Keeping in Touch – Autumn 2013

This is the third edition of KEEPING IN TOUCH

Upcoming Presentations

On 22 November next in Cork Richard Grogan will present a paper to the Employment Law Association of Ireland / Southern Bar Association for Lawyers on the "Taxation of Employment Law Awards".

On 4th March 2014 Richard Grogan will be presenting a similar talk but from the perspective of adjudicators of employment disputes as part of the Law Society of Ireland Certificate in Adjudication Course.

While these are very technical issues their importance for adjudicators, employers and employees cannot be stressed too much. Depending on how a Decision is worded or a settlement written the tax rules apply to that document.

The firm is delighted to be able to pass on some of our specialist knowledge. A copy of a previous paper on this topic given by Richard Grogan is available to download from our website.

Latest News

The firm has been involved in a significant number of interesting cases particularly under the Organisation of Working Time Act. In total five of these cases have now been referred to the High Court on a Point of Law. Four of them relate to the issue of Von Kolson and Kamann concerning the level of compensation which has been awarded. The cases concern whether the level of compensation was appropriate taking into account the European Legislation from which the Organisation of Working Time Act derives.

The first of these cases is due for hearing on the 14th November next. A further case involving the interpretation of what is a "proper rest period" and how it is to be determined has also been referred to the High Court and will be listed for preliminary mention on the 4th November next. This case has significant implications for those in the Security Industry particularly security guards in fixed positions. By this we mean individuals who work in a set location and are not given a designated rest period to use as they wish during the shift which they are on. This would only apply where the worker works in excess of six hours on a particular shift.

We have seen some significant developments and have cases coming up at the present time relating to the daily rest intervals which workers should obtain. One issue which will be litigated upon soon is the issue of shop workers and their entitlements. It appears to the firm that such workers may in fact where they work between 11am and 2.30pm be entitled to a one hour uninterrupted break. This is an anomaly in the legislation. It however relates back to the Shop Workers Acts of 1911. Yes we are referring to 1911 which is over 100 years ago.

While the firm has seen a rise in the number of unfair dismissal cases and involving underpayment of redundancy in the last few months, we have also seen a significant rise in employees bringing claims who are still in employment. These claims relate to such items as not receiving holiday pay and public holiday pay while on maternity leave, not receiving the same job back when the employee returns from maternity, a significant rise in bullying and harassment claims and a significant rise in sexual harassment claims. The rise in bullying and harassment claims and sexual harassment claims should be worrying for everybody whether employees or employers. Such activities within the workplace are entirely inappropriate. Not only can they leave the employer open to significant claims for damages but have a disruptive element on the workplace.

<u>New Complaint Form</u>

On 30th September the Minister for Jobs Enterprise and Innovation launched a new website called Workplace Relations. This website is an extremely useful website for identifying decided cases. It importantly allows a person checking the website to check particular types of claims. There are very useful guides. These are useful for both employers and employees as regards what their entitlements and duties are. The new website also includes an online complaint form. We anticipate that many employees will fill out these claim forms themselves and submit them. There is a number of concerns we have.

1. From experience we have found that many employees who lodge their own claims do not keep a copy of the claim form. This causes difficulties if they seek legal representation later on or for checking what claims have actually been lodged.

2. The claim form can be difficult to navigate if the person filling out the form does not know the precise legal claim that they are making. It may be useful to give two examples here.

(a) If bringing a claim under the National Minimum Wage Act a claim cannot be made until the employee has sent in a request under Section 23 of the National Minimum Wage Act requiring a statement as to the hourly rate of pay for a pay reference period falling within the last 12 months. A pay reference period is the pay period which the employee is paid for. If an employee is paid for on a weekly basis then the pay reference period is a particular week. If it is on a monthly basis it is for a particular month; and
(b) Where the employee is a mobile worker, by which we mean a person who drives a large vehicle, they may need to bring claims under both the Organisation of Working Time Act and Statutory Instrument 36/2012.

