

KEEPING IN TOUCH – SPRING 2013

Welcome to the Spring 2013 edition of keeping in touch. Our Newsletter is now being produced in PDF format for ease of access, rather than having to request one by email. We hope this new service is of interest to our readers.

Danske Bank/Irish Law Awards 2013

The firm of Richard Grogan & Associates is delighted and honoured to announce that the firm was shortlisted in March 2013 as a Finalist in the Employment Law Firm of the Year category of the Irish Law Awards which are sponsored Danske Bank.

This firm is delighted and honoured that the judging panel would have considered this firm as a Finalist in this category. As a small boutique law firm specialising in Employment Law, Personal Injury, Taxation and Probate, it is a singular honour for this firm to even have been shortlisted. The quality of the Finalists includes some of the larger law firms in this country and this firm is honoured to be associated with such a prestigious award.

Change to State Pension Age

From 1 January 2014, the State Pension will not be paid until a person reaches the age of 66 years. The age will move up to 67 years in 2021 and to age 68 in 2028.

These developments are likely to have a significant consequence for employers, employees and Pension Scheme Trustees.

Mandatory Retirement Ages

Because of the changes in the State Pension rules mandatory retirement ages for employees may cause difficulties.

Under the Employment Equality Acts 1998 to 2011 (“EEAs”) the setting of a mandatory retirement age does not constitute discrimination.

There is no fixed mandatory retirement age in Irish law. Employers should therefore consider having a mandatory retirement age in their Contract of Employment.

Saying this, employers need to be aware that a mandatory retirement age may still be the subject of legal challenges by employees. Challenges have been made to the Equality Tribunal, in recent

time, that having a mandatory retirement age to force an employee to retire may constitute discrimination.

With the State Pension retirement age increasing from 1 January 2014 to 66 years it is anticipated that mandatory retirement ages will be subject to increased challenges. If such a challenge is made an employer will have to justify the existence of a mandatory retirement age on the basis of it being reasonable and there are objective reasons for same namely that there is a legitimate aim. The requirement for objectivity and to justify a legitimate aim is not set out in the EEAs. Saying this, decisions of the European Court of Justice have always prompted the Equality Tribunal to interpret the EEAs in line with the European Court of Justice decisions.

What is a legitimate aim will depend on the particular business. It could be an employment policy in the employer company, a labour market requirement, a health & safety issue or some other legitimate reason. Saying this, employers will need to make sure that they apply any rules in relation to mandatory retirement age in a consistent way, which is not in itself discriminatory, to avoid exposure to claims by employees.

In the case of Unfair Dismissals Acts 1977 to 2011, there is nothing in the legislation which sets out what a normal retirement age is.

The Employment Appeals Tribunal have held that the normal retirement age is a definitive or particular age in the employment it is not simply the retiring age that may be set out in a Contract of Employment. If for example a higher retirement age is applied in practice by an employer then despite what may be in the Contract the higher retirement age will apply.

The Requirement for Legislation

It would be useful in this area if legislation was introduced to clarify the obligations on employers relating to employers having a mandatory retirement age and the rules for justifying same.

Reviewing Policies

Employers in light of the change in the State Pension age may wish to consider looking at their Contracts of Employment as regards a retirement age. If a retirement age, in the Contract of Employment is 65 then after the 1 January 2014 an employee can be left in a situation of having to wait for 1 year to get the State Pension Scheme.

Costs to Employers

There could also be costs to employers depending on the wording of any Employment Pension Scheme. This would be particularly so in the case of Defined Benefit Schemes. Many such Schemes will provide that a pension will be paid as a percentage of final salary divided by a notional number of years multiplied by the number of years that the employee was in employment. Such Schemes usually provide that the payment will be less the State Pension Scheme payment. Where the State Pension Scheme may not be payable then in those circumstances there could be a substantial increased cost for the employer going forward.

New Parental Leave Entitlements

The Parental Leave Regulations, which came into effect on 8 March 2013 extend Parental Leave from 14 weeks to 18 weeks. The Regulations also provide that parents returning to work after Parental Leave may request a change in their working hours and/or working patterns.

Employers are required to consider such a request but they are not required to grant it.

It must be remembered that employers are required to consider part-time work requests from all employees in accordance with the Labour Relations Commission Code of Practice on Access to Part -Time Working.

Employers should be careful to make sure that they comply with the Code of Practice and Grievance and Disciplinary Procedures and apply fair procedures at all times.

Employers also need to be aware that applying the rules differently to different categories of workers can result in discrimination claims under the Employment Equality legislation.

Change in Social Welfare Entitlements to Job Seekers Benefit and Job Seekers Allowance

S.I. No. 61/2003 provides that from 20 February 2013 last, Sunday work will be taken into account to determine a person's entitlement to Job Seekers Benefit and Job Seekers Allowance. Prior to 20 February 2013 Sunday work was not taken into account.

