Keeping In Touch – Spring 2014

The Quarterly Newsletter of Richard Grogan & Associates Solicitors

Introduction

Welcome to the Spring 2014 issue of "Keeping In Touch".

As part of our policy of providing a quality specialist service to our clients we have developed a number of Guides to Accidents and Employment Law issues on our website. These can be viewed in the Publications and the About Us section of our website. As a small boutique specialist firm we are committed to providing a quality service to our clients. Over the coming months additional Guides will be placed on our website www.grogansolcitors.ie.

The first 2 months of 2014 have been a busy time. We have seen some unusual trends in the last few months. The number of National Minimum Wage Act claims has increased to a significant level. Many of these claims are coming through because of what we term "bargain basement" tax evasion schemes being put in place. These invariably involve employers either not putting through the full wages of the employee through the tax system or alternatively providing that part of the payment of wages are described as expenses. These schemes are not only unfair to employees as they affect Social Welfare and redundancy entitlements. They also cost the State a significant sum, particularly in lost employer's PRSI. In a publication such as this it is not appropriate to set out how these schemes operate but effectively they are "managed" and we use the word "managed" on purpose, to structure matters so that the rate of pay of the employee is below a figure which the higher employers PRSI is payable on. This is a significant cost to the State and every taxpayer. Not only is it unfair to employees it is also unfair to compliant employers. Tax and Social Security compliant employers are being put at a disadvantage because of the actions of a minority of employers. There are approximately four schemes which we regularly come across. These schemes are operates throughout Ireland. Because some of the schemes are quite complex we are of the opinion that professional advice from persons with tax experience are being used to put in place these schemes. Similar schemes are replicated by different employers in different parts of the country and we do not believe that a lot of these employers have thought up these schemes on their own.

We are seeing particular difficulties arising in relation to cases involving haulage companies. The Government in 2012 introduced Statutory Instrument 36 of 2012. The difficulty with the Statutory Instrument is that it was not properly implemented. There are clear deficiencies in the implementation in that two rights introduced in the Statutory Instrument have no complaint procedure. We believe that a number of significant claims will proceed to the Labour Court for a determination on this issue this year.

The firm has been involved in a number of claims to the High Court under the Payment of Wages Act. These were Point of Law appeals. We won 5 and lost 1. The one that we lost was where there was a clause providing for lay-off. It is important for employers when drafting contracts that provision is made for lay-off and that the lay-off will not be paid. The cases which we have won, relating to the non-payment of wages during lay-off, in the High Court, are all ones where there is no lay-off clause in the contract.

We currently have three appeals to the High Court on a Point of Law relating to the Terms of Employment (Information) Act. These are all appeals from the Employment Appeals Tribunal. The appeals which we have relate to issues concerning noncompliance with the legislation. Unfortunately the legislation has been amended many times and it is sometimes difficult even to know what the law on the issue is because of the number of amendments. We have set out a detailed Technical Guide on the Terms of Employment (Information) Act on our website. We anticipate that some of these cases are going to deal with the European Directive which was implemented by the Terms of Employment (Information) Act. We will be interested to see the outcome of some of these cases.

We have a number of cases in the pipeline relating to the issue of the calculation of holiday pay and public holiday pay. At the present time the Labour Court operates on the basis that overtime should not be taken into account in calculating holiday and public holiday pay.

It is our belief that overtime, where there is a requirement to do it in the contract, is a term and condition of the employee's employment and therefore should be taken into account in the calculation of holiday pay. A number of cases on this point are due for hearing before the Rights Commissioner shortly and we anticipate that a number of these will go to the Labour Court for a final determination.

We are still seeing a significant number of claims for breach of the Organisation of Working Time Act as regards maximum hours of work. This trend has not ceased despite the fact of us having being in recession for a number of years. If anything we are seeing an increase in these claims. In the current economic environment, with a significant number of individuals being unemployed, there is no reason why any individual should be working in excess of 48 hours per week averaged over a four month period of time.

For employers who have "busy periods" it is possible to draft contracts in such a way that the averaging period will be extended. In addition we are surprised that a number of employers do not, for management purposes, specify the averaging period. Employers are entitled in contracts of employment to set out averaging periods. The easiest of these is that they would be three averaging periods in a year being the period January to April inclusive, May to August inclusive and September to December inclusive. If however an employer has a particularly busy period followed by a quiet period for example the Christmas and January Sales followed by a less hectic period in for example February and March there is no reason why an employer cannot specify that the averaging would commence from 1st December to 31st March. Then from 1st April to 31st July and then from 1st August to 30th November. The legislation allows this and we are surprised that more employers do not utilise these procedures.

