dismissals to the approach being taken by the courts when determining whether an employee claim falls outside the statutory time limit.

2 WORKPLACE INVESTIGATIONS AND FAIR PROCEDURES

2.1 Unsurprisingly, over the course of 2018 there have been a number of cases focusing on an employee's right to full and fair procedures and natural justice during the course of any workplace investigation, disciplinary process and/or decision to dismiss. In particular the courts have considered whether an employer's decision to dismiss falls within the "*range of reasonable responses*" open to an employer.

Danceglen Ltd t/a Dunboyne Castle Hotel v Fernando Ribiero [2018] 6 JIEC 2801 – Labour Court

The facts

2.2 Dunboyne castle dismissed its night manager with 10 years' service for breaches of internet and email security policy (determined to constitute gross misconduct). In particular, the employee (Mr Ribiero) was in possession of USB key containing "*highly confidential*" company information. The employee was suspended on pay pending the investigation of the matter and put on notice that termination of his employment was a possible outcome of the investigation process should it progress to a disciplinary stage.

2.3 The hotel submitted that "Opera" (the hotel's management information system) was the "*backbone*" of the hotel. On reviewing the employee's emails as part of the investigation, the hotel submitted that a number of emails had been sent to the employee's personal gmail account containing company and guest information.

The decision

2.4 The Labour Court held, while it would not substitute its view for that of the hotel employer, the hotel's decision to dismiss was "*within range of responses of a reasonable employer*" and, therefore, not unfair. The Court agreed with the hotel's position that the employee's breaches of its internet and email security policies were "*extremely serious*" and the employee's explanations in that regard were "*vague and generalised*". The Court noted that the hotel "*places great weight on the importance of its commercial data and regards that information as central to its business operations*" and that the Opera system "*holds a range of personal data regarding the customers of the client's business*".

Towerbrook Ltd t/a Castle Durrow Country House Hotel v Young [2018] IEHC 425 – High Court

2.5 A recent High Court decision is an excellent example of the requirement to ensure independence and impartiality in the context of an investigation and disciplinary process.

2.6 This unfair dismissal case was initially heard before the Employment Appeals Tribunal before being appealed to the Circuit Court and then the High Court (pre- the 2015 Workplace Relations Act).

The facts

2.7 The employee has been employed by Castle Durrow hotel as general handyman for 13 years. Briefly the factual background to this case involved a busy bank holiday

weekend in June 2013. The employee was aware of the hotel rule that rubbish should not be removed from the back entrance of the hotel until 11am (so as not to make noise that would disrupt sleeping guests). However, on that particular day the employee concluded that it was necessary to remove the rubbish (that had piled up at rear of hotel near kitchen) in order to deliver food from a nearby café. On hearing the noise, the Managing Director confronted the employee and allegedly "*poked or jabbed*" the employee in the chest.

2.8 The employee spoke to the MD later that day and demanded an apology. The MD sent the employee home and told him to return the next day to discuss. However, when the employee returned the MD was not there and a further exchange took place between the employee and the hotel's CFO which resulted in the employee filing a complaint with the hotel that he had been assaulted by the MD.

2.9 Significantly, it was the MD who sent the employee a letter advising him of his suspension on pay pending the investigation outcome.

2.10 The employee's position can be summarised as follows:

2.10.1 It was inappropriate for the MD to investigate the matter and determine whether a disciplinary sanction was warranted;

2.10.2 No investigation ultimately took place – rather the employee was invited to attend a disciplinary hearing at which both the MD and CFO were to be present; and

2.10.3 The disciplinary process was conducted in the employee's absence (as he objected to the impartiality of the proposed disciplinary panel).

<u>The decision:</u>

2.11 The High Court found that the hotel had failed to provide an independent, thorough, impartial or objective investigation. It upheld the previous Circuit Court finding that the employee had been unfairly dismissed. He was awarded compensation in the amount of €32,178.

2.12 In particular the High Court held that the investigative/disciplinary meeting was fundamentally flawed, contrary to both natural justice and the hotel's own policy. The MD had conducted the disciplinary process in respect of his own complaint such that the investigation and ultimate decision making process was not independent/thorough/impartial/objective. The Court found it was "*hardly surprising*" in those circumstances that the employee had objected to the MD conducting the investigation and disciplinary process.

2.13 Barton J commented:
"I was left with the distinct impression that, had a little common sense and humility been brought to bear on matters, the outcome might very well have been different and this entire litigation avoided".

A Banker v A Bank ADJ-00001266 – Adjudication Officer

The facts

2.14 In April this year a bank was ordered by an Adjudication Officer to reinstate a banker, who had been dismissed for gross misconduct, to his former post. Briefly, the case concerned the handling by the banker of funds placed on deposit on behalf of his parents.

2.15 In the dismissal letter the bank concluded that the banker "*deliberately and repeatedly manipulated the Bank's system to apply a rate of interest to his parents' deposit account that was significantly higher than the market rate".* A key finding made by the investigator appointed to investigate this matter was that, while the interest that should have been applied was circa €7,000, the interest actually applied was €18,000. The banker was dismissed for gross misconduct.

2.16 The banker's position can be summarised as follows:

2.16.1 his actions had been entirely transparent:

(a) at no time did he hide his relationship with the owners of the account;

(b) his line manager knew about the relationship at all times; and

(c) the bank signed off on the account on a monthly basis

2.16.2 the bank could have instructed him not to be involved with his parents' account;

2.16.3 he was subjected to a "*most flawed disciplinary process*" for the following reasons:

(a) The investigation report made no allegation of fraud, dishonesty or theft therefore any disciplinary process based on that report should not have resulted in dismissal;

(b) No evidence or witnesses were produced during the disciplinary process;

(c) Investigator did not provide notes of meetings with witnesses to banker;

(d) Investigator did not speak to "key figures" identified by the banker;

(e) Banker had been expected to give his evidence during this process in response to the allegations yet was not able to cross examine the persons behind the allegations; and

(f) "*serious gaps and flaws*" in the investigation had been exposed under cross-examination, but the investigator was not produced at the disciplinary process.

2.17 The banker relied on a number of seminal Irish cases: *In re Haughey*; *Gallagher v Revenue Commissioners*, *Lyons v Longford Westmeath* and *Kiely v Minister of Social Welfare*.

2.18 The bank's position can be summarised as follows:

2.18.1 The banker's initial suspension had been "*holding in nature and not punitive*"; and

2.18.2 The banker had not been prevented from cross-examining any witness of his choosing.

The decision

2.19 The AO considered whether the decision to dismiss in these circumstances was within the range of reasonable responses for a reasonable employer. The AO held that there were serious flaws in the process that resulted in dismissal. In particular, the AO relied on *Bunyan v UDT* (1982):*"the fairness of a dismissal should be judged by the objective standard*".

2.20 The AO noted: *"Two things are striking from the evidence. The first is the number of documents that record the complainant's actions on this account*" and the fact that the banker used his work email to discuss his actions. Another feature that guided the decision-making in this case was that eight bank officials were involved in the transactions. Further, the AO found that the absence of any written authority was not enough to allow for an inference that the banker had been involved in concealment.

2.21 The AO observed that the investigator had made findings on foot of conversations with senior managers but did not set out these statements so as to allow the complainant to give a reply to them. It was held:
"*gaps in the investigation could have been addressed at the disciplinary stage by hearing from colleagues and managers. This was especially the case once the allegation of dishonesty and theft was formulated*".
The failure to set out this evidence was "a *substantial flaw in the process*".

2.22 Significantly, the AO ordered that the banker be reinstated despite the Bank's concerns that this would lead to disharmony and a fractious relationship. On this point the AO held: "*no direct evidence was presented at the adjudication of the basis for any such fear*".

Heinz-Peter Nasheuer v NUI Galway [2018] IECA 79 – Court of Appeal

2.23 A significant decision was also handed down by the Court of Appeal this year, shining a light on issues of alleged bias on the part of an investigator within workplace investigations.

2.24 In this case, while the Court of Appeal acknowledged that persons accused of bullying are likely to be highly sensitive to any potential bias on the part of the investigator, it emphasised the objectivity of the test of bias – i.e. that the courts will not apply a subjective test when considering whether an investigator lacks the independence necessary to conduct an impartial investigation.

The facts

2.25 An NUIG staff member (Nasheuer) sought to halt a workplace investigation into alleged bullying by Nasheur (and other NUIG staff). Industrial and employment relations practitioner (Janet Hughes) had been appointed by Labour Court to conduct the NUIG investigation but objective bias was alleged for the following reasons: (1) 20 years ago Ms Hughes had represented the complainant in her then capacity as a TU official; and (2) Nasheuer was not consulted in relation to investigation Terms of Reference (but the complainant was).

2.26 The High Court held: (1) Ms Hughes' prior representation of complainant did not raise a serious issue to be tried concerning objective bias; but (2) a reasonable fair minded observer might apprehend bias in the supposed inequality of treatment between Nasheuer and complainant re: consultation re: Terms of Reference. The Court ordered that the investigation be stopped on this basis.

