Keeping In Touch

Winter 2013 Edition

Newsletter of Richard Grogan & Associates

Welcome to the Fourth issue of Keeping in Touch.

2013 has been an exciting year for the firm. The firm was nominated as a finalist in the Employment Law Solicitor of the Year Award. As a boutique firm which specialises in employment and accident claims and associated taxation issues we regarded this as a significant honour to have been shortlisted for such a prestigious award. We were honoured that the Irish Law Awards / Danske Bank would have nominated us for consideration.

While we did not win the section the fact that we were nominated has spurred us to attempt to increase our services to our clients.

There have been a number of new developments in the services which we are now providing namely;

1. We now produce quarterly newsletters. These newsletters cover not only the work that we have been involved in but also set out in some detail developments in the law.

2. We have produced a number of Guides to various aspects of Employment Law and Accident and Personal Injury claims. These are all available to download.

3. The firm produced a Budget 2014 Summary particularly aimed at the changes which will impact on employers and employees.

4. In 2013 Richard Grogan presented two lectures. Both of these were on the "Taxation of Employment Law Award and Settlements". The first was given in February to the Employment Law Association of Ireland in Dublin. The second was given on 22nd November 2013 to the Southern Law Association and the Employment Law Association of Ireland.

5. Richard Grogan was interviewed on "The Brief" on Near FM radio about the effects of the Registered Employment Agreements being declared void by the Supreme Court.

6. Richard Grogan was interviewed for an article in the Irish Examiner on Monday 28th October entitled "Foreign Workers more likely to take Unfair Dismissal Action".

While our newsletters are intended to set out what type of work we have been doing we also take the opportunity of setting out developments in the law which we hope are of interest.

We would like to wish all our clients and those who read this newsletter a Happy Christmas and a Peaceful New Year.

Payment of Wages Act 1991

There have been some interesting developments in this area.

We were involved in an appeal on a Point of Law to the High Court relating to non-payment of wages during lay off. The case had been before a Rights Commissioner. It then went to the Employment Appeals Tribunal. In respect of the first hearing before the Employment Appeals Tribunal we issued Judicial review proceedings. These were heard by Mr. Justice Hogan who held in our clients favour and remitted the case back to the Employment Appeals Tribunal for a considered opinion. That Decision issued. The Employment Appeals Tribunal held that it would be contrary to public policy for an individual to be able to claim Social Welfare and wages. We disagree with this view. They also held that the employer would have had a legitimate expectation that the layoff would be for a short period. This we also disagree with.

No evidence was given by the employer so in respect of the second argument we cannot understand how the EAT held as they did. In respect of the first argument the whole basis of being placed on lay-off is that the individual is entitled to Social welfare. If they recover the wages from the employer then in our view there is nothing to stop the Department of Social Protection to seek a reclaim. However, where an employer places an employee on lay-off and that is not a legitimate lay-off but gives the employee documentation in respect of same to go to Social Welfare then you would expect the employee to go to Social Welfare.

We will be interested to see what the outcome of the appeal on the Point of Law is.

There has been an interesting case where a Decision issued on 14th October 2013. It is case PW-113/2012.

This office was not involved in the case but it is interesting. The Appeal in relation to the non-implementation of a recommended pay increase. The EAT was asked to consider a preliminary question as to whether the complainant was out of time. Section 6 (4) of the Payment of Wages Act 1991 requires an appeal to be presented within 6 months from the contravention.

The employee in the case contended that each deduction represented fresh contravention of the Act and there is therefore a period under Section 5 of six months from each and every deduction to make a claim. The employers claim is that the Act in Section 6 (4) and the phrase;

"Unless it is presented to him [The Rights Commissioner] within the period of 6 months between the dates of contravention".

In their submission means when the first or initial deduction for non-payment was made and that subsequent deductions do not amount to a contravention of the Act.