In the following Sections we have included information which we hope will be of interest to our readers. We have attempted as far as practicable to provide relevant and unbiased advice and information on developments in the law. We will be producing three further editions of our Newsletter over the coming year.

Please feel free to sign up for our Newsletter. In signing up for our Newsletter we confirm that we will not use your information for any other purpose other than to send you the Newsletter. You will not receive emails from us. You will not receive marketing material from us. You will not receive information on new publications or developments from us. In signing up for the Newsletter all you will receive is our Newsletter and we confirm and undertake that your contact details, which you provide to us for such purpose, will not be used for any other purpose whatsoever. Alternatively, you can simply download the Newsletter from time to time.

Finally we would encourage you to visit us on facebook or to see our LinkedIn page and updates from Richard Grogan.

Unfair Dismissal and Redundancy – Overlap

Case UD1114/2012 being a Decision where Mr. MacCarthy SC along with Mr. Noone and Mr. Butler have given a very interesting Decision as to how the provisions of Section 6 (1) and Section 6 (6) of the Unfair Dismissal Acts apply.

In this case the Tribunal held that the dismissal was unfair. The company, against whom the claim was brought, went into liquidation shortly after the Unfair Dismissal. The employee's financial loss was therefore 6 months' pay, However, in addition, the Tribunal properly held that the redundancy payment to which she would have been entitled was also payable.

The Tribunal awarded the employee the 6 months financial loss which amounted to €16,800 together with her statutory redundancy entitlement of €8,600. In respect of the Statutory Redundancy entitlement the Tribunal properly applied the income cap of €600 per week the same. The total financial loss was therefore €24,600. An award of this amount was made under the Unfair Dismissal Acts.

The Tribunal also properly pointed out that in respect of the loss of income for the 6 month period which was calculated at the rate of €646 as the employee would be applying to the Social Fund that that part of the award would be subject to the cap of €600 per week also which would reduce the amount payable to her by €1200.

It is sometimes missed that where an employee is dismissed and the company, dismissing the employee, subsequently goes into liquidation, that in those circumstances the employee may well be able to claim both the redundancy and the unfair dismissal at the same time with both awards going under the Unfair Dismissal legislation.

However, from a tax perspective the full award is taxable as the exemption for the redundancy element is not excluded. This is an anomaly in the tax laws.

Organisation of Working Time Act

In the case of Nurendale Limited trading as Panda Waste and Andrei Suvac represented by this office being a Decision by the Labour Court under Determination Number DWT1419, which issued on 19th February 2014, the case is interesting for the review of the law relating to the exemption under Section 5 of the Act. Section 5 of the Act provides that an employer is not obliged to comply with Section 11 (11 hour break between finishing and starting work), Section 12 (being the daily rest intervals at work), Section 13 (being Sunday work) Section 16 (night-time work limited to 40 hours per week averaged over a two month period) or Section 17 (relating to notification of overtime 24 hours in advance) where due to exceptional circumstances of an emergency (including an accident or the imminent risk of an accident it would not be practicable for the employer to comply with the sections of any of them.

The Court pointed out that it is noteworthy that the Section does not relieve the employer from complying with Section 15 (the 48 hour rule on averaging over a 4 month period of time) or Section 20 (Time and pay for holidays). The Court overviewed the European Legislation in this matter including the Directive which implemented the Working Time Legislation in Ireland and held that the exemption is intended to apply to circumstances in which it is not practicable to comply with the Act in order to undertake work in the immediate aftermath of an accident or where there is an imminent risk of an accident. The Court held that this suggests a close “temporal nexus” between the accident and the work in question.

The Court held that the exemption must be construed narrowly.

In assessing the level of compensation the Court properly pointed out that there was no evidence to indicate that the employee in question took any action during the currency of his employment to assert his rights under the Act and that he did so only after the employment finished. While it is not stated in the Decision it is, probably inherent, in that Decision that where an employee has raised objections or has issued grievances concerning working conditions which relate to rights under the Organisation of Working Time Act, which are not addressed that this would have a bearing on the level of compensation that can be awarded against an employer.

It is possible that there is, in assessing compensation for identical breaches, that there are possibly three matters which the Court in future may take into account being;

1. Where the employee has raised complaints which relate to rights under the Organisation or Working Time Act during the period of employment which had not been addressed.