The decision:

2.27 However, the Court of Appeal set aside the High Court decision to halt the workplace investigation at NUIG. The Court of Appeal held that the High Court's injunction in favour of Nasheuer was wrong as the High Court had erred in law and in fact.

2.28 The Court of Appeal found that there was no serious issue to be tried concerning bias in respect of ***both*** of the above factors i.e. "*two noughts are still nothing*". The Court cited the 2015 Supreme Court of *Goode Concrete v CRH*:
"*It is an objective test, it does not invoke the apprehension of a judge, or any party, it invokes the reasonable apprehension of a reasonable person, who is possessed of all of the relevant facts."*

2.29 In particular, the Court of Appeal took account of following facts: (i) Ms Hughes had been appointed by the Labour Court and the complainant had not been consulted prior to her nomination; (ii) the Labour Court's recommendation required Ms Hughes to consult with complainant and NUIG on Terms of Reference – but did not provide for any consultation obligation with the alleged perpetrators; (iii) the Labour Court was made aware of Ms Hughes past professional involvement with the complainant but satisfied itself she remained the appropriate person to carry out the investigation; (iv) Nasheuer was given the opportunity to comment on the methodology to be adopted by the investigator; and (v) the overall process was in line with NUIG's own anti-bullying policy.

2.30 The Court of Appeal concluded that:
"an informed observer would understand that [Nasheuer] had no entitlement to be treated in the same manner as the complainant regarding the terms of reference and that in such circumstances no bias could be imputed to the decision of Ms Hughes not to consult with him on the matter".

It also held that there was "*nothing irregular or suspicious about the procedure advised by the Labour Court…just because it did not provide for consultation with the respondents regarding the terms of reference."*

3 WORKPLACE BULLYING

3.1 Another significant damages award for workplace bullying was handed down by the High Court over the course of 2018. Here, An Post was ordered to pay a former employee, Ms Catherine Hurley, €161,000 in damages made up of €50,000 in general damages, €84,426 in respect of loss of earnings and €22,064 in interest. In making such a large award, the Court found that An Post had "*failed to tackle"* the workplace bullying experienced by Ms Hurley.

3.2 As we know, the Supreme Court decision in a previous landmark workplace bullying decision, *Ruffley v The Board of Management of St Anne's School*, confirmed that the threshold to be reached in meeting the legal definition of "bullying" is quite high. However, the *Hurley* decision is an important reminder to employers of their common law and statutory duties to ensure a safe place of work by preventing physical and mental injury. At a minimum, employers must have in place a robust and comprehensive Anti-Bullying Policy (that adheres to the terms of the Code) and take a proactive approach in both investigating and addressing complaints of workplace bullying. The content of such a policy should be communicated clearly to all staff and appropriate training should be put in place for staff and management to recognise the types of conduct that constitute "bullying" and how to address same.

3.3 The significant level of damages being awarded to employees who have suffered a reasonably foreseeable injury as a result of workplace bullying serves as a key reminder to employers of the imperative of fulfilling their statutory and common law duties to employees.

Catherine Hurley v An Post [2018] IEHC 166 – High Court

The facts

3.4 Ms Hurley, a postal worker, was involved in an incident with a co-worker in 2006 during which the co-worker reacted aggressively to Ms Hurley's request to pass postal packets from a trolley to her. Ms Hurley gave evidence that she was afraid the co-worker was "*about to head-butt her*" and that she was "*afraid of her life*". The co-worker was subsequently suspended. However, it was the reaction of Ms Hurley's other colleagues following this particular co-worker's suspension, coupled with An Post's poor handling of the matter, that formed the basis for Ms Hurley's case.

3.5 Ms Hurley gave evidence that, after her co-worker's suspension, her fellow employees effectively ignored her and made her feel unwelcome and "*ostracised*". On raising the issues with An Post's human resource manager, Ms Hurley was advised

that the matter would "*die down*". Ms Hurley subsequently raised her concerns with another supervisor, advising him of her feelings that "*75% of her* [Ms Hurley's] *colleagues were ignoring"* her and the situation was "*getting worse*", but no action was taken. The situation worsened and Ms Hurley was absent from the workplace on numerous occasions on grounds of work-related stress and Post-Traumatic Stress Disorder. An Post later dismissed Ms Hurley in 2011.

3.6 Ms Hurley sued her employer for negligence, breach of duty and breach of contract as a result of being ostracised by her colleagues.

The decision

3.7 The High Court once again endorsed the definition of "bullying" as set out in the Code of Practice prepared under the Industrial Relations Act 1990 (the Code):

> *"Workplace Bullying is repeated inappropriate behaviour, direct or indirect, whether verbal, physical or otherwise, conducted by one or more persons against another or others, at the place of work and/or in the course of employment, which could reasonably be regarded as undermining the individual's right to dignity at work*."

3.8 The High Court held that Ms Hurley had been *"subjected to unfriendly behaviour and social exclusion in the workplace".* It found that the conduct of Ms Hurley's colleagues constituted "*debilitating and humiliating*" treatment of Ms Hurley and undermined her right to dignity at the workplace. It was held that the "*accumulation of pretty daily humiliations and repeated spiteful or petty actions with a continuing social rejection or exclusion is the very essence*" of the legal definition of bullying.

3.9 Justice McDermott was also critical of An Post's response in allowing the behaviour of Ms Hurley's colleagues to "*continue unchecked*" while providing Ms Hurley with "*minimal*" support, effectively suggesting that she "*ride out the storm in the hope it would pass*". The Court found that Ms Hurley had no "*practical support or protection*" from her employer. It was also critical of the fact Ms Hurley was not encouraged to make a formal complaint, in accordance with the Code, but rather advised to let matters settle down naturally.

3.10 The High Court confirmed that an employer has a common law duty to "*take all reasonably precautions of the safety of its employees and not to expose them to a reasonably foreseeable risk of injury*". It also confirmed employers have a statutory duty under the Safety, Health and Welfare at Work Act 2005 to protect, so far as is reasonably practicable, the safety, health and welfare at work of its employees. Such an obligation requires an employer to have in place protective and preventative measures to prevent both physical and mental injury.

3.11 The Court found that Ms Hurley's deteriorating physical and mental health, including the recognisable psychiatric illness (PTSD) that should have been reasonably foreseeable by her employer, was caused by the workplace bullying she experienced.

The High Court held that the symptoms of PTSD, depression and anxiety were triggered by the 2006 incident and were *"also caused and substantially contributed to by reason of the bullying and harassment to which the plaintiff* [Ms Hurley] *was subjected thereafter".*

3.12 An Post, as Ms Hurley's employer, was found liable for the bullying and harassment which Ms Hurley experienced from her co-workers in the course of her employment. The Court found An Post had breached both its common law duty of care to Ms Hurley as an employee and its statutory duty under the Safety, Health and Welfare at Work Act 2005. The Court was satisfied that An Post had failed to address Ms Hurley's complaints in any meaningful way and noted that *"no efforts were made by management to engage with her predicament other than by hoping that matters would improve over time".* The Court was also critical that*:*

"No attempt was made to caution the workforce about Ms Hurley's treatment or advise that it was unacceptable to management or that persons engaged in such behaviour might be subject to discipline".

McCarthy v ISS Ireland Ltd [2018] IECA 287 – appeal from High Court to Court of Appeal

The facts

3.13 Ms McCarthy was employed by ISS Facility Services as a cleaning supervisor in a Limerick hospital. She claimed that, over the course of 2 years, she experienced 5 separate incidents where other cleaning staff, whom she supervised, acted in an "*aggressive, threatening and abusive manner towards her"* causing her *"severe stress and anxiety, humiliation, pain and suffering*" such that she experienced significant stress and ultimately resigned from her job.

3.14 Ms McCarthy reported these incidents of threatening and abusive behaviour, ranging from one male employee pinning her to a wall and another employee "*shouting and roaring*" at her in public, to her employer. However, she alleged that "*no particular action was taken to prevent a recurrence*" which resulted in a culture of tolerance for such behaviour within the workplace. Ms McCarthy asserted that the inaction, which resulted in Ms McCarthy experiencing "*fear, stress and anxiety*", constituted negligence.

The High Court decision

3.15 The High Court regarded Ms McCarthy's personal injuries claim as one of bullying in the workplace (although Ms McCarthy was not alleging bullying). In particular the Court identified three "*markers of bullying*":

1. Repetition: "*something happening on a daily basis…or weekly basis that a person has to endure*";
2. Duration: of the particular treatment to which the person is subjected; and

3. Indications of escalation of the activity.

3.16 Bearing these "markers" in mind, the High Court was critical of the fact that each of the 5 incidents was perpetrated by a different employee and there were "*temporal gaps between each such incident*". The trial judge adopted the view that "*ordinary human life is full of upsets large and small…which don't necessarily give rise to legal liability*" and queried what steps Ms McCarthy's employer could reasonably have taken in respect of the 5 incidents.

