Keeping In Touch

Summer 2013 Edition
Newsletter of Richard Grogan & Associates

Introduction

Welcome to the Summer Edition of Keeping in Touch. This publication is intended to both give an update on the activities of the firm but also to give a practical overview on areas of law to employers, employees, legal professionals and those providing services in the Employment law area and Personal Injury cases.

Keeping in touch is intended to give not only practical information but also more general legal information of a more technical nature.

We hope that this new format is successful and that those reading it find it of interest.

This publication is not intended to provide legal advice. Before acting or refraining to act because of anything in this publication legal advice should be obtained. We can be contacted on 01-6177856 or info@grogansolicitors.ie.

Radio and Newspaper Coverage

On Thursday 30th May Richard Grogan of this firm was interviewed on THE BRIEF – NEAR FM. The interview related to the effect of the recent Supreme Court Decision on Registered Employment Agreements. In particular the interview looked at how the recent Supreme Court Decision would impact on both employers and employees and existing and practical arrangements.

The firm has also agreed to provide a weekly column in the Lithuanian newspaper Letuvis and in the voice of the Russian Society in Ireland, Hawa, where readers send in questions which are then responded to relating to Employment Law matters. We have also entered into a similar arrangement with a Polish newspaper. These articles are provided in Lithuanian, Russian and Polish.

Danske Bank – Irish Law Awards

May was an exciting month for this firm. The firm was nominated in the Employment Law Firm – Individual of the Year Category in the Danske Bank / Irish Law Awards Category.

While the firm was not successful we were delighted with being nominated.

This firm is a boutique firm dealing with a limited number of areas of law namely Employment Law, Personal Injury / Accidents, Tax especially Capital Taxes and employment related tax issues and Estate Planning. We are not a full service firm. We do not seek to be. We seek to specialise in the areas where we have particular specialisms. Simply being nominated as a finalist for such a prestigious award and being linked in the same category as Finalist with leading law firms in this country was a significant achievement for a firm such as this. The firm is committed to continuing to provide a quality service to our client. We hope to continue to grow and expand our expertise in the employment field going forward.

Equal Pay and Discrimination

In a case in which this office was involved claims were brought for two employees. The employees complained of being discriminated as regards the terms and conditions of their employment compared with a named Irish national and were awarded a sum of €7500. One of the employees was able to show that he was paid over €9 less per hour than an Irish National doing the same work as him. No evidence was produced by the employer to show that there was any reason why the non-Irish national was paid less than the Irish national and accordingly an award for the period of his employment which was over 2 years of the difference of €9 an hour for each hour worked during that two year period was awarded.

The case highlights the importance of employers in setting rates of pay to have regard to the value of the work being done and not simply setting a rate of pay for one employee at a lower level because they are of a different nationality. If there is to be a difference in rates of pay it needs to be clearly set out as the rationale for same with appropriate back up documentation in place which is created at the time that the job is being advertised to show why there may be a reduced rate or why there would be a difference in pay. This case was a significant win for this office. Equal pay claims are always difficult claims to win because of the burden of proof that is placed in the employee. Saying this, where an employee can show that they do the same

job or a job of comparable value to another employee equal pay claims where the difference can be shown to be on any of the prohibited grounds are being successful. This case was very much a team effort by this firm with the submission and the preliminary work being done by Richard Grogan but with Ruth Lynch taking over the lead role in presenting the case.

Forced Retirement leads to an award of 2 years' salary for Age Discrimination

In a recent case of Dunican and Spain –v- Offaly Civil Defence DEC-E2013-027 held that employees who were retired where they exceeded the normal company retirement age had been treated in a discriminatory fashion on the grounds of age.

The Decision is important for employers. The case confirms that an employer must be able to objectively justify a retirement age within an organisation. An employer may rely on an objective justification grounds set out in the case of Wolf –v- Statt Frankfurt AM Main Case C229-08. In that case the European Court of Justice affirmed the position by saying that in that particular case which involved an application for a job that the "possession of a specially high physical capability may be regarded as a genuine and determining occupational requirement within the meaning of Article 4(a) (1) of the Directive from carrying on the occupation of a person in the fire service". Where an employer intends to use an objective justification for a retirement age the employer will be required to be able to justify same on specific grounds which will need to be formally identified in advance of any forced retirement. The effect of this Decision for employers is effectively that a blanket retirement age may not stand up to scrutiny in an Equality claim. Unless the employer can justify specific grounds to justify a forced retirement the employer runs significant risks of an Equality claim. Effectively an employer will have to be able to produce a policy guideline which sets out objective criteria for determining a person's continued employment. That must be reasonable. The employer must be in a position to show that the applicable rules were not only applied to the person who was being retired but would also apply to any other person in the role.

The issue of forced retirements is going to become a significant issue. With the State pension age rising, difficulties for employees who have minimum pension entitlements, especially where the employer does not have a company pension scheme, or where they are on a defined contribution scheme it may well be that more and more employees will look to work longer.

Under the Employment Equality Acts 1998 to 2011 (EEAs) having a mandatory age for retirement of employees is not in itself discriminatory. Where there is no fixed mandatory retirement age it is useful for employers to have a mandatory retirement age in the contract of employment. Saying

this, employers should be aware that such mandatory retirement age may still be the subject of legal challenge. The employer will have to justify the existence of a mandatory retirement age on the basis of the imposition of objectively and reasonably justified legitimate aims and that these are proportionate and necessary. It is therefore important for putting in a mandatory retirement age to have these procedures and policies put in place at the time. What constitutes a legitimate aim for on organisation may not for another. It depends on the particular business and the business environment of the employer. Equally a legitimate purpose now may not be appropriate in the future and a purpose which may not be appropriate now may in fact become appropriate in the future. Therefore it is important that such procedures and policies are kept under review and updated on a regular basis.