2. Where the employee has raised no grievances for issues during the course of the employment and only brings a claim after the employment ceases; and

3. Where the employee did not know or their rights or there was a misstatement of their rights.

The Decision of the Labour Court in Nurendale Limited trading as Panda Waste is a significant Decision which anybody, involved in employment law who may be considering raising the defence under Section 5 of the Act will need to read. It is a seminal Decision on this issue.

As is usual the Labour Court went to great lengths to set out the law. Such an approach is extremely useful for practitioners and employers.

What is an Establishment for Collective Redundancies

This issue often arises in the case of multi – site redundancies.

The UK Court of Appeal has referred a case to the European Court of Justice arising from a ruling in the Woolworths case as to what constitutes an “establishment” for collective consultation purposes.

When Woolworths went out of business some 25,000 employees supported by their Union brought claims for protective awards arguing that the administrator has failed to comply with the information and consultation duties.

A UK Tribunal found that the "establishment" was each individual shop. The UK EAT upheld an appeal against this Decision ruling that the "establishment" was the whole business.

The case then went to the UK Court of appeal who decided to send the issue to the European Court of Justice.

While these cases do not come on quickly it would appear advisable that where an employer is considering redundancies that they look at the business as a whole rather than individual units to determine whether the consultation is required.

Constructive Dismissal

Two very important Unfair Dismissal claims issued being UD-415-2012 and UD-1648-2011.

Both cases dealt with the claim that the employee was constructively dismissed. Constructive dismissal is defined in the Unfair Dismissal Act 1977, as amended, as; "Dismissal in relation to an employee means the termination by the employee of his contract of employment with the employer, whether prior notice of the termination was or was not given to the employer, in circumstances in which, because of the conduct of the employer the employee was or would have been or it was or would have been reasonable for the employee to terminate the contract of employment without giving prior notice of the termination to the employee".

The EAT held that an employee is entitled to terminate the contract only where the employer is guilty of conduct which amounts to a significant breach going to the root of the contract or shows that the employer no longer intends to be bound by one or more of the essential terms of the contract.

In the case of Brady-v- Newman UD330/1979 the EAT stated:

…an employer is entitled to expect his employee to behave in a manner which will preserve his employment reasonable trust and confidence in him so also must the employer behave".

In case UD-415/2012 the Tribunal considered the English case of Western Excavating (ECC) LTD- Sharpe (1978) ICR121 which stated;

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract then the employee is entitled to treat himself as discharged from any further performance."

The EAT held that circumstances which render it reasonable for the employee to terminate the contract of employment may constitute constructive dismissal and may also justify resignation.

The EAT held that if the changing nature of the tasks required of an employee for which the employee was employed that this may constitute a repudiation of the contract of employment and that therefore a repudiation would occur and a resignation may be considered an Unfair Dismissal by virtue of constructive dismissal facts.

The EAT held that if the employee has an honest belief that the work environment produced intolerable conditions the employee is entitled to resign and such resignation may be viewed by the Tribunal as a "forced resignation" constituting a "constructive dismissal". The EAT quote the case of Weatherall (Bond Street.W1) –v- Lynn where Bristow J stated;

It is the conduct of the employer which you must look at.

In this case the Tribunal identified that they were dissatisfied with;

1. The absence of minutes of various meetings

2. The lack of an original signed statement of other employees interviewed

3. That failure to furnish a letter to the claimant that a formal approach to the investigation would take place

4. Notification to the claimant of meetings by text

5. The lack of notes at the appraisal meetings

6. The fact that the investigation report was sent to the employee with a compliment slip. They noted that a letter should have set out the options available.

In this case the employee was awarded €14,000.

The facts of this case revolved around issues of bullying and harassment. The employee in question following the birth of her baby returned to work. She was transferred to another site. The employee became aware she would not get promotion. The employer was monitoring her hours and checking her work including advising her that he was checking cameras. There were threats to be moved off site. The employee was afraid to lose her job.

The case is important in that it highlights the importance of individuals and particularly employers complying with procedures making sure that those procedures are properly communicated to employees.

Constructive dismissal cases are notoriously difficult to win but they can be won.

European Communities (Protection of Employment) Regulations 2000 and Protection of Employment Act 1977.

In the case of Brian Tangney & Others and Dell products, Limerick, the High Court 2013 IEHC 622 which can be found on www.courts.ie is an important Decision relating to the issue of collective redundancies.