While all the claims are set out it can be confusing for somebody filling out a claim form. If an individual lodges a claim under the National Minimum Wage Act and does not lodge a request under Section 23 of the National Minimum Wage Act and have evidence of sending same to the employer such as a registered slip and a copy of the request itself then a Rights Commissioner will have to decline jurisdiction and dismiss the claim. If a person is a mobile worker and they bring the claim under the wrong section or Statutory Instrument depending on the type of vehicle which they drive then again the Rights Commissioner may well be obliged to dismiss the claim.

3. In the case of Unfair Dismissal claims the claim form gives two options. The first is to have the matter referred to a Rights Commissioner. The second is to have it referred to the Employment Appeals Tribunal. If there is a referral to the Employment Appeals Tribunal ("EAT"), currently there is a delay of approximately 80 weeks for a hearing. If the matter is referred to a Rights Commissioner the delay is approximately 3-4 months. If an employee elects to refer the matter to a Rights Commissioner the claim form automatically drops down two options. The first is that in the event that the employer objects to a Rights Commissioner hearing, which they can do, that in those circumstances the employee can request that the claim form is sent to the Employment Appeals Tribunal. We have serious concerns about this provision as there appears to be nothing in the legislation which allows for an employee to so elect. The legislation appears to us to require the employee to lodge a new claim directed to the EAT.

4. The current online claim form is produced in English only. There is no Irish version. There is no version in any of the official languages of the European Union. This is a deficiency in the claim form.

While there are deficiencies in the claim forms with appropriate legal advice it is not difficult to have the proper claims submitted. There are procedures to be applied. It is not simply a matter of filling out a claim form and sending it in. It is important that any claim that is put in is specific and precise as to the section that matters are being complained under. For example, if an individual is making a claim that they were unfairly dismissed that element of the claim form should only relate to setting out the complaint they have as regards how they were dismissed, when they were dismissed and the reasons why they claimed the dismissal was unfair. If they have other complaints such as working excessive hours or being discriminated against then those sections of the complaint form should be utilised. Again, they should be specific. We have found in a number of cases where individuals have come to us after they have lodged their own claim form that the wrong complaint had been placed in the wrong sections relating to the wrong legislation. This causes significant difficulties particularly if the time limits have elapsed.

Time Limits For Bringing Employment Claims

Generally speaking, the time limit is six months from the last date. At times, it is possible to get the period extended but generally speaking we will always advise employees that claims must be brought within six months. What many people forget is that the complaint that is being brought relates to a specific reference period. The reference period is invariably six months. If an individual has a complaint that they worked excessive hours two years ago then the person hearing the claim has no right to hear that. The claim must be within the six month period of time. There are exceptions and appropriate legal advice is always required.

What Should I Do if I Wish to Bring a Claim

Our normal advice is that you get advice from a Solicitor who specialises in this area as to what your claims are. Most Solicitors such as this office will see you on the basis of a first consultation free of charge. At that stage either an estimate of the fees can be given or you will be advised as to the likely duration of the case if that is possible and the likely range of fees depending on the hourly rate that will be charged. In some cases specific set fees can be obtained from Solicitors where it is identifiable as to what exactly will be required and when.

We always advise employees and employers that if there is a claim that it is important to write out a statement for their Solicitor in relation to the allegations. If there are witnesses then it is important to get them also to write out, as soon as possible, their recollection of events.

Why is this done

The answer is simple. A case may take between four months and two years to be finalised. People forget important matters. They forget timings. They forget who was present or where they were or exactly what was said. If a statement is written oust then it is less likely that somebody is going to forget what happened. They will have a document that they can refer to it to remind them as to exactly what happened, who said what, who was present, where various conversations took place or what exactly the complaint is about. We cannot stress the importance of people writing out statements themselves as it is written out in their own words. This will make it easier for their representative to clearly set out the claim as it insures that nothing is left out whether bringing or defending a claim. For example, if somebody has an equal pay claim saying that they do the same work as somebody else but are paid less then it is important to have a statement set out as to exactly what work they do and exactly what work the other person does. It is important to identify are there any reasons why the other person might be paid more for doing the same work such as that they have an additional role that they undertake, or that they have been in the organisation longer. Once a claim is put in it relates to the time that the claim is put in. Therefore if the case takes some time to come on for hearing or the matter goes on appeal it may be important to have set out very clearly exactly what one person does and what another person does. It also allows the issue as to why there may be a difference to be investigated and to set out the basis under which it is claimed that one person is paid more than the other or why is one person paid more than another.