The EAT indicated that the Act does not seek to limit a claim by an employee for making a claim for each and every contravention. The Tribunal held that each deduction for non-payment amounts to a new contravention.

We would agree with the EAT on this reading of the legislation.

The EAT set out that it would be "extraordinary" if the Act permitted a situation where an employer could make fresh and new deductions of an employee's salary after six months and be "immune" from any action by the employee under the Act.

The Decision of the EAT effectively confirms that each deduction is a separate deduction and the time limit runs from the time that that deduction takes place. We regard this as a correct reading of the legislation. There is a previous decision of the EAT under reference PW182/2011 where the contrary view is taken by the EAT. The interesting matter in relation to PW182/2011 is that in that case the employee appeared unrepresented. In case PW113/2012 the employer representative was the same Barrister. However in PW113/2012 the employee was represented by Counsel.

Appeals on Points of Law / Judicial Review to the High Court – Working Time

This office has been involved in a number of appeals on Point of Law and Judicial review cases since the last issue of Keeping in Touch. The first case which we have is an appeal relating to a Decision of the Employment Appeals Tribunal. This has been referred to the High Court and relates to the issue of Payment during Lay Off. This office has been involved in a number of these cases in the past and in respect of the four claims which we have sent to the High Court to date all of them have been successful. The second case involves an appeal on a Point of Law relating to a Decision of the Labour Court. The case revolves around the Security Industry and the issue of breaks under Section 12 Organisation of Working Time Act (OWTA). In this case the employee was a security officer. He was located in a security cabin. His shifts were 8 hours a day. During that period he was not free to leave the cabin. It was accepted by both sides that there were no scheduled rest breaks provided to the employee under Section 12. The employer relied on a particular exemption. It was accepted that one of the conditions related to that exemption namely the setting of rest breaks was not complied with. The Labour Court held that because of the fact that there was a kettle and a microwave that it was implied that the employee had breaks. The matter has been referred by our client to the High Court on the basis that he did not have any scheduled breaks and that there was a significant breach of the Organisation Of Working Time Act during the entire reference period referred to the Labour Court. The case is listed for hearing in March 2014.

Taxation of Maternity Benefit / Adoptive Benefit and Health and Safety Benefits

In the Summer 2013 edition of Keeping in Touch we set out in the newsletter and Overview of the Revenue E-Brief No. 19/13 which issued on 17th May 2013.

The issue of the Taxation of Maternity Benefits in particular has been causing some problems.

Maternity Benefit became liable to PAYE from 1st July 2013. It should be remembered that such payments will be exempt from PRSI and USC. The taxation applies to all Maternity Benefit effective 1 July 2013. This is regardless of when the Maternity Benefit commenced. This matter has caused some problems for employers. There has been calls for the Revenue to assume responsibility for the taxation of this payment by way of reducing the employees SRCOP and Tax Credits. The Revenue, to do this require relevant information from the Department of Social Protection.

Maternity Benefit is subject to Tax in a similar way to Illness Benefit. This means that employers will be responsible to tax this payment to employees through their payroll. If the employee is not being paid by the employer, while on Maternity Leave and does not have sufficient tax credits to cover the payment, this could result in a negative pay situation. The employer will then have to revert to applying week 1 basis for the employee. It has been suggested that relevant documentation being a P45, P60 and P35L will be amended to record taxable Maternity Benefit.

Employers are responsible for the identification, taxation and submission of tax on so many payments and benefits but Revenue should ensure that they have the correct information and Guidelines to do so.

If an employee is going on Maternity Leave it is important for employers to ensure that their Payroll Department or Payroll Provider are aware of the start date of the expected date of confinement. This is so that they can assist an employer in the correct treatment of this entitlement.

We envisage and are seeing problems arising. It is likely that when an employee returns from Maternity Leave or Additional Maternity Leave that the Taxation issues will need to be addressed which may mean that additional deductions subsequently will have to be made from the employees pay or that their Tax Credits will reduce. From a practice point of view we would advise employers that it is important to bring to the attention of employees, particularly those going on Maternity Leave that Maternity Benefits are taxable.