In practice this means that before 20 February 2013, an employee who worked, for example, Sunday, Monday, and Tuesday would have been entitled to get three days Benefit/Allowance. Since 20 February 2013 the employee will only be entitled to two days Benefit/Allowance.

New Social Welfare Rules for Night Workers

Social Welfare Regulations S.I. No. 142 of 2007 by amending Article 45.

The effect of this new Statutory Instrument is that where a person works at night time and that night time covers a two day period of time, then only one day will be taken into account for Job Seekers Benefit.

For example if an employee commences work on a Monday at 6.00 p.m. and finishes on Tuesday at 3.00 a.m. then only Monday will be taken into account as a day worked. If the employee started work at 9.00 p.m. on Monday and finished at 6.00 a.m. on Tuesday then only Tuesday will be taken into account for Job Seekers Benefit purposes.

These new Regulations only apply in effect to employees who are working part-time.

Employees being Referred for a Medical Assessment

The issue of an employee being referred for a medical assessment often arises where there has been an accident in the workplace, the employee has been out for an extended period of sick leave, the employee has a pattern of sick leave or a complaint has been made, for example, bullying and harassment with the employee claiming that they have suffered a psychiatric illness such as being unable to sleep as a result of the trauma.

The High Court Case of Delaney –v- Central Bank of Ireland is a timely reminder of the principles to be applied when referring an employee for medical examination. It is important that fair procedures are applied at all times.

1. It is important to make sure that all Contracts of Employment/Handbooks provide that the employer may require an employee to attend a medical practitioner nominated by the employer.
2. Where an employee is being referred for a medical/psychiatric assessment it is imperative that only information that is strictly relevant is provided to the Doctor or the Psychiatrist conducting the assessment.
3. Any information provided to Doctor or a Psychiatrist must also be given to the employee in advance of any referral. This issue is often overlooked.
4. If the employer sends any documentation to the Doctor or the Psychiatrist after the assessment, again a copy must be given to the employee. In addition, the employee must be allowed comment on its contents.
5. The employee should be allowed an opportunity to reply to the issues raised in any medical report, and careful consideration needs to be given as to whom an employee should be referred to. An appropriate medical specialist should be considered for each referral. A GP may be an appropriate medical specialist in the case of an employee with a

history of short illness of a day or two at a time particularly if they are around the time of a weekend but may not be an appropriate medical specialist to deal with for example a psychiatric issue.

Part-Time Workers – Holidays and Public Holidays

A common problem which we receive from clients is how to work out the annual leave entitlements (holiday entitlements) and Public holiday entitlements for employees who are part-time workers.

The holiday entitlement for part-time workers depends on the number of hours that they work. There are two methods used to calculate their entitlements. These are

- (a) Where the employee works at least 170 hours in certain months throughout a year then they are entitled to one third of a working week per calendar month, or
- (b) Employees who work on a part-time basis and work less than 170 hours per month will receive 8% of the hours they work in a leave year.

Example

Mary works from 9.00 a.m. to 1.00 p.m. five days a week. This is 4 hours a day for 5 days being 20 hours per week.

20 hours per week multiplied 52 weeks = 1,040 hours in the year
1,040 hours x 8% = 83.2 holiday entitlements

The entitlement to annual leave is 20 days being 4 weeks per annum. In this case the entitlement would be a full 20 days.

If Mary only worked 3 hours a day her entitlement would be for 3 weeks paid leave.

Public Holidays

All full time staff have an entitlement to Public holiday benefits. Where an employee is a part-time worker then the employee must work for at least 40 hours in the 5 weeks ending on the working day before the Public holiday. Where this happens the employee is entitled to one fifth of the benefit based on their normal working week. In the example of Mary above, as she works Monday to Friday from 9.00 a.m. to 1.00 p.m. being 4 hours per day or 20 hours per week she will be entitled to 4 hours pay on the Public holiday.

How to calculate Public Holiday Entitlements

To qualify for a Public holiday entitlement the employee who is not a full time worker, that is a part-time employee, must have worked for the employer for at least 40 hours in the 5 weeks ending on the working day before the Public holiday.

For each Public holiday the employee is entitled to either

- (a) A paid day off on the holiday, or
- (b) A paid day off within the month following the Public holiday, or
- (c) An extra day's annual leave, or
- (d) An extra day's pay

An employer is entitled to set out whether an employee will work on a Public holiday in which case the employer determines which of the benefits at (b), (c) or (d) apply. If the employer decides that the employee will have a day off and will not work that day then the employee receives their normal day's pay for that day.

It should be remembered that where an employment ceases in the week before the Public holiday is due to fall and the employee has worked for the employer during the four weeks before that week, then the employee is entitled to receive payment for that Public holiday equivalent to his/her normal daily rate of pay.

Calculating part-time workers entitlements can be complex and appropriate advice should always be obtained.