The Entitlement to Wages During Lay-Off.

This summer the office was involved in three High Court Point of Law Appeals relating to the issue of payment during lay-off. The cases were lost in the Rights Commissioner Service and before the Employment Appeals Tribunal. They went on appeal on a Point of Law. In all cases the matters were won.

The normal defence that is being raised by an employer is that there is a custom in practice to lay off individuals without pay in certain industries. The argument put forward by this office is that a lay off is only allowed to be unpaid where the provisions of the Redundancy Payment Acts are applied. This has effectively two criteria namely;

1. That there is a custom in practice within the business or the industry for the layoff to be unpaid; and

2. The provisions of the Redundancy Payment Act are strictly applied in that there must be a realistic prospect of work. This is not the belief of the employer or the hope of the employer that there will be work but effectively independent verifiable evidence that there is a realistic prospect of full time work.

If there is no realistic prospect of full time work then regardless as to the customer practice the employee should be made redundant.

Deduction / Reduction in Wages.

We are still seeing a situation where employers are applying reductions in wages. There is no difficult in employers doing so provided the employee consents. This means that the employee gives their written consent. In many cases the reduction is simply enforced without written consent. Two specific defences are being raised by employers at the present time both of which we have significant difficulties from a legal perspective.

The first of these is that it is not a deduction but rather a reduction. This argument is backed up by employee's representatives quoting what is called the Mckenzie case. That case however dealt with a reduction in allowances. Allowances are not wages, despite what many people believe, under the provisions of the Payment of Wages Act.

The Mckenzie case dealt solely with the issue of reductions on allowances. That case has been quoted by many employer representatives but we believe that the submission on this point is incorrect at law.

Secondly, some employer representatives are also raising the issue of an alternative that it is "reasonable" for the employer to have made the deduction. The first issue on this is that an employer cannot claim that it is reasonable unless the employer is admitting that it is a deduction. If this defence is being put forward then effectively the employee in those circumstances is entitled to cross examine the employer on their accounts and their management accounts and this would relate to such matters as what drawings they owner or director is taking rom the business and that would include all payment to them, family members and spouses. The second issue of raising the issue of what is known as Section 6 (2) of the Payment of Wages Act is that it can open the employer up to a claim not only for the amount of the deduction made but for the wages properly payable in the week prior to the deduction. For example, if an employer pays an employee €500 a week and reduces it to €400 a week the employee may be able to claim under the provisions of that legislation that the compensation should not be just €100 but in fact €500.

There is no reason why an employer should not reduce wages for the purposes of maintaining employment. When doing so however it is important that there is a clearly defined rationale for same. It has to be open and transparent. It may mean disclosing confidential information relating to the business. That can easily be protected within the workplace but if the information is not given and the deduction is subsequently challenged this information may have to be given in a more open forum.

We anticipate a considerable number of claims under the Payment of Wages Act will be subject to significant legal argument over the next 12 months and it is probable that a number of these claims will head to the High Court for an ultimate legal determination.

Workplace Relations Website

The Workplace relations Website now has put the Decisions of the various Tribunals onto a website. If we take for example the old Labour Court website you could type in the particular Act and you would get all Decisions that issued. The latest Decision came up first. In the new Workplace Relations Customer Service Website the latest Decision comes last. While you can refine the search to particular months or days, if you are just seeking to get to the most recent decisions you have to trawl through all the Decisions from the earliest to the latest. There is no "latest" button that can be pushed unlike on for example the Equality Tribunal website. While it is useful that the Decisions are on the website and all the decisions are on one website the format of same is not user friendly for checking Decisions. It has some advantages for research purposes as regards different sections which can be searched under or different name of employers or employees but overall the new website while combining all the older websites is not as user friendly.