Protection of Employees (Temporary Agency Work) Act 2012

The Labour Court has recently issued an extremely important Decision in the case of Team Obair Limited and Robert Costello AWD134.

This case was an appeal by the employee to the Labour Court. The employer is an employment agency. The employee was employed by the company as a Forklift Truck Driver. His basic rate was €13.50 per hour. The employee was assigned to a third party STL. The company told the Court that when it started the contract it obtained a statement in writing from the hirer in accordance with Section 15 of the Act setting out the basic Terms and Conditions that would apply if it employed workers directly. In it the hirer indicated it would pay Forklift workers the same rate as paid to the employee by the employer. The employer pointed out that the comparator as nominated by the employer were all employees prior to coming into effect of the Act being 5th December 2001 and also pointed out that these workers had service ranging from 18 to 9 years. The Court noted that the workers named that their pay was not in any way based on service requirements. The Court in their conclusion pointed out that from Section 6 of the Act and Article 5 of the relevant Directive an agency workers is entitled to the same basic employment conditions as those which he or she would be entitled if employed directly by the hirer company rather than through the employment agency.

The Court pointed out that unlike similar Employment Rights Statutes the Act does not require a claim for Equal Pay to be grounded by reference to an actual comparator. In many employment claims for equal pay a named individual must be put forward. This does not apply to Agency Worker claims. The Court pointed out that the information to establish reliable evidence as to rates of pay will be within the knowledge or power of procurement of the employer. Therefore the Court place the Burden of Proof on the employer.

The Labour Court rejected the submission of the employer and held that in the absence of reliable evidence to the contrary the Court had come to the conclusion that it was more probably that the employee in this case if he had been employed directly by the hirer would have been paid €18.50 per hour in line with other Forklift Drivers similarly employed. This is a very substantial and important Decision of the Labour Court in the area of Agency Workers.

The Importance of Contracts Specifying Hours of Work.

In a case of Lucey Transport Limited and Marius Serenas WTC/13/178 Determination DWT13141 the Labour Court dealt with a situation where an employee brought a claim under Section 17 of the Organisation of Working Time Act.

The Court held that the contract nowhere specified that the normal or regular starting or finishing times which the employee was obliged to observe. It was submitted on behalf of the company that the starting time of around 6am in the morning was an implied term of the contract. That submission was based on the pattern on the employees starting time. The employee made no complaint in relation to the period provided by the employer but his complaints related to an earlier period. The Court held that practice of the employer of informing the employee by text of his duties and consequently of his starting time is also wholly inconsistent with a contractual term implied or otherwise fixing the normal or regular starting time.

The Court importantly stated;

"Moreover, it is well established that a term cannot be implied into a contract which contradicts or is inconsistent with a written or express term of the contract".

In this case the Court accepted that the employer rarely if ever had adequate advance notice of his finishing times in the period during which he worked as a driver. The Court held that the language of Section 17 (4) which is an exemption provision indicates that it is directed at a situation where the requisite notice is given and some unforeseen event intervenes before the specified starting or finishing time. The Court held that in the case of no notice of finishing times given an employer who seeks to rely on the sub section must establish cogent evidence what the intervening event actually were and the basis upon which it is contended that they were unforeseen.

The Court awarded a sum of €2500 for breach of Section 17 of the Act.

This case is going to have significant implications for employers who operate on a work to finish basis or on as and when required basis. Section 17 of the Act provides that an employee must receive 24 hours' notice of their start and finishing time. There is also an obligation to record such notices.

Returning to Work after Maternity Leave

A recent report has indicated that 26% of Irish parents have been prevented from returning to employment or training due to the high cost of childcare. It appears that parents in lower income groups are particularly badly hit. 56% have been prevented from looking for a job due to childcare costs according to the research. The report was commissioned by the Donegal County Childcare Committee and carried out by INDECON which is an Economic Consultancy Group. This showed that the average cost of full time child care for a two child family stands at €16,500. It appears that Ireland has the second highest childcare costs as a percentage of average wages across the OECD.