3.17 Ultimately the trial judge concluded that "*at the end of the day this was an unfortunate episode*" but the 5 incidents were not, in the judge's view, of the nature that would "*in the ordinary course cause a person to suffer as the plaintiff {Ms McCarthy] claims to have suffered".* The judge held that the Court "*could not possibly impose some sort of legal liability to pay the huge sums of damages and compensation being claimed on behalf of the plaintiff in this case*". The case was dismissed.

The Court of Appeal decision

3.18 On appeal, Ms McCarthy claimed that the trial judge had erred in characterising her claims as one of "workplace bullying". Ms McCarthy argued that she never presented her case as one of workplace bullying, but rather one of negligence on the following 2 grounds:

1. Alleged individual tortious acts by employees committed in the course of their employment which caused her injury and for which the employer was *vicariously liable*; and
2. Alleged negligence by the employer by *failing to provide a safe place of work* by taking no reasonable or effective action to prevent recurrence of the behaviour and thereby "*negligently permitting*" an atmosphere to exist in the workplace whereby cleaning staff felt free to "*speak and act aggressively and abusively*" towards Ms McCarthy "*without fear of sanction*".

Vicarious Liability?

3.19 While in the case of a workplace bullying claim there is an onus on the plaintiff to demonstrate that the injury to her health was reasonably foreseeable by the employer in the circumstances, no such obligation arises in the context of determining an employer's vicarious liability for the individual tortious acts of its employees.

3.20 However, the Court of Appeal, while acknowledging that each incident amounted to a "*technical assault*", did not find that the acts were committed in the course of the perpetrators' employment. The Court went on to find that the "*concept of vicariously liability*" would be stretched "*beyond its intended limit if an employer was to be found vicariously liable for every individual aggressive verbal outburst by one employee to another during the course of a day's work, even where that outburst has caused distress*". Ms McCarthy's first ground of appeal was therefore dismissed.

Failure to Provide Safe Place of Work?

3.21 In relation to Ms McCarthy's second ground of appeal, the Court confirmed that an employer has both a common law and statutory duty to ensure a safe place of work. The Court noted that an employer must "*take all reasonable steps to protect the employee"* where there is a "*foreseeable risk*" so that no injury is caused.

3.22 The Court noted that Ms McCarthy, as a supervisor had authority over the employees in question. In the Court's view, this role could "*potentially bring her into conflict with those under her supervision*" such that it was reasonable for her employer to have "*a particular duty of care*" towards her as a supervisor and to "*anticipate that such conflict might occur"*. An employer should have procedures in place to minimise such conflict and to deal with it when it occurs so as to "*prevent as far as reasonably possible any recurrence*". The Court concluded that "*nothing was done to protect the plaintiff who was in a supervisory role, which role, by its very nature, may lead to confrontation with those who are being supervised*".

3.23 Peart J acknowledged that the extent and nature of the duty of care varies depending on the nature of the employee's employment. He confirmed that the duty of care must take account of the employee's job and relationship between her and other employees such that "*one cannot overlook the fact that the plaintiff's job was as supervisor of cleaning staff in a busy hospital"* which required a *"very high standard of cleanliness*". In such circumstances the Court concluded that where Ms McCarthy had made complaints to her employer about hostility, the employer owed a duty of care to take some reasonable steps to address what occurred to minimise the chance of recurrence.

3.24 The Court found that the employer was "*liable in negligence for the injuries, loss and damage that are attributable*" to its negligence by (i) not having policies and procedures in place to deal with issues of this nature; and (ii) failing to provide Ms McCarthy with a safe place of work.

3.25 This case has been remitted to High Court for determination of the issues of causation and damages.

4 DISABILITY DISCRIMINATION / REASONABLE ACCOMMODATION

Nano Nagle School v Daly [2018] IECA 11 – Court of Appeal (note pending Supreme Court appeal)

4.1 The Court of Appeal recently delivered its judgment in a long running disability discrimination case which is noteworthy from an employer's perspective. The judgment brings clarity to the law on the extent of an employer's statutory duty to reasonably accommodate disabled employees.

4.2 In overturning the High Court judgment in *Daly v Nano Nagle School*, which was widely considered the seminal judgment on the law in this area, the Court of Appeal has confirmed that the statutory duty to reasonably accommodate a disabled employee is ***not*** as onerous as previously understood.

4.3 Significantly, the Court of Appeal confirmed that the obligation does not extend to requiring an employer to employ a person in a position if they are not able to perform the essential duties of that position.

4.4 The Court has also clarified that an employer will not fall foul of its statutory obligations merely by having failed to carry out an exhaustive examination as to whether or not an employee with a disability can be reasonably accommodated.

Duty to Reasonably Accommodate

4.5 Section 16 of the Employment Equality Acts (1998 - 2015) obliges employers, subject to it not being a disproportionate burden, to take appropriate measures to enable a disabled employee undertake the essential duties of their position. The section does not require employers to retain a disabled employee in a position where the employee is, despite such measures being taken, not "*fully competent to undertake and capable of undertaking*" the duties of that position.

High Court Decision

4.6 In summary, the High Court affirmed a decision of the Labour Court which awarded a paraplegic Special Needs Assistant €40,000 compensation in respect of its failure to reasonably accommodate her. The High Court specifically found that by failing to adequately consider a redistribution of her duties as a Special Needs Assistant, the school had failed to discharge its statutory obligations.

4.7 The High Court decision suggested employers had to actively explore and consider any and all potential accommodations that could be put in place in order to ensure they could safely say they had discharged their statutory obligations. As the Court of Appeal has now overturned the High Court's decision, it is necessary to reassess the extent of an employer's obligations when it comes to accommodating disabled employees in the workplace.

Court of Appeal lays down the law

4.8 In overturning the High Court's decision, the Court of Appeal honed in on the literal language of Section 16 and analysed whether the requirements, as set down in that section, had been discharged on the facts of the case. As the Court concluded that the claimant could not perform the essential tasks of a Special Needs Assistant, regardless of the accommodations put in place, it found the school had not failed to reasonably accommodate her.

4.9 The Court emphasised that the statutory duty requires an employer to objectively assess whether reasonable accommodations can be made to enable a disabled employee perform the essential duties of their role, which they would otherwise be unable to perform. The quality or otherwise of the enquiry process is ultimately not relevant to determining whether that statutory obligation has been discharged.

Key Takeaways

4.10 While, for now, this judgment provides a definitive interpretation of the law on an employer's duty to reasonably accommodate disabled employees, it is important to be aware that this decision is pending appeal to the Supreme Court.

4.11 The key takeaways from the Court of Appeal judgment are as follows:

4.11.1 An employer must consider the redistribution of non-core duties/tasks that a disabled employee is unable to perform, even with the provision of reasonable accommodations. However, this does not extend to the removal of core duties/tasks.

4.11.2 Employers must be in a position to objectively justify the characterisation of duties as 'essential duties' of a role, particularly if they are going to dismiss a disabled employee on the grounds that they are not fully competent and capable of undertaking those duties.

4.11.3 An employer will not have failed to reasonably accommodate a disabled employee even if they do not consult the employee in the course of their evaluation of the accommodations required to be put in place for that individual.

4.11.4 An employer is not required to create a new position for an employee who, even with reasonable accommodations, is not in a position to perform the essential duties of the position they are employed to perform.

4.11.5 An employer must objectively evaluate what, if any, reasonable accommodations can be put in place and that process needs to be informed by expert medical advice and should be documented.

4.11.6 An employer is not obliged to retain a disabled employee who is not fully competent and capable of performing the essential duties of the position concerned. The fact that the employee might, with reasonable accommodations, be in a position to perform some, but not all, of the essential duties is not sufficient.

Dunnes Stores v Mary Doyle Guidera [2018] IEHC 503 – Labour Court (but note under appeal to High Court)

The facts

4.12 The complainant employee was on sick leave from June 2014 to her dismissal in September 2016. She was ultimately dismissed due to her continued absence from work and inability to provide an indication of date of return. The employee had provided her employer with a doctor's letter in August 2016 stating she had improved

markedly and advised that she see a specialist. The letter stated: "*any potential return to work will depend on outcome of specialist visit*". In September 2016 the complainant provided her employer with documentation to show she had sought specialist appointment be expedited but she was dismissed shortly after.

4.13 The employee's position can be summarised as follows:

4.13.1 she was dismissed due to a disability on the basis that her employer had concluded she was incapable of carrying out the work for which she was employed;

4.13.2 the employer's decision was reached without input of "*impending medical advice*"; and

4.13.3 the employer had breached its s16 obligation to make reasonable accommodation where the employer did not wait for key medical advice and made no effort to understand whether any supports or other reasonable accommodation could have facilitated return to work.