The Protection of Employment Act 1977 as amended and in particular part 2 thereof in Section 9 provides that there is an obligation on an employer to consult with employee representatives. An employer who proposes to create collective redundancies initiate consultations with the employee representatives and those consultations shall be initiated at the earliest opportunity and any event at least 30 days before the notice of dismissal.

The question in the High Court was whether the consultation process required in the Act had been properly commenced. The Rights Commissioner concluded that the specific terms of letters sent to the employees made it impossible for the employer to comply with Section 9. The Employment Appeals Tribunal gave a different view.

The case is interesting in that there is a very detailed overview of the European Legislation and the European case law on this complex area.

The case revolved around effectively the trigger point for the employers' obligation of prior consultation in the case of collective redundancies. The effect of the decision appears to be that when an employer makes a strategic or commercial decision concerning redundancies then where the Act applies the employer must embark on a consultation once that decision has been taken.

The case is interesting in that the Court did look at the factual situation that occurred after the date that the letters were sent to the employees and that matters changed between the original date that the employees were written to and the end of the consultation period. The case is interesting in that it would appear that if an employer, who was involved in collective redundancies, wrote to employees setting out certain facts and those facts never varied or changed during the consultation process it may well be arguable that the employees can contend that the consultation commenced too late. The difficulty with the legislation is that the legislation requires the consultation to commence when effectively a strategic decision is made.

Employers who are involved in collective redundancies do need to carefully consider whether they are commencing the consultation process at the earliest date when a strategic decision has been made. If they do not then they run the risk that they will be held not to have complied with Section 9 of the Act and this can have very serious financial consequences for employers.

National Minimum Wage Claims

Since our last update we have been involved in a number of National Minimum Wage Act claims.

In one case before a Rights Commissioner the employee sought compensation on the basis that her payslips were being manipulated to show €8.65 per hour when in fact she was paid €7 per hour. The employee was employed in a cleaning company which provided state contracts.
The employee was claiming that she lost €1.65 per hour.

On reviewing the documentation, and in addition after the case commenced, the respondent was fined in the District Court for underpaying 13 of the employee's colleagues.

The employer admitted in the District Court to manipulating the payslips to show €8.65 per hour when in fact the rate was €7 per hour.

The Rights Commissioner therefore held that the underpayment of wages to this employee for a period from 7th February 2011 to 2nd December 2012 amounted to €5791.50 for the 90 week period of time.

In addition the Rights Commissioner exercised his entitlement to award a sum of €1,500 as costs to the employee being reasonable costs and expenses which is allowed under the legislation.

The interesting part of the case also is that because of the underpayment of the wages the employee was not paid her proper holiday pay or public holiday pay. As a result of which the financial loss amounted to €1,653 but in respect of which the employee was awarded €2,500 in total with the difference between €1,653 being compensation for breach of her entitlements.

Where an employer fails to pay an employee their correct rate of pay under the National Minimum Wage Act is also opens up the employer to claims, from the employee, under the Organisation of Working Time Act.

KEEPING IN TOUCH

THE NEWSLETTER OF RICHARD GROGAN & ASSOCIATES SOLICITORS

Payment During Lay-Off

The issue of Payment during lay-off has been a constant matter which this office has been involved in in the last twelve months.

In all but one case to date where we have lost in the Employment Appeals Tribunal we have won on Points of Law to the High Court.

In one recent case which was brought to the High Court being a case of Domantas Petkevicius –v- Goode Concrete Limited (In Receivership) responded that the Employment Appeals Tribunal Notice Party being a judgement of the President of the High Court delivered on 31st January 2014, the employee in this case was unsuccessful in the appeal on the Point of Law.

This case was different than other cases which were brought.

In this case the contract for the employee had a lay-off clause. In this case the employee received a lay-off letter on 19th April 2009. He was further laid off on 4th September 2009.

On 16th December 2009 the employee was notified that he would be made redundant.

The employee in this case originally lost in the Employment Appeals Tribunal and by way of Judicial Review went to the High Court. In the subsequent appeal the President of the High Court pointed out that Mr. Justice Hogan had held that the Employment Appeals Tribunal had failed to engage with the legal submissions in respect of the Redundancy Payments Act and to hear evidence in relation to these matters. The Court held that no one could not discern from the words of the Tribunal, the essential rationale of its conclusions. This is required by the Supreme Court Decision in Meadows –v- Minister for Justice [2010] 2IR 701 and that the Tribunal was held not to have adequately set out the issues of the custom and practice of payment and non-payment during lay off and whether this was in compliance with the Redundancy Payments Acts and that no essential rationale was set out within the remit of the requirements of O' Donoghue –v- An Board Pleanala [1991] I.L.R.M. 750.