The report makes three Recommendations.

The first is that for all long term unemployed individuals that there should be a subsidy of 67% of child care costs up to a limit of €5000 per annum.

For low income families who have been on long-term unemployment that there should be a 50% subsidy.

For families who are just missing the legibility but are earning the average industrial wage there should be tax break equal to 40% of the childcare.

It is estimated that the cost of providing this benefit would be in the region of €20 million per annum.

The Minister for Children who launched the report stated that she would examine its recommendations in the context of a planned review in 2014 of two child care subsidy schemes.

Difficulties with Grievance and Disciplinary Proceedures

Many employers have different procedures. There is a Code of Practice and Grievance and Disciplinary Procedures.

Some employers have no Grievance and Disciplinary Procedures. The issue of avoiding employment litigation is a significant issue for employers and employees. Nobody wants to be involved in litigation unless they have to be.

This firm believes that a considerable number of issues could be dealt with if there was a proper Grievance and Disciplinary Procedure in place which had a statutory basis. We accept that different rules may apply to different size organisations.

The cost of putting in place Grievance and Disciplinary Procedures can be expensive for an employer. There is a strong argument that different procedures should be put in place for small, medium and larger organisations. There is an argument that the Government should by Statute set out binding minimum requirements and that in the event that the employer does not have their own procedure in place, which would be more beneficial, that State Legislation would automatically apply with an obligation on an employer to notify an employee of these procedures. Because of the fact that we have a multicultural workforce it would mean that these could be translated by the State into all the EU languages which would mean that both employers and employee would understand and know the procedures and would have access to documentation setting out what they are.

A significant number of Unfair Dismissal claims are lost by employers not because the employee did nothing wrong but rather because of the fact that fair procedures were not applied.

It would mean that the cost for small and medium enterprises would be significantly reduced.

Instead of having to draft a detailed procedure they would instead only have to look at whether a more beneficial procedure was to be put in place and would only therefore have to, in their documentation, set out the more beneficial procedures.

It would also ensure that employee's understood their duties also in connection with disciplinary matters.

Having a Statutory Grievance and Disciplinary Procedure may result in grievances being dealt with earlier rather than resulting in unnecessary litigation. If there is to be a statutory scheme then there is the issue of representation.

Currently most procedures provide that the employee may bring a Trade Union or fellow worker with them. There is no reason why a representative such as a Solicitor or other representative should not be able to represent an employee in a grievance and disciplinary matter. In respect of Grievance matters the issue is to get matters resolved. Anything that results in matters being resolved must be regarded as beneficial. This office does not believe that Solicitors will be given such a right but we do believe that there is a strong argument that Solicitors and outside parties have a significant role to play in attempting to resolve workplace differences. The alternative is that they are not resolved internally and matters go to the Labour Relations Commission or to the Labour Court. This is a cost to an employer and an employee and could be avoided by having a statutory scheme.

Conclusion

In the next number of months the firm of Richard Grogan & Associates will be placing additional Guides on Employment Law, Personal Injury and Accident cases and Taxation topics on our website. These Guides have been and will continue to be written in plain English. They are Guides only. They are not a replacement for getting appropriate legal advice but they are a starting point for individuals including employers and employees to find out what their rights are. With rights there are also obligations.

We look forward to 2014. We need to be optimistic for our firm, business and the country. As a Nation we have come through very hard times. As a Nation we have met those challenges. The new challenges to move forward, create new jobs, create wealth in the economy and create a Country that we all want to live in.

For this firm our role is to continue to represent our clients to the best of our ability and to provide our specialisms expertise and knowledge to the benefit of our clients. We hope we have done in the past. We look forward to doing in the future.

December 2013