4.14 The employer's position can be summarised as follows:

4.14.1 The employee had been absent for over 2 years with no improvement in condition (appeared to be worsening);

4.14.2 The employer met with employee on seven occasions and concluded there "*there was no reality to the Complainant returning to work in the near future";*

4.14.3 The employee did not appeal the employer's decision to dismiss internally;

4.14.4 The employer had arranged for the employee to be examined by Company doctor; had been furnished with regular medical certs so was "*in full possession of all material facts concerning Complainant condition";*

4.14.5 The employer had advised the employee that it could not hold her position open indefinitely and that, when the time came, dismissal on grounds of incapacity was being considered;

4.14.6 The employee was given an opportunity to influence employer's decision (demonstrated in notes of meetings); and

4.14.7 The employer relied on *Nano* decision and submitted: "*The Court must consider the reality of the situation rather than the process utilised by the Respondent to reach a view of the reality of the Claimant's capacity to work at the date of dismissal".*

The decision

4.15 The Court cited the Court of Appeal decision in Nano Nagle:
"The point is a simple one: the statutory duty is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation. If no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting. It is not a matter of review of process but of practical compliance."

4.16 The Court held that, as a result of *Nano*, to determine whether an employer adequately discharged its responsibilities under s16, the Court must "*give consideration to the efforts made by the Respondent to objectively evaluate whether reasonable adjustments to the work arrangements of the Complainant could be made so as to render her fully capable of carrying out her duties. The Court finds that the Respondent did make efforts throughout the Complainant's absence to be aware of her condition. The Court noes, however, that, notwithstanding the recommendation of the company doctor in February 2015 that the Respondent make arrangements for the company doctor to keep the Complainant under review, no steps were taken by the Respondent to arrange such a process*."

4.17 The Court found that the employee's inability to "*definitively address the demand for a return to work date on the date of her dismissal was a function of her medical advice related to her disability as provided to the respondent in writing".*

4.18 Ultimately, the following factors where fatal to the employer's defence: (i) the company doctor recommended regular review (which not done by employer); and (ii) the employee's inability to provide a return to work date was due to outstanding/impending specialist medical advice that her employer did not wait for (therefore Dunnes Stores was not in a position *to "objectively evaluate the degree to which appropriate adjustments could be made to her working arrangements so as to render her capable of participating in the employment".*

4.19 The Labour Court found the employee had been discriminated against on grounds of disability. The employer had "*failed to adequately discharge the duties imposed on it by the Act at section 16*". Significantly the Labour Court doubled the compensation award to €30,000 (for the effects of discrimination).

An Employee v An Post DEC-E2018-005 – Adjudication Officer

The facts

4.20 The claimant employee was suspended from work following an incident and sought to argue that An Post had discriminated against her by failing to accommodate her re: the location of the disciplinary hearing. The employee submitted that she made numerous requests to have the hearing conducted at her place of work (a quiet location outside Galway) rather that at the Regional office in centre of Galway. The employee submitted An Post's failure to accede demonstrated *"total lack of understanding of her condition involving anxiety and intense fear of any situation where escape may be difficult*".

4.21 An Post submitted the employee failed to provide confirmation of her agoraphobia and did not provide any medical opinion re: the location of hearing. An Post had already accommodated employee by moving meeting to Galway rather than usual

location (Dublin). An Post ultimately agreed to move the meeting to employee's place of work (but employee failed to collect registered post letter notifying her of this).

The decision

4.22 The Adjudication Officer confirmed agoraphobia could be a disability under Employment Equality Acts but that An Post provided "*more than adequate reasonable accommodation*" to an employee suffering from agoraphobia.

4.23 Section 16(3) of EE Acts placed an onus on employers to take reasonable steps to accommodate an employee with a disability. It was also reasonable to include that this onus extends to a work-related activity, particularly a meeting of a "one off" variety such as a disciplinary hearing.

4.24 The AO was accordingly satisfied that the attendance of the complainant at the hearing constituted a "*duty*" of her employment.

4.25 The AO noted An Post's willingness to depart from normal procedure by scheduling the hearing in Galway. Satisfied that by doing so, "*the respondent provided significant accommodation to the Complainant in light of her disability*."

4.26 The AO also noted that the standard practice was to locate the hearings in Dublin in order to meet "*confidentiality and sensitivity concerns*" and evidence presented that the employee did attend other off-site meetings in relation to work related matters, including a visit to a consultant psychiatrist in Dublin.

An Employee v A Retail Store ADJ-00008141

The facts

4.27 The complainant was employed between November 2003 and October 2016 but went on sick leave in July 2014 due to stress and anxiety. The employee claimed her employer "*failed to consider all the options that might have been available to accommodate her return to her employment"*.

4.28 The employer argued that, having met the employee on a number of occasions, it was "*clear to the Regional Manager that the complainant continued to experience significant anxiety when visiting and being physically present in the store"*.

The decision

4.29 The AO held that a bona fide attempt must be made to "*source some alternatives before terminating the employment"*. She did not see any evidence of enquiries from local management to Head Office or HR. By failing to consider or evaluate potential

options of reasonable accommodation, the employer did not comply with responsibilities placed on it by the Act/

4.30 The employer cited *Humphreys v Westwood Fitness Club [2004*] – that in meeting with the employee at regular intervals to discuss her illness and organising occupational health appointments to assess her potential to return to work, the employer was in "*full possession of all the material facts concerning the complainant's conditions"*. This case found that a two stage enquiry should take place which looks at (1) the factual position re: employee's capability and degree of impairment and likely duration; and (2) if it is apparent the employee is not fully capable, the employer should consider what special treatment/facilities may be available to become fully capable (with the employee having the opportunity to participate at each level)

4.31 The AO also cited *Nano Nagle* but noted that in the present case "*no evidence was presented to me to show that the respondent made any attempts to provide any special treatment or facilities. Obviously there is no actual obligation on the employer to produce a successful outcome to enquiries as to alternative duties or such similar reasonable accommodation. However a bona fide attempt must be made* "

A Solicitor v A Legal Service ADJ-00011821

The facts

4.32 Here the claimant solicitor suffered from epilepsy and experienced a number of acute attacks. The solicitor had made 6 requests between March 2015 and Feb 2017 to work from home due to decline in her health (i.e. request for reasonable accommodation) but all requests refused by employer.

4.33 The solicitor's position can be summarised as follows:

4.33.1 she remained fully competent to discharge her functions but sought reasonable accommodation (work from home);

4.33.2 other colleagues had been accommodated;

4.33.3 cited *Daly v Nano Nagle*: "*The point is a simple one; the statutory obligation is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation…The general principles set out in Humphries v Westwood Fitness Club require an employer to make a bona fide and informed decision regarding disabled employee's capabilities before concluding that he or she is unable to perform the duties of their employment".*

4.33.4 The law firm had failed to make any bona fide and informed decision before reaching its concluding by failing to engage in any meaningful way as to how the proposed arrangement might actually work etc.

4.34 The law firm's position can be summarised as follows:

4.34.1 an independent medical practitioner had concluded that working from home would only have a "*minimal*" impact on employee's stress and fatigue levels (trigger for epilepsy);

4.34.2 pointed to "*frontline*" duties of solicitor (client face to face meetings, attending court etc.);

4.34.3 sought to rely on *A Health and Fitness Club v A Worker*: "*Secondly if it is apparent that the employee is not fully capable Section 16(3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can become fully capable"; and*

4.34.4 facilitated the claimant's disability previously by providing claimant with shorter working week.

The decision

4.35 The AO awarded €30,000 in compensation, finding that the law firm had breached its obligations under the EE Acts by refusing reasonable accommodation.

"*The failure to engage with the complainant is especially significant in that the issue was initially decided long before medical opinion came into play. In my view there was no attempt to assess with the complainant the precise outworking of the work from home option and this unduly influenced the decision even after the IMP assessment*."

"It is quite clear that both the nature of her work and her attitude to flexibility permit her to work from home. The objection seems to be a matter of policy on the part of the respondent and to judge from its description of the accommodation as creating incompatibility with her role; a fairly entrenched one. However, that is not sufficient to decide whether the refusal to permit it breaches an obligation to provide reasonable accommodation. The medical evidence is not very decisive."

"*It is clear from the history of the case that the respondent had set its face firmly against accommodating the complainant, whatever argument she made and it took advantage of the 'minimal' impact assessment to reinforce this position without properly assessing all of the implications.*

"*It seemed locked into its view that the accommodation was 'incompatible' with her role, which is rather extreme and sounds more like a pre-determined view than one based on any evidence*". *"In my view, making a minimal impact on the possibility of avoiding a life-threatening event is, to put it very mildly 'a reasonable accommodation'. There should be a zero-risk approach in such a situation."*

Dublin Bus v McKevitt [2018] IEHC 78

4.36 The High Court recently considered the question of the need to follow a disciplinary process prior to dismissing an employee on long-term sick leave.