The President of the High Court set out the relevant law being Section 5 of the Payment of Wages Act in full. The President also set out the provisions of Section 11 of the Redundancy Payments Acts. The President of the High Court held;

"Under Section 11 (1) of the Act 1967 (Redundancy Payments Acts) the employer must give notice and must reasonably believe that lay-off is not permanent."

The President went on to say;

"It is well established law that lay-off without pay may occur where it can be established that there is a custom and practice of the trade."

The President of the High Court went onto say;

"This custom must be reasonable, certain and notorious".

The President noted that the case law referenced by Counsel in the case for the employee highlights the need for a custom which allows for lay-off without pay has generally been considered where there is no contract and where the contract is silent on the issue of lay-off. This case highlights a number of issues.

1. The judgement refers to section 11 of the Redundancy payment Acts which does allow for lay-off but importantly the employer must notify the employee at the time that it is a lay-off and that it is intended to be a temporary lay-off.
   In this case the employee was laid-off for approximately somewhat less than 3 months. The Decision did not cover the issue as to how long a lay-off can occur even with a clause allowing for lay-off without pay.

2. For employers laying employees off even where there is a lay-off clause it does appear that the employer would still have to comply with Section 11 to notify the employees that it is a temporary lay-off. It would also appear that there will have to be a custom and practice to lay-off without pay and that the employer reasonably believed that the lay-off would be short term.

3. It is advisable for employers drafting contracts of Employment to provide a lay-off clause without pay.

We anticipate further cases going to the High Court on this issue particularly where there is lengthy lay-off and the employer has not made the employees redundant and where the employer has not given notification to the employee that the employer intended for it to be temporary. This is an area which we see developing law occurring in and we will have to see how matters develop.

Copies of the Decision are available on www.courts.ie

The Importance of Properly Drafted Documents when making an offer to employees

In Browne –v- Iarnrod Eireann Irish Rail [2013] IEHC62 Mr Justice Hogan in the High Court had to consider whether there was a binding contract between parties where an offer of voluntary redundancy was made.

The employee claimed that he had accepted an offer of voluntary redundancy made by the company in 2006. The employee claimed that the offer was binding.

The facts

In early June 2006 the company sent a notice which was headed Voluntary Severance Estimate

It went on to state;

"Please note… these figures are an estimate only and are subject to final verification. The provision of these figures is not a guarantee or promise that the company will, in fact, grant voluntary severance." The employee was happy to proceed. The next document which the employee received was headed "Voluntary Severance Offer". This document was similar to the earlier document. In one critical point the document was now described as an "offer" rather than an "estimate". In addition the reference to the fact that no guarantee could be given was now deleted. The employee then signed the document accepting the terms which read;

"I wish to confirm acceptance of early retirement from Inroad Eireann with effect from 29th September 2006 under the terms of the Voluntary Severance outlined above.

I understand and accept that my ex gratia payment is inclusive of both my entitlements under the Minimum Notice and Terms of Employment Act 1973 and all payments in lieu of annual leave due to me which will now be taken prior to my retirement".

This document was signed by the employee on 11th September 2006. It was witnessed and was sent to the company. Mr Justice Hogan outlined the evidence of the employer and the employee.

Was there a binding contract between the parties

Counsel for the employee relied on a Decision of the South African Labour Court Wiltshere –v- University of the North [2005] ZALC94. This case had some similarities with the present one. In that case Gusg AJ accepted the evidence given by the Plaintiff to the effect that they had accepted the offer made by the university, they have communicated their acceptance in accordance with the requirements of the university and that "therefore a valid agreement was entered into". In that case Gush AJ wet onto hold that the university was bound by the acceptance and that nothing further was required on the part of the staff.

Mr Justice Hogan in his judgement stated that in these principles applied in this country also. Mr. Justice Hogan held that it would be hard to describe it as anything other than the acceptance of an offer made by the company and at that point became binding.

Mr. Justice Hogan referred to a number of cases. He also referred to the case of Kelly –v- Cruise Catering Limited High Court 5 July 1994 where Blaney J held that an offer had been accepted once an employee posted a contract of employment which had been sent to him by a Norwegian company based in Oslo and that had posted the signed contract in Dublin.