An old election adage comes to mind when it comes to the website "A LOT DONE – MORE TO DO"

Parental Leave Bill 2013

The purpose of this Bill which was introduced earlier this year is to amend the Maternity Protection Act 1994 and 2004. The purpose of the Bill is to provide both maternity and paternity leave for parents of a new-born child. The Bill seeks to provide for an entitlement to maternity or paternity leave after the birth of an employee's child. The purpose of the Bill is to permit and Mother and a Father to share between them the minimum period of maternity and paternity leave however they would not be allowed take the maternity and paternity leave at the same time. The Bill also proposes to allow the Minister to extend the periods of maternity and paternity leave. The Bill also proposes to extend the definition of protective leave to include paternity leave.

It will be interesting to see whether this bill progresses.

Ownership of Social Media Contacts

The issue of the ownership of Social Media Contacts is now beginning to be litigated upon.

The case of Hays Specialist Recruitment (Holdings) Ltd –v- Ions is a UK Decision dealing with the ownership of LinkedIn contacts.

The employee in this case argued that his employer had consented to and encouraged him to use LinkedIn to connect with clients. He also that once an invitation on Linked in had been accepted by a contact this information ceased to be confidential because it could then be accessed by others on LinkedIn.

The Court did not accept this argument in the UK. The Court ordered that the employee disclose the LinkedIn business contacts which he had acquired during his employment. The Court also ordered that all emails sent to or received by his LinkedIn account be disclosed. The Court also importantly ordered the employee to disclose all documents, including invoices and emails relating to his use of LinkedIn contacts and any business obtained from them.

The use of LinkedIn and Twitter along with Facebook can have an economic value to employers.

It is therefore important that employers be proactive in dealing with the ownership of such accounts.

We would advise as follows.

All employers should ensure that a social media policy is in place. That policy should address the ownership of social media contacts. A policy should clearly define work related social media contacts as distinct from personal contacts. It should be tailored to the business operations of the company. It is important that the employer can show that the Social media policy has been communicated.

Employers should be proactive in addressing the ownership of Social Media contacts.

Where employees use a corporate brand or other official company social media accounts then the employee should sign an agreement as a condition of their employment that deals with at a minimum the following;

A. That the employer owns the social media account and the associated contacts

B. That the employer has access to the account at all times.

C. That the employer only is allowed to change the account name and settings

D. That all social media accounts including log in details and passwords must be given at the end of the employment to the employer.

Defining what constitutes Social Media Contacts.

It is important that the employer clearly specifies what constitutes Social Media Contact which the employer wishes to have access to and to retain. It is important that the employer can demonstrate a business reason for same. It is also important that employers should include a non-dealing and non-solicitation restrictive covenant in contracts of employment and any severance agreement with specific reference to online networking. It is important that such restrictive covenants are very clearly drafted. They may not go further than is necessary to protect the employers' legitimate business interests. This is important if the restrictive covenant was challenged in Court or was sought to be enforced.

Going Forward

We see the issue of social media contacts as being one which is going to become more important in the coming years. It is very important that an employer protects the business as failure to do so could result in the employee walking away with a significant amount of contacts which could affect the employer.

Post Termination Restrictive Covenant

The case of Octavio Hernanendz –v- Vodafone Ireland Limited 2013 IEHC 70 is an important case for employers. The contract of employment contained a number of conditions which subsequently became the subject of proceedings before the Courts.

One of the clauses provided for a six month period of time during which the employee agreed not to be engaged or interested in any business or commercial activity which competes or conflicts with that of the employer.

There were very well drafted non solicitation clauses and a confidentiality clause.

The employee in question resigned from his employment with Vodafone to take up a position with O2. The employer sought to impose the six months restrictive covenant and the other provisions. Correspondence issued between Vodafone and O2 as a result of which the employee was not able to take up his position with O2 until 1st May 2013. This resulted in the employee being left without any source of income from January 2013 until May 2013. He therefore issued proceedings. While the Court held that even though the employees damages in monetary terms was quantifiable it was of importance to him that he continue to have a source of income in order to meet the needs of his family. The court acknowledged that the employee had agreed to be bound by the non-solicitation clause and a confidentiality clause and he had given an undertaking as to damages. The Court held that on the balance of convenience they would grant him an order i.e. an order preventing Vodafone from preventing him from taking up his role with O2.

This case demonstrates the possible weakness of non-compete clauses.