The Facts

4.37 Ms McKevitt (the Complainant) was employed by Dublin bus (the Company) as a bus driver from 2007 until her dismissal in 2014. In 2011, the Complainant was diagnosed with a medical condition which made it unsafe for her to operate a vehicle. Subsequently, the Complainant went on long term sick leave. She also had a myriad of other medical conditions. She was assessed by the Company's Occupational Health staff (OH) on numerous occasions, and it was recommended that she be placed on non-driving, non-physical duties due to this illness. There were no open positions available for the Complainant. Hence, her sick leave was extended. While she was on sick leave, OH reviewed a total of 23 medical reports regarding the Complainant. Two years later OH informed the Complainant that she may be subject to retirement on ill-health grounds as the restriction on her driving ability had been classed as permanent. She was told of this possibility on at least four occasions. In April 2014, the Complainant was compulsorily retired on grounds of ill-health upon a recommendation by OH.

4.38 Ms McKevitt challenged the lawfulness of that decision under the Unfair Dismissals legislation. She argued that Dublin Bus had failed to comply with the procedural requirements set out in the failed to comply with the procedural requirements set out in the Industrial Relations Act, 1990 (Code of Practice on Grievance and Disciplinary Procedures) (Declaration) Order, 2000 prior to dismissing her.

The Decision

4.39 The High Court ultimately held that the statutory code of practice did not apply to dismissals on the grounds of medical incapability and more properly applied in the case of conduct related dismissals.

4.40 Significantly, the Court reiterated the well-established test that must be satisfied in order for an employee to be lawfully dismissed under the Unfair Dismissals Acts on medical incapability grounds. In this regard, the Court stated that the onus is on the employer to show:

- 4.40.1 That it was the ill-health that was the reason for the dismissal;
- 4.40.2 The reason was substantial;
- 4.40.3 The employee received fair notice that the question of his dismissal for incapacity was being considered; and
- 4.40.4 The employee was afforded an opportunity of being heard.

4.41 There is therefore no requirement for an employer to follow a disciplinary process prior to dismissing an employee on long-term sick leave on the grounds of medical incapability. However, before an employer does so, it is essential that they consider whether any reasonable accommodations can be put in place to facilitate the employee's return to work. This assessment should be informed by up-to-date medical advice. If the medical advice received confirms the employee's medical

incapability of returning to work in the medium-to-long term, even with the provision of reasonable accommodations an employer should, at that point, make the employee aware their continued employment is in jeopardy. The employee should ideally be afforded the opportunity to present any medical evidence they consider relevant to their proposed dismissal and also be afforded an opportunity to meet with their employer, as part of the employer's decision-making process. It is also prudent to afford the employee a right to appeal a decision to dismiss.

4.42 A dismissal on medical incapability grounds should be considered a last resort. Before making such a decision, it is always worth considering whether any other viable alternatives exist such as permitting the employee to remain on unpaid sick leave to afford them a longer period to recuperate, or facilitating a voluntary ill-health early retirement. If an employer provides employees with access to a permanent health insurance scheme, the employer should not dismiss an employee prior to their eligibility for admission to this scheme being assessed by the insurance company. If they do so, they could end up facing a significant damages claim on the basis that their decision deprived the employee of a potentially very valuable contractual benefit. Furthermore, it goes without saying that if an employee has been admitted to such an insured scheme, their employer should not terminate their employment without first seeking legal advice on the implications of so doing.

4.43 The Court held:
"in a case where a judgement call has to be made as to whether someone's medical history renders them unfit for work, it seems to me sensible that the judgement call would be made by suitably qualified and experienced medical personnel".

The Court vacated the Circuit Court order and allowed the appeal.

5 REDUNDANCY

5.1 Two particular cases in the redundancy sphere that were determined over the course of 2018 will be of note for employers. The first, *Cinders Limited*, looks at the circumstances in which an employee may become disentitled to a statutory redundancy lump sum payment. The second case considers whether a substantively fair and genuine redundancy situation will provide a defence to a claim of unfair dismissal.

Cinders Limited v Celina Byrne [2018] 8 JIEC 0802 – Labour Court

The facts

5.2 Briefly, Cinders Limited sells ladies footwear through a mix of concessions and stand-alone stores. Here the complainant employee had worked as a sales assistant for 20 years in one of stand-alone stores that Cinders ultimately decided to close due to declining sales. The employee was offered alternatives (moving to one of two places

where there was a concession arrangement in place or to move to another store in Wicklow Street Dublin). The employee refused the first alternative on the basis that the concession arrangement would have been different to her work in a store. She also refused the Wicklow St alternative as she felt that store was also trading badly and would ultimately shut down too.

The decision

5.3 Section 15 of Redundancy Payments Acts provides that an employee is ***not*** entitled to statutory lump sum payment where:

Section 15(1):

(a) Employer offers to renew contract;
(b) Provisions of contract as to the capacity and place in which he would be employer and the other terms and conditions would not differ;
(c) Renewal would take effect on or before date of termination; and
(d) Employee subsequently "*unreasonably*" refuses that offer.

Section 15(2):

(a) Employer offers in writing to renew contract;
(b) Provisions of contract as to the capacity and place in which he would be employer and the other terms and conditions would differ;
(c) Offer constitutes offer of "suitable employment";
(d) Renewal would take effect on or within 4 weeks of date of termination; and
(e) Employee subsequently "*unreasonably*" refuses that offer.

5.4 There are two issues to be considered:

(a) Suitability of the alternatives offered; and
(b) Reasonableness of complainant's refusal to accept alternatives

5.5 The Labour Court looked to *Cambridge & District Co-Op v Ruse* [1993] where the English EAT held:

"*the suitability of the employment is an objective matter, whereas the reasonableness of the employee's refusal depends on factors personal to him and is a subjective matter to be considered from the employee's point of view".*

5.6 The Labor Court concluded that the offers were suitable from objective point of view but it was reasonable for the employee to reject the concession alternative as it was quite a different environment. However, her refusal to work in Wicklow St was unreasonable. On this basis the employee was denied an entitlement to a statutory redundancy payment (set aside AO decision).

Internal Sales Specialist v Respondent ADJ-00013173 – Adjudication Officer

The facts

5.7 The employee was employed as an internal sales specialist. In January 2016 a new managing director was hired with a mandate to bring transformation and change to the business". Significant organisational change and investment in systems and processes were envisaged. On determining that many of the systems were no longer fit for purpose, a restructuring of the sales customer service and technical service teams was announced by the employer in October 2016. Further, one of the company's largest customers terminated their contract with the company, such that the need to reduce more roles within the company was identified.

5.8 At a companywide briefing, the MD advised all staff that *"in line with the announced strategy of creating a "new" company*", organisational changes were needed. The briefing explicitly stated that "*some roles will cease to exist"* and that "*at the end of this process there won't be jobs for everyone because the new structure needs approximately half a dozen less roles than we currently have*".

5.9 Affected staff were informed in personalise letters that their roles were at risk of redundancy. A consultation procedure was set out and at risk employees were met in small groups and one to one sessions. Redeployment options and vacancies were put forward and supports were put in place in the form of interview preparation specialists (Communique International). In respect of vacancies, specific skills and abilities such as "commercial acumen" were referenced in the job descriptions provided. Pension, outplacement and tax advice was also provided, as well as ongoing training and mentoring.

5.10 The employee's positon can be summarised as follows:

5.10.1 The employer displayed "*exceptional arrogance and lack of* concern". The employee's employment had been terminated "suddenly and without forewarning" with no process of engagement;

5.10.2 The job descriptions provided to the complainant purported to be fundamentally different or new roles but there were not;

5.10.3 A number of people had been "*corralled*" at meetings by their managers";

5.10.4 The process was a "*sham*" being "*sudden and compressed into five days*" in order to "maximise pressure on those concerned";

5.10.5 The employee claimed he was *"dismissed in disguised circumstances and fair procedure, by any reasonable measure, was absent*". He submitted that "*the evidence of the treatment of the complainant demonstrates how the selection was anything but impersonal. There was no fair procedure applied, on the contrary it was wholly unfair"*; and

5.10.6 The employee was "*effectively dumped out of the employment in a scenario contrived to look like redundancy and in a manner contrived to look like some kind of due process*".

The decision

5.11 The AO confirmed that a business has a right to restructure and found, on the balance of probability, that the restructure in this case as "*necessary and that as a consequence redundancy was inevitable".* On this basis the redundancy situation was genuine. The AO went a step further to note that the *"dismissal by reason of redundancy was substantively fair*". However, the AO went on to consider whether it was procedurally fair.

5.12 THE AO concluded that "*the process from start to finish was carried out with undue haste*". In particular the AO was critical of the following aspects of the procedure:

- 5.12.1 The implementation plan was not shared with the complainant;
- 5.12.2 The employer failed to properly explain the change process and give reasons for it;
- 5.12.3 There was a lack of effective communication and consultation with the complainant;
- 5.12.4 There was no consideration for the employees who were all long serving staff;
- 5.12.5 They were given far too little time from the date of announcement to conclusion;
- 5.12.6 The offer of support for interviewing skills was not as suggested by the employer – direct evidence was given that employees were scheduled for a mere 30 minutes; and
- 5.12.7 The interview process was based solely on their ability to perform at interview and to set out their position on criteria and competencies which were foreign to them.