In this case Mr. Justice Hogan concluded that there was in fact an offer made by the employer which having been accepted by the employee.

What is the importance of this case

The real importance of this case is that it has significant impact for both employers and employees. Where an employer makes an open offer to an employee the employer will be bound by that offer. Equally where an employee signs up to an open offer from an employer the employee will be bound.

For employers the most important aspect of this case is that if voluntary severance schemes are not being put forward particularly if they are subject to further approval it would be important to specify in the following terms;

"The provisions of these figures is not an offer. The provision of these figures is not a guarantee or promise that the company will, in fact, grant the voluntary severance."

While it is not dealt with in this Judgement it is a standard legal principle that a document will be construed against the party who drafts the document. If an employer drafts a document and sends it to employees then the employer will be bound by same.

This case highlights the importance of employers when dealing with severance packages to make sure that appropriate legal advice is obtained before any letters of correspondence or communications are sent to employees. This is a very important decision for both employers and employee representatives.

Injunctions in Employment Cases and Breach of Trust

In a recent High Court case of Hartnett –v- Advanced Hire Company Limited trading as Advance Pitstop [2013] IEH615 which was published on 19th December 2013, on the Courts website www.courts.ie, Mr. Justice Ryan in the High Court was considering an application for an injunction to set aside a purported dismissal or at least for the purposes of the employee receiving his salary in accordance with the principle in Fennelly-v- Assicurazioni Generali [1985] 3 ILTR 73.

The case is interesting in two respects for employers and employees.

At the start we can say that the injunction was not obtained on the basis of the balance of convenience.

The Court held that it is inappropriate to give an injunction where the relationship between the parties has broken down with loss of trust. The Court determined that there was no uncertainty that the balance of trust had been removed and therefore the employee was not entitled to the injunction on the balance of convenience test.

What is however interesting in the case is that the Court determined that the company fell into errors of procedures. The Court decided that they were entitled to suspend the employee and engage an investigation. The Court held that the company should have arranged for the employee to have an opportunity in some satisfactory mode to cross examine the witness as the evidence of the witness was crucial. It was in fact the only evidence as to the alleged misconduct which the employee was being put through the disciplinary procedure for. The other witnesses had little or no relevance to the central issue. The Court held that however understandable it may be that the companies investigation went wrong the fact as found by the Court was that they did go wrong and seriously wrong. The Court held that they made a decision which was unfair to the employee. The Court held that it was in breach of fair procedures laid down by the constitution.

The Court also stated that they thought it was manifestly unfair and unreasonable way for an enquiry to arrive at a conclusion. The Court pointed out that there was a breach of the employees' constitutional right which must be implied in his contract if it is not already there.

Effectively that there would be fair procedures. The Court held that the employee had therefore proved the first leg of a claim for an injunction. While the employee did not ultimately get the injunction the decision is important particularly for Unfair Dismissal claims. If an employer is going to rely on evidence from a particular individual then the employee must be given an opportunity to examine that witness and cross examine them.

In many cases employers have a great difficulty in allowing the cross examination of a witness. If that witness is the sole witness on whose statement a decision to dismiss is going to be made or where the facts set out by this witness cannot be independently proved from records and accounts then the employee, it would appear, following this case, certainly has a right to cross examine.

It can be a fatal flaw for an employer if they fail to allow an employee to do so.

If you read Decisions from the Employment Appeals Tribunal, it becomes evident, very quickly, that a significant volume of Unfair Dismissal cases are won by employees not because the dismissal was unfair on the facts but because fair procedures were not applied.

If an employee is to be dismissed employers do need to consider getting appropriate legally qualified advice from a practicing Solicitor who specialises in employment law as to how to apply the procedures correctly.

It may appear, at first sight, costly to get a professional but it can be a lot more costly if you get an amateur.

Risks Associated With Workplace Romance

With Managers and professionals spending so much time at work it is no surprise that employees often find love in the workplace. It is a matter of fact that many employees find partners through work.

Employers have several options when it comes to addressing office romance. These range from ignoring the issue to attempting to impose an absolute prohibition.

Imposing an absolute prohibition, while it may work in the US, does not work in Ireland.

Thoughtful evaluation of the best approach for a particular workplace and proper implementation of a suitable policy can help employers avoid legal consequences.