It does also demonstrate the importance for employers who have Senior Officials whom they wish to restrict from working for a competitor, particularly if there are a limited number of competitors in the marketplace, to consider more lengthy notice periods with garden leave provisions. There is however a downside for any employer that does so in that the employer will be bound by the longer notice period and will have the pay the employee during the garden leave. However, saying this if the employee is senior enough to warrant the employer being concerned about the employee working for a competitor then the non-compete clause in itself may not be sufficient to protect the employers business.

We would anticipate that because of these clauses being in existence they are going to be litigated upon and employers are going to have to be in a position to show that the non-compete clause is reasonable.

For senior employees the issue of extended notice periods coupled with garden leave seriously needs to be considered.

What is pay under the Protection of Employees (Temporary Agency Work) Act 2012.

The Labour Court recently had to deal with the issue as to what "pay" was on behalf of a Midwife. The employee claims she was entitled to a specialist qualification allowance treated as part of her basic pay. Her claim as upheld by the Labour Court.

The Act provides that agency workers should be accorded equal treatment as if they had been employed by the hirer firm from the first day of work. In this case the Labour Court was asked to decide if the allowance was "pay". The argument that was put forward by the employer was that the definition of pay in the Act sets out every definition of what pay is and that it did not include a specialist qualification allowance.

Under the Act basic pay and any pay in excess of basic pay in respect of shift work, piece work, overtime, unsocial hours worked and hours worked on a Sunday are set out. The issue of allowances does not fall within the definition.

The Labour Court held that the issue of basic pay is not defined in the Act. In this case evidence was furnished as to how the specialist qualification allowance was treated or viewed and the Court held that it was in the nature of pay because of its normal treatment.

The case highlights a particular problem. That problem is that the definition of basic pay is not defined in the legislation. We anticipate that this is going to cause difficulties in interpretation of what is basic pay. Saying this, the decision of the Labour Court gives useful guidance on what might be deemed to be basic pay.

The Act is a new piece of legislation. We can already see potential for this Act creating significant amount of litigation even in determining what basic pay is. It is unfortunate that the Act does not define the provisions of what is basic pay.

An Employer's Guide to Interviews.

There have been some recent cases in particular one involving an electrical firm where employees were asked to dance to a Daft Punk song during an interview. The employer subsequently apologised but the case highlights the issue for employers that it is important that potential candidates are not treated less favourably than another candidate or to apply a requirement or condition which is less easily complied with by a particular candidate on the basis of gender, civil status, family status, age, disability, race, religious beliefs, sexual orientation and/or membership of the travelling community.

We would advise all employers when preparing for interviews to follow some basic rules.

You should draw up a job description. If there are personal requirements relevant to the post these should also be drawn up.

The specifications for the job should be checked as being relevant and appropriate.

You should check all advertisements and application forms to ensure that they comply with the Equality legislation.

All candidates for a position should be asked in advance if they have any particular requirements to enable them to attend the meeting.

Have a marking sheet for all interviews.

In advance of any interviews make sure that those undertaking the interviews are trained on how to use the marking sheet and the criteria to be used for marking.

If it is possible to have a gender balance on the interview panel.

Make sure that all marking sheets are retained.

It is important to be aware that if a claim is brought under the Employment Equality legislation then these interview notes and the notes and all issues relating to the job specification and advertisement and application forms will be subject to review by an Equality Officer.

International Mobile Employees

When determining the applicable employment law regieme in an international context the choice of law by the parties is important. There was a view that the country of habitual place of performance of the work or where the work was performed in one country for a lengthy period would be a deciding factor. The EU Court of Justice in case C-64/12 held this not to be the case holding Article 6(2) of the Convention on the law applicable to contractual obligations must be interpreted as meaning that, even where an employee carries out the work in performance of the contract habitually for a lengthy period and without interpretation in the same country, the National Court may, under the concluding part of that provision, disregard the law of the country where the work is habitually carried out, if it appears from the circumstances as a whole that the contract is more closely connected with another country.

If there is anything in this newsletter which you require advice on you can contact this office on info@grogansolicitors.ie or by phoning to make an appointment on 01-6177856.