5.13 The AO was also critical of the fact that no alternatives to redundancy appeared to have been contemplated by the Company.

5.14 In particular the AO was critical of the short lead-in time for employees to submit expression of interest for new roles (one day after commencement of the process). The AO noted that staff were "*expected to grasp (in that short period) the complexities of a competency based assessment"* despite not having had a job interview in 20-30 years.

5.15 The AO directed that the employer should have entered into a far more detailed consultation explained "*in detail and slowly"* the changes involved and that alternatives to redundancy should have been fully explored before details of the job losses envisaged were published.

5.16 The AO held that the dismissal of the employee was "*carried out in a cold systematic fashion*" and that, while the dismissal met the criteria for redundancy on a technical level, it "*completely failed to deal with the human aspect".* The employee's claim for unfair dismissal was upheld, though his award of compensation (€17,500 which equated to 5 months' salary) reflected his lack of mitigation of loss.

6 WORKING TIME AND THE RIGHT TO DISCONNECT

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

6.1 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**).

6.2 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

6.3 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.

6.4 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

6.5 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

6.6 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.

6.7 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.

6.8 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*".

6.9 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.

6.10 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.

6.11 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.

6.12 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 ADDITIONAL CASES OF NOTE

CAN PAYING AN EMPLOYEE IN LIEU OF NOTICE REMOVE THE RISK OF AN UNFAIR DISMISSAL CLAIM?

An Employee v A Technology Company ADJ-00010670

7.1 A recent case before an Adjudication Officer considered whether paying an employee in lieu of the employee's notice period could impact on that employee's entitlement to take a claim for unfair dismissal which, under the Unfair Dismissals Acts 1977 – 2015 (the **UD Acts**) requires an employee to have 12 months continuous service with the employer.

The facts

7.2 The employee was employed on a 6 month fixed-term contract as of 20 June 2016 which expired in accordance with its terms on 19 December 2016. The employee was not provided with a further fixed-term contract and, in continuing to work, she considered she was a permanent employee on a contract of indefinite duration. In June 2017, the employee was notified of a meeting to discuss her performance. The employee was informed by letter dated 16 June 2017 that the meeting could result in termination of her employment and that she could be accompanied at the meeting by her Trade Union representative. However, the employee received a subsequent letter informing her of her termination of employment on the basis that her fixed-term contract had expired and was not being renewed. This second letter made no reference to any performance related reasons for dismissal and no reference to her 1 week statutory minimum notice.

7.3 The employee's position can be summarised as follows:

7.3.1 The employee said it was "*misconceived, cynical and disingenuous*" for her employer to assert she was on rolling fixed-term contracts following the expiry of her original fixed-term contract. In breach of section 3 of the Terms of Employment (Information) Acts, the employee had not been provided with a written statement evidencing the alleged rolling fixed-term contracts.

7.3.2 The employee contended that her dismissal was due to performance issues, not the alleged expiry of her fixed-term contract.

7.3.3 According to section 1 of UD Acts, in ascertaining the date of dismissal, an employee is entitled to the benefit of the applicable noticed period under the Minimum Notice and Terms of Employment Act (in this case 1 week). In such circumstances, the employee's correct date of dismissal was 23 June 2017 such that she had the requisite 12 months service to bring a claim for unfair dismissal.

7.4 The employee's position can be summarised as follows:

7.4.1 The employee was employed on a series of rolling one month fixed-term contracts following the expiry of the original fixed-term contract in December 2016. The employee's final fixed-term contract terminated on 16 June 2017. The employee's original fixed-term contract contained the requisite "*exclusion*" wording required by the UD Acts, such that she was prevented from bringing a claim for unfair dismissal where the dismissal was due solely to the expiry of the fixed-term.

7.4.2 On the basis that the employee's fixed-term contract expired on 16 June 2017 (some 4 days shy of the employee attaining one year's service) and the employee was paid in lieu of her statutory notice entitlement such that additional service beyond the termination date did not accrue, the employee did not have the requisite service to bring a claim for unfair dismissal.

The law

7.5 Section 1(1)(b) of UD Acts defines "date of dismissal":

"(b) where either prior notice of such termination is not given or the notice given does not comply with the provisions of the contract of employment or the Minimum Notice and Terms of Employment Act 1973, the date on which such a notice would have expired, if it had been given on the date of such termination and had been expressed to expire on the later of the following dates:

(i) the earliest date that would be in compliance with the provisions of the contract of employment; or

(ii) the earliest date that would be in compliance with the provisions of the Minimum Notice and Terms of Employment Act 1973"

The decision

7.6 The Adjudication Officer acknowledged that the original fixed-term contract contained the requisite exclusion wording and expressly enabled the employer to pay in lieu of notice. However, the AO noted that the date of dismissal for the purposes of the UD Acts "*must be construed in accordance with that Act"*. As the Minimum Notice Act defines 1 weeks' notice as 7 consecutive days, the employee's date of dismissal for the purposes of eligibility to bring a claim for unfair dismissal was 23 June 2017.

7.7 The AO did not accept that the employee had been placed on rolling fixed-term contracts in respect of which the exclusion wording contained in the original fixed-term contract could be applied. The AO held: "*the contract had expired, no contract was in place complying with these conditions which must be strictly construed. Therefore the Respondent must show substantial grounds justifying the dismissal".*

7.8 The AO awarded: compensation of €4,707 (approx. 7 months loss with mitigation demonstrated).

DOES TRADE UNION REP ADVICE AMOUNT TO INDEPENDENT LEGAL ADVICE?

7.9 A case before an Adjudication Officer earlier this year provided some valuable clarity to an everyday situation when entering into a compromise agreement with an exiting employee. While it is well known that an employee should receive independent legal advice as to the content and effect of any waiver agreement before signing up to same, the question of whether advice from a trade union representative reaches the threshold of independent legal advice can be uncertain.

A Showroom Host v A Car Sales Company ADJ-00006034

7.10 To ensure the enforceability of any compromise or settlement agreement entered into between employer and employee, it is essential that the employee received independent legal advice as to the content and effect of the waiver of rights and claims within that agreement. From a practical perspective however, a recent Adjudication Officer decision considered whether the advice of a trade union representative in the context of settlement agreements would suffice to constitute independent legal advice.

The facts

7.11 By way of background, a former showroom host of a car dealership claimed her redundancy was not b*ona fide* but rather had been contrived to dismiss her due to her refusal to engage in what she claimed was a "*fraudulent financial practice*". Although the employee entered into a settlement agreement in respect of the redundancy of her position, she sought to take a claim for unfair dismissal.

7.12 The employer's position was that the employee had been advised to take legal advice before she signed the settlement agreement such that there could be no question but the employee understood the content and effect of the agreement before signing.

7.13 The employee submitted that the advice she had received from her TU official could not be construed as "*independent legal advice*" as he was not a solicitor or barrister. The employee asserted that she was "*placed under extreme pressure*" to enter the settlement and the redundancy process was "*procedurally flawed".*

The decision

7.14 The AO rejected the employee's contention that she had not received adequate legal advice for settlement agreement wherein she waived her rights. On this basis the employee was estopped from bringing a claim due to the existence of the settlement agreement.

7.15 The AO held that the employee had entered into settlement "*in the full knowledge of the events…described*". The employee claimant was aware of the alleged breaches and flaws in the redundancy procedure at the time she signed the agreement.

7.16 The AO found that regardless of legal qualifications, the TU official was "*quite capable of providing legal advice in respect of employment law issues and associated matters".* The official "*would be giving such advice, on a regular basis, even as it relates to settlement agreements*". Moreover: *"most large trade unions provide legal training to their officials and have their own legal departments which support TU officials in the conduct of their business".*

A RECENT TREND – STRINGENT APPLICATION OF STATUTORY TIME LIMITS TO BRING EMPLOYEE CLAIMS

7.17 There have been a significant number of decisions, before Adjudication Officers, the Labour Court and the High Court, over the last 12 months addressing the preliminary point of whether a particular employment claim is being brought outside the timeframe set out in the applicable legislation and is, therefore, statute barred. A selection of recent cases on point are summarised below and demonstrate a clear reluctance on the part of the courts to deviate from prescribed statutory time limits.

Pat the Baker v Conor Brennan [2018] 7 JIEC 3003

The facts

7.18 This case concerned an appeal of an AO decision to the Labour Court, which is required to be submitted within 42 days of the AO decision. Here the claimant employee's solicitor had used an online tool to calculate the latest date for submission but this had resulted in a miscalculation by one day.