It is important to understand the issues associated with office romances. It is necessary for employers to assess the following possible risks;

• Sexual Harassment claims
• Sexual favouritism by participants
• Sexual favouritism by third partied
• Third –party retaliation
• Workplace violence

Employers also run a risk where one individual has a management or supervisory role of another. This is particularly important where there can be financial issues involved.

Workplace complaints also arise relating to issues particularly of favouritism where a Supervisor or Manager is in a relationship with an individual whom they supervise or manage. These complaints tend to come from co-workers who feel that there may be favouritism or special treatment for that person. Where relationships breakdown again there can be practicable difficulties in the workplace particularly if individuals are working closely together or one has a management role in respect of the other person. Employers can limit the likelihood or legal action by;

• Understanding best practices to avoid sexual harassment claims
• Providing regular sexual harassment training to employees as to how to prevent same.

There are two difficult issues in the workplace where there is a romance. The first is while it is in place the second is when the romance breaks down. Being in a “divorce” situation in a workplace is not a great working environment. It is necessary for employers to have a policy in place that deals with workplace romances. It is not a question of discouraging same. It is a question of putting in place procedures that individuals who are in a management role who are managing an individual with whom they are in a relationship with clearly understand that their role in the workplace is to perform their function without favouritism.

Equally the person whom they manage must understand that favouritism is not allowed in the workplace.

It is important that an employer has in place a policy which enables an individual who is in such a position to speak to somebody on a confidential basis so as to get guidance so as to ensure that they are not in breach of their employment obligations to the employer and also to get assistance in the event that there is a breakdown in the relationship. In larger organisations there is always the potential of individuals being moved from one location to another or from one section to another. In smaller organisations that is not always possible. A practicable approach to the particular organisation needs to be taken.

In other jurisdictions what are termed "love contract" document for consensual relationships are put in place.

Currently such "love contracts" can create difficulties in Ireland.

In many cases it is simply a matter of an employer applying common sense and ensuring that workers understand that what happens in the workplace are workplace matters subject to the employers rules and that they have to be complied with.

Can Sexual Banter become Sexual Harassment?

An issue which does come up at times is at what point sexual banter or teasing become sexual harassment sufficient to qualify as a hostile work environment. Does a work environment which permits or turns a blind eye to sexual banter become a hostile work environment.

Most employers will have a policy which dictates that sexual harassment is not tolerated in the workplace. Most employers will have a policy which indicates that there will be zero tolerance to same. Where employers receive complaints relating to sexual banter or teasing employers need to be very careful. There is what is sometimes called the "broken window theory". This theory arises from around 1982 at the height of the urban blight and crime. The argument was that if an urban environment was kept well-ordered and that every broken window was repaired this might prevent escalation into more serious crime. The theory is that if a window in a building and is left unrepaired all of the rest of the windows would soon be broken. This view is a reasonable view in relation to an employer taking as regards sexual banter and teasing in the workplace. Such activities can move relatively quickly to full scale sexual harassment and can result in significant claims against an employer. Employers need to be very careful to make sure that any form of inappropriate activity in the workplace is dealt with under the disciplinary policy.

When is a worker not a worker

An interesting UK case from their Employment Appeals Tribunal being the case of Halawey and WDFG UK Ltd trading as World Duty Free and Caroline South Associates held that where the arrangement was such that the employee was not required to work personally on her job but could get another person to substitute for her and where that power was not merely theoretical, since in had in fact been exercised, the individual in question was not a worker for the purposes of their employment legislation.

Where there is an agreement in place which allows the individual to substitute another person then that individual may not be a worker for the purposes of employment legislation.

The case is HALAWY –v- WDFG UK Ltd (T-A World Duty Free) & ANOR (Contract of Employment) .. whether established [2013] UK EAT 0166_13_0410 (4 October 2013 Bailii.org).

Receiver by way of Equitable Execution

Equitable Execution is a method by which a Receiver can be appointed to collect assets of a debtor.

In the case of Eamon Flanagan and Maresa Prenderville and Thomas Crosby, Michael McNamara and Kieran O'Brien, the High Court 2014 IEHC 59 available on www.courts.ie bring a Decision which was delivered on the 2nd July 2014 but became available later. The issue arose as to whether a Receiver can be appointed over the salary of individuals in respect of their future earnings.

In this case Mr. Justice Hogan detailed the law in considerable detail but held that a receiver by way of Equitable Execution is confined to the enforcement of equitable rights only and as payments from a County Council by way of emoluments (i.e. salary) was not equitable in nature since the individual had a statutory right to such payments and therefore held that there was no entitlement to appoint a receiver by way of equitable execution over what will effectively be wages / salary.