7.19 Legal submissions put forward on the part of the employee argued employee was blameless for the mistake in not submitting appeal on time such that "*exceptional circumstances*" permitted extension of the timeframe from 6 months to 12 months. It was argued that not extending the time limit "*would be effectively to make the complainant vicariously liable for his solicitor's actions".*
"As a matter of law a litigant cannot automatically be identified with, and is not automatically vicariously liable for, the acts or omissions of the solicitor instructed by that litigant….as a matter of law, a failure by a solicitor instructed by a litigant to lodge

a claim or to institute proceedings to lodge that claim, or to institute those proceedings, within the time limit prescribed for doing so in circumstances where the litigant bears no personal blameworthiness for the failure can constitute substantial grounds or good and sufficient reason or a justification for extending the time limit."

7.20 Legal submissions put forward on the part of the employer argued that miscalculating the date of appeal does not constitute "*exceptional circumstances*" within meaning of section 44(4) of Workplace Relations Act 2015. It was also argued that an attempt to introduce concept of vicarious liability was "*misconceived*". Argued that the Supreme Court decision in *Duignan* case (relied on by the employee's counsel) should be distinguished on facts. In that case the plaintiff had taken steps to ensure his solicitor was acting on his instructions (hence Supreme Court concluded that plaintiff could not be held responsible for the delay). Conversely, in the instant case the employee took "*no such steps*" and did not seek assurances from his solicitor and didn't enquire if she was pursuing his appeal.

The decision

7.21 The Labour Court held: "*The appeal was not brought within the relevant statutory time limit as decreed by the Oireachtas in section 44(3) of the 2015 Act. This was not disputed between the parties".*

7.22 The Court agreed that "*the concept of the Complainant being vicariously liable in some way for his solicitor's error in calculating the timeframe within which his appeal ought to have been lodged is not a relevant factor to be taken into account by it in determining whether, in all the circumstances, the Court did not receive his notice of appeal within the statutory 42 day period due to the existence of exceptional circumstances such as would justify it applying section 44(4) to enlarge the period for bringing the appeal".*

7.23 The Court cited *Galway & Roscommon ETB v Kenny UDD1624*: "*the Court cannot accept that a miscalculation of the due date amounts to "exceptional circumstances". The miscalculation of the deadline date is akin to a misinterpretation of the statutory provisions. The Court is satisfied that the legal principle ignorantia juris non excusat (ignorance of the law excuses not) applies in this case and therefore the miscalculation cannot be accepted as excusing a failure to comply with the statutory time limit".*

McGarry v McGuinness [2018] IEHC 350 – High Court

The facts

7.24 The plaintiff, a part-time teacher, was suspended (and subsequently dismissed) for his refusal to teach a Junior Cert Science class. The plaintiff sought judicial review of

the decision, leave for which was refused. The alleged causes of actions arose in 1998 and 2002.

The decision

7.25 The Court emphasised the necessity for the administration of justice "*within a reasonable time*," stating the "*excuses proffered by the plaintiff were not acceptable in this age of an imperative to prosecute proceedings without undue delay*."

7.26 The Court concluded there was undoubtedly presumed and specific prejudice caused to the defendants arising from the delay, citing the decision of Hardiman J. in Gilroy v. Flynn [2005] 1 ILRM 290:
"*The courts have become ever more conscious of the unfairness and increased possibility of injustice which attach to allowing an action which depends on witness testimony to proceed a considerable time after the cause of action accrued*.'
[F]ollowing such cases as McMullen v. Ireland (ECHR 422 97/98 29th July, 2004) and the European Convention on Human Rights Act, 2003, the Courts, quite independently of the action or inaction of the parties, have an obligation to ensure that rights and liabilities, civil or criminal are determined within a reasonable time."

7.27 The Court refused to allow the plaintiff to air and substantiate his various allegations and grievances at such a late stage and ordered the proceedings to be struck out The plaintiff was found to be responsible, personally or vicariously, for inordinate and inexcusable delay in the prosecution of the proceedings and failed to satisfy the Court that it should exercise its discretion to extend time.

Globe Technical Services Limited v Kristin Miller [2018] 5 JIEC 1702 – Labour Court

The facts

7.28 The claimant employee was out of time to bring a claim of unfair dismissal (11 months after dismissal). On appeal to the Labour Court, the employee submitted that she had not been in a position to research her situation until she was established back in USA.

The decision

7.29 The Labour Court examined the law on granting of extension of time beyond the initial 6 month timeframe. As the claimant was obliged to show "reasonable cause" for delay, the Court considered the meaning of "reasonable cause" in previous cases. In *Salesforce.com v Alli Leech* (EDA1615) which drew on Labour Court decision in *Cementation Skanska* (DWT0338) it was held:
"it is for the claimant to show that there are reasons which both explain the delay and afford an excuse for the delay" The explanation must be reasonable, that is to say it must make sense, be agreeable to reason and not be irrational or absurd". Onus on

applicant to identify reason for delay. There must be a causal connection between reason cited and failure to present complaint in time.

7.30 Test drew heavily on High Court decision in *Donal and Catherine O'Donnell v Dun Laoighaire Corpn* (1991). Costello J: "*It is clear that the test must be an objective one and the court should not extend the time merely because an aggrieved plaintiff believed that he or she was justified in delaying the institution of proceedings*".

7.31 Court must be satisfied, as a matter of probability that the complaint would have been presented in time but for the intervention of factors constituting reasonable cause. While the established test imposed a relatively low threshold of reasonableness on an applicant, *"there is some limitation on the range of issues that can be taken into account".*

7.32 Held: "*it is not uncommon for parties no longer in the State to initiate and pursue complaints*". However, the fact that an appellant may be resident outside the State should not of itself justify a delay in bringing the complaint. "*Ignorance of one's legal rights, as opposed to the underlying facts giving rise to a complaint, cannot provide a justifiable excuse for failure to bring a claim in time".*

Gavin t/a Cloud 9 Creche v Dunleavy [2018] 7 JIEC 1003 – Labour Court

The facts

7.33 In 2011 the claimant employee was diagnosed with muscular dystrophy. On notifying her employer, the employee submitted that she was called to meeting with employer (2015) and informed that she was a "*liability*" and "*might fall on a child*". The employee was later dismissed.

7.34 The employee was initially successful before the Adjudication Officer in her claim for unfair dismissal. However, the crèche appealed to the Labour Court on the basis that the original claim had been out of time (i.e. submitted in July 216 more than 12 months after the date of the alleged unfair dismissal). AO held: unfair dismissal. Crèche appealed to Labour Court that complaint was out of time (July 2016 – i.e. more than 12 months after date of alleged UD).

7.35 The employee submitted that she had engaged in correspondence with the Workplace Relations Commission in January 2016. Her letter stated: *"Please find enclosed my file of correspondence between myself and my previous employer…detailed description of disability and events up to dismissal…I hope your office is in a position to assist me in the above regard".*

7.36 The WRC wrote to the employee in February 2016 to direct her to the complaint forms online and provided address details. In July 2016 the employee's solicitor wrote to the WRC stating that as far as employee was concerned she had "*done all that needed to*

be done" and had been unable to download the complaint form. The WRC responded to note it no record of having received a complaint form. The employee submitted she was pregnant at the time and suffering associated complications.

The decision

7.37 The Labour Court had regard to the provisions in respect of extension of time limits in section 41(6) of the Workplace Relations Act 2015

7.38 The Court held there was no merit in the employee's contention that she had written to the WRC in Jan 2016 enclosing documents. This did not constitute a complaint under the WRC Act 2015. The Court noted that the letter contained *"no reference to a complaint under this, or any other Act*".

7.39 It was held:
"No Act is referred to, no complaint is itemised and no legislation is identified. It contains no assertion that such a contention was previously made to the WRC in the course of nay of the previous exchanges with her. It is at best a poor attempt to overcome the failure to initiate a complaint in any of the earlier exchanges".

7.40 Held: the Court "*does not stand on ceremony in determining what constitutes a complaint under the Act. What is required is that the written complaint on which a complainant relies makes reference to both the complaint and a relevant Act. In this case neither is referenced in the letter of 16 Jan 2016 and accordingly cannot be elevated by this Court to the status of a complaint within the meaning of the Unfair Dismissals Act as amended by s 41(6) of the WR Act 2015*".

7.41 Here the employee's claim was found to be statute barred and the initial compensation award (€14,300) was set aside by the Labour Court.

Ryanair Ltd v Tony Lowe [2018] 6 JIEC 0601

The facts

7.42 Former Ryanair employee sought to appeal WRC decision to Labour Court. However, documentation lodged on his behalf was lodged outside the 42 day time limit. Court considered whether "*exceptional circumstances"* existed. Mr Lowe submitted that the problem with the documents arose as a result of an "*unusual technology issue"* in that he and his representatives did not notice the dropdown menu options in pdf documents on the website.

7.43 Details of what constitutes a valid appeal are set down in a series of Rules published in 2016 by the Court, pursuant to Section 20 of the Industrial Relations Act as amended.

The decision

7.44 The Labour Court held: the documentation lodged "*failed to identify a decision that was purported to be under appeal and failed to identify legislation under which any decision under appeal might have been made*." Documentation was "deficient in fundamental respects" and could not be accepted as a valid appeal.

7.45 The Court referred to the case of *Joyce Fitzsimons Markey v Gaelscoil Thulach na nOg* where it considered the meaning of the phrase "*exceptional circumstances*." There, it concluded that to be exceptional, *"a circumstance need not be unique or unprecedented or very rare, but it cannot be one that is regularly or routinely or normally encountered*."

7.46 The Court concluded that the technology encountered in this case did not meet the criteria set down. It is a fact, it said, "*that these appeal forms have been the basis for the submission of appeals since October 2015 [...] the legal profession have been successfully navigating the technology to access these forms in order to make appeals to the Court since that time."*

CONSTRUCTIVE DISMISSAL

7.47 There have been a number of claims of constructive dismissal before the Workplace Relations Commission this year. 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.

7.48 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.

Cedarglade Limited v Tina Hiban [2018] 7 JIEC 1302 - Labour Court

The facts

7.49 Here the claimant resigned her employment (as a sales assistant in Centra supermarket) following what she alleged to be an unfair bullying and harassment disciplinary procedure by her employer.

7.50 Briefly, the claimant worked as a sales assistant at a Centra Supermarket. When her till was €99 short at the end of her shift, she was informed that a disciplinary meeting would take place. However, before this meeting, she was called (without notice) to her manager's office to be shown CCTV footage of mistakes she had made by not scanning items at till. Her manager said he was "*disgusted and disappointed*" in claimant. The disciplinary meeting was subsequently held as scheduled despite the employee's request for the assistant manager to accompany her to the meeting (this was not facilitated as he was on his break).

7.51 The employee's position can be summarised as follows:

7.51.1 The disciplinary meeting was "rushed", lasted only 5 minutes;

7.51.2 The minutes taken do not accurately reflect what was discussed;

7.51.3 Lack of evidence of wrongdoing such that it was impossible for her to respond to the allegations;

7.51.4 The employee was subsequently informed her til as short €20 two days beforehand but no evidence was provided to her.

7.51.5 disputes contents of minutes taken; letter of 7 April with "verbal warning"; claimant appealed; panic attack; hospital; certified sick; felt demeaned and humiliated; ultimately resigned

7.52 The employee ultimately suffered a panic attack and claimed she was traumatised by the manner in which the employer had dealt with the situation.

7.53 The employer submitted that the employee had not acted reasonably in resigning as she had not "*substantially utilised the grievance procedure to attempt to remedy her complaints*" – as held by EAT in *Conway v Ulster Bank UD474/1981*. The employer claimed it sought to engage with claimant and offered her the opportunity to withdraw resignation but claimant declined.

The decision

7.54 The Labour Court held that the "*onus of proof is on the claimant to establish facts to prove that the actions of the respondent were such as to justify her terminating her employment".*

7.55 There are two sets of circumstances in which a resignation may be considered a constructive dismissal:

(a) Firstly, where an employer's conduct amounts to a repudiatory breach of the contract of employment, the employee would be "*entitled*" to resign his position. In this instance the employer must be guilty of conduct which is a "*significant breach going to the root of the contract of employment*", or which shows that the employer "*no longer intends to be bound by one or more of the essential terms of the contract*", or

(b) Secondly, there is an additional reasonableness test which may be relied upon as either an alternative to the contract test or in combination with that

test. This test asks whether the employer "*conducted his or her affairs in relation to the employee so unreasonably that the employee cannot fairly be expected to put up with it any longer and, if so, she is justified in leaving". "In normal circumstances a complainant who seeks to invoke the reasonableness test in furtherance of such a claim must also act reasonably by providing the employer with an opportunity to address whatever grievance they may have. They must alert the employer to their situation in order to allow the employer an opportunity to rectify the problem before resigning. They must demonstrate that they have pursued their grievance through the procedures laid down in the contract of employment before taking the step to resign": Conway v Ulster Bank Limited UDA474/1981.*

7.56 Whether or not this test has been satisfied in any particular case has to be considered from an objective perspective. The Court must examine whether or not an employee in the same circumstances would be justified in resigning in response. In the Supreme Court case *Berber v Dunnes Stores[2009] ELR. 61* Finnegan J. held :-

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

7.57 Every contract of employment contains an implied term that the parties will maintain mutual trust and confidence in their working relations with each other as held by the High Court in *Cronin v Eircom Ltd[2007] 18 ELR 84*. In that case Laffoy J. adopted the reasoning of the House of Lords in *Malik v Bank of Credit and Commerce International SA(in Liquidation)[1998] AC 20*.The Judge held that as a matter of legal principle every contract of employment must be deemed to contain a condition implied by law of mutual trust and confidence.

7.58 Contrary to the contents of her email to HR, the Court notes that the claimant was given only one warning, a verbal warning, she was not given a written warning. Also, the Court notes that she was never accused of theft/dishonesty but was asked to account for a till shortage of €99.00, which in the circumstances it would not be unreasonable for an employer to do.

7.59 There was no evidence to suggest that there was an undermining of the relationship of trust and confidence between the parties. On the contrary, the facts suggest that both parties were actively engaged in dealing with the only grievance being pursued by the Complainant i.e. her appeal of a verbal warning. The Court notes, in addition, that no disciplinary action was taken on foot of the €20 till shortage. The Complainant's Solicitors were in the process of gathering information/data concerning her appeal. Management were actively engaging in that process. Indeed, on the day that the Complainant tendered her resignation, her legal representatives had written to the Respondent seeking such information/data.

7.60 The Court could not accept that the reason cited by the Complainant for her resignation constituted a fundamental breach by the Respondent going to the root of her contract of employment.

7.61 The Court accepted that there can be situations in which a failure to give prior formal notice of a grievance will not be fatal see *Liz Allen v Independent Newspapers [2002] 13 ELR 84*, *Moy v Moog Ltd, [2002] 13 ELR 261* and *Monaghan v Sherry Bros [2003] 14 ELR 293*. See also the Determination of this Court in *New Era Packaging v A Worker [2001] ELR 122*. However, in this case there are a number of factors which cannot excuse the Complainant. Firstly, the Respondent did have a grievance procedure in place, the Complainant had received and signed for a copy of the procedures at the commencement of her employment and her Solicitor was supplied with a copy. Secondly, despite being legally represented, she never made a complaint under either the Respondent's grievance procedure or its Anti-Bullying Policy and she had been informed that her appeal would be dealt with on her return to work and this was accepted by her legal representatives as the normal practice. Thirdly, following her resignation, the Respondent offered her an opportunity to withdraw her resignation and allow the appeal to be pursued. While the Complainant did not pick up the registered letter from An Post, a copy of it was forwarded to her legal representatives at the time.

7.62 Ultimately the Labour Court held that "*the Complainant's failure to make any complaint in relation to her treatment, prior to her resignation, is fatal to her claim of constructive dismissal*".

A Technical Support Agent v A Contact Centre Company – ADJ-00008084 – Adjudication Officer

The facts

7.63 A tech support agent worked at contact centre between 2014 to 2017 before resigning as a result of her work environment. She had made litany of complaints of sexual harassment on the part of her former supervisor and alleged subsequent mistreatment following such complaints.

The decision:

7.64 The AO awarded €45,000 compensation to the tech support agent (€35,000 for distress suffered and effects of discrimination, harassment and discriminatory constructive dismissal and €10,000 for victimisation

7.65 Held: complainant had been subjected to "a *particularly offensive and humiliating work environment for a number of months and this behaviour was perpetrated by her Team Leader who was her immediate line manager".*

7.66 AO found it "*totally inexplicable*" that the company "*failed to put even the most basic measures in place in order to separate the complainant and Mr A in the workplace following the conclusion of the investigation especially in light of the serious nature of the harassment and sexual harassment which had been found to have already occurred"*

7.67 The employee's absence (8 days) which was linked to the harassment was met with a letter from the employer stating her "*absence has a negative impact on your colleagues and the performance of the business and this is not acceptable…a significant and sustained improvement is immediately required*". Held: *"totally unwarranted and unjustified".*

7.68 Found that although an investigation into the complainant's 9 allegations of verbal and physical sexual harassment was undertaken, it exhibited a *"number of critical shortcomings and fundamental failings*":

(a) Inordinate length of time (2 months) for investigator to conduct investigation and issue outcome;

(b) Complainant not allowed to comment on the assertions and responses made by the harasser in response to the allegations;

(c) Investigator failed to investigate 2 further allegations of harassment that came to light during investigation;

(d) Investigator concluded in report that she was unable to substantiate a number of the complaints as there were no other witnesses present. AO felt it was "*unreasonable that Ms B could not have come to a decision as to whether or not these matters occurred on the balance of probabilities*";

(e) Gravity and seriousness of allegations and impact that this treatment had on complainant was not accurately reflected in the report;

(f) Despite upholding 5 allegations of harassment/sexual harassment, investigator failed to recommend disciplinary action; and

(g) Investigator failed to make any recommendations as to how the matter could be remedied.

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END