The use of a Receiver by way of equitable execution can be a very useful method for a judgement debtor to obtain their monies. It can be used for example to collect rents over property, to cease bank accounts or shares of a debtor. The use of a receiver by way of equitable execution has become more prevalent in recent years and we expect to see significant developments in this area of law over the coming years.

Increase in compensation for mental distress in Personal Injury cases

Statutory Instrument No. 206/2014 has amended the Civil Liability Act so as to provide that the level of compensation which can be awarded, to dependents (being family members) for mental distress caused by a fatal injury in an accident has been increased to €35,000.

This increased amount does not affect an entitlement for family members to seek other financial loses which they incurred.

New "Open Disclosure" Law over incidents in Hospitals

The Minister for Justice Alan Shatter announced in February that he and the Minister for Health had started work on the preparation of "Open Disclosure" Legislation for hospitals. This will involve hospitals and medical personnel having to inform patients or families of medical incidents and failures which have caused harm or which are responsible for the death of a patient.

Addressing the Family Lawyers Association of Ireland the Minister Mr. Shatter stated;

"I believe that if hospitals were to investigate an incident and to admit liability quickly once medical negligence had been established such reform would be much more beneficial to families".

The Minister pointed out that it would avoid families having to go to Court to prove medical negligence. Families would not have the same level of costs for medical reports and legal advice.

A reform of this nature could achieve a better outcome for patients and families. It would not create additional large increases in costs to the tax payer. It may very well mean that tax payers' money would no longer be wasted by State agencies seeking to defend the indefensible.

Currently, the cost of bringing a medical negligence claim can be extremely expensive for families. While a number of these costs will ultimately be repaid, once a case is won, a number of law firms, such as this firm, have noticed that in such cases claims are being defended which should never have been defended. This simply delays matters and increases costs.

This new proposed legislation from Minister Shatter is to be welcomed. We look forward to seeing this legislation. Hopefully it will come through in the near future.

Pending the legislation coming through the existing rules will continue to apply. Medical negligence can cause huge problems for families' particulars where a medical procedure is not performed properly.

Children and Family Relationship Bill

The heads of the Children's and Family Relationship Bill were released at the end of January.

The effect of the Bill, once it is passed, will be that commercial surrogacy, where women are paid a fee to have babies, whom they subsequently give up, is to be made a criminal offence.

Criminal sanctions will apply to both the surrogate mother and the commissioning parents. There will effectively be a ban on commercial surrogacy. It will extend to couples to travel abroad to engage the services of a surrogate mother.

Non-commercial surrogacy will be permitted. A new legal framework enabling the commissioning couple to be registered as the parents of the child will apply.

They will be able to pay the surrogate mothers' medical and other reasonable expenses. However strict controls will prohibit payment in any other guise.

It will be offence to advertise surrogacy arrangements or to arrange them.

Irish couples are increasingly travelling to foreign counties where women and clinics provide the service for a fee estimated to range from €30,000 to €150,000. There is currently no regulation or practice about this. The new legislation, when enacted, will prohibit these activities.

Construction Contracts Act

This Act was drawn up as a Private Members Bill by Senator Feargal Quinn. It has been described as a powerful tool for construction sub-contractors. Previously sub contractors were obliged to complete their work even if they were not being paid. Now they will have a right to demand Independent Adjudication decisions on their payment disputes within 28 days.

If a construction company refuses to pay after this process the sub-contractor has a legal right to walk off site.

This system has worked successfully in Britain for the past 15 years where the vast majority of Decisions are not appealed. In the UK the Courts have upheld 80% of the Adjudication Decisions which are challenged.

This has been introduced to ensure that small sub-contractors in future are paid on time by construction companies.

There has been some criticism that this could be seen as a new cottage industry for lawyers. This should not be the position. The objectives of the Act are to move away from legal implementation to dispute resolution mechanisms.

The difficulties, as we see it, is that if the large contractors start using lawyers to represent them in any dispute mechanism or to prepare submissions for them then sub-contractors to ensure that they have a level playing field, as regards airing their complaints, may feel obliged to obtain their own legal advice and input.

It would be important for contractors and subcontractors, going forward, to ensure that proper contractual documents are entered into and that they provisions relating to payment and stage payments are clearly and precisely set out.

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