Employers must ensure that they apply the rules relating to retirement ages in a consistent manner.

Employee may have a separate claim against employers. Employers should be careful of the Unfair Dismissal Acts 1977-2011 (UDA). There is no claim for Unfair Dismissal where an employee has reached the "normal retirement age" under the UDA. The Employment Appeals Tribunal have held that normal retirement age is a definite or particular age in the relevant employment and not simply the retiring age that may be specified in the contract of employment. Therefore the proper test for regarding a normal retirement age is to work out what would be reasonable for an employee holding position at that time. It is therefore important for the practice in the place of work to match the provisions of the employment contract. For example if the employment contract provides for mandatory retirement at 65 but many employees work on until 67 or 68 then that moves the normal retirement age up to what is normal in the business. Equally if competitor businesses which are similar have a higher normal retirement age then that retirement age can effectively be forced onto a particular employer.
We anticipate that there is going to be a considerable amount of claims against employers by employees who are forced to retire.

An Easy Guide to Leave Entitlements.

Leave	Duration	Employee pay / unpaid while on
Adoptive leave	26 weeks ordinary adoptive leave 16 weeks additional adoptive leave	Employer is not required by law to pay the employee while they are on leave. There are adoptive leave benefits from the State for a period of 24 weeks.
Annual Leave	This depends on the Hours worked in the Holiday year. The maximum annual Statutory leave is four Working weeks. This is Taken in effect to mean 20 days as public holidays would be excluded in calculating The working week.	The employee must be paid their normal salary / wage while on leave
Carers Leave	Minimum period is 13 weeks Maximum period is 104 weeks	There is no requirement for the employer to pay wages / salary but a carers allowance or carers benefit is available.
Force Majeure Leave	The maximum period is 3 days in any 12 month period or 5 days in any 36 month period.	The employee must be paid
Maternity Leave	26 weeks ordinary maternity leave and 16 weeks additional maternity leave	There is no requirement to pay the employee but the employee may receive up to 26 weeks maternity benefit from the State.
Parental leave	18 weeks parental leave	The employer is not

	per child. This must be taken before the child turns 8 years of age. This is extended to 10 years of age in certain circumstances where the child is adopted. This is also extended to 16 years of age when the child has a disability or long term illness.	required to pay the employee. There is no entitlement to any Social Welfare benefit.
Non Statutory Leave Entitlements / Compassionate leave	This is at the discretion of the employer	There is no requirement to pay and no entitlement to Social Welfare
Paternity Leave	At the discretion of the employer	There is no requirement to pay and no entitlement to Social Welfare
Public Holidays	All Public Holidays	A paid day off or if required to work an additional days pay, or, an additional day of annual leave, or, a paid day off within one month of the Public Holiday.
Sick Leave	No restriction on duration	The employer is not required to pay the employee salary while they are on leave but may subject to certain cases which are presently going through the Labour Court be required to pay holiday pay. The employee may receive illness or disability benefit from the State.

The above is a synopsis of leave entitlements. The law on this area is complex and the synopsis is intended as a guide only.

Guidance on Protection of Employees (Temporary Agency Work) Act 2012

The basis of the 2012 Act is to entitle agency workers to the same basic working and employment conditions as employees who are directly employed by the hirer.

The Department of Jobs, Enterprise and Innovation have published in August 2012 a guidance document on the 2012 Act. This is available from the Department. The 2012 Act does not apply to the following category of persons;

Persons who work as Independent Contractors, are in business on their own account and are placed by an employment agency where the hirer is a client or customer placement services. That is where the employment agency introduced a person to an employer for direct employment that is paid by the employer.

Managed service contracts. This is where persons who work under the supervision and direction of the company which employs them and not under the supervision or direction of the company where they work.
The concept of managed serviced contracts is the vehicle of choice for companies to avoid the provisions of the 2012 Act. By properly structuring such contract it is possible to negative completely the entitlements of what are effectively Agency Workers. Saying this, it does mean that the agency, if you can call it that, has to supervise and direct the individuals. In practice this is difficult though not impossible to structure.

The 2012 Act in Section 14 provides that a hirer shall in relation to collective facilities and amenities at work treat an agency worker the same and certainly no less favourably than an employee who is directly employed unless there are objective grounds for doing so.

These cannot be based on economic consideration such as cost. For example it would mean that the hirer could not for example exclude the agency workers from using the canteen where there would be subsidised meals. Saying this, practical and organisational considerations could be a factor amounting to objective justification.

The guidance notes are useful. The guidance notes expand on what might be considered collective facilities and amenities. In addition the canteen or other similar facilities, child care facilities and transport services are provided for in the 2012 Act. The guidance includes the following examples which may be onsite or offsite such as;

Toilet / shower facilities
Staff common room / kitchen facilities
Food and drink machines;
Car Parking.

The guidance also provides that transport services might include for example local pick up and drop off services or transfer between sites. It does not extend to benefit in kind entitlements. This would include contribution towards company cars or company laptops. It would not include benefits such as long time service or loyalty awards.

The Provision of Information

The 2012 Act is extremely strong on the area of the provision of information. The hirer must provide the agency staff with such information that they have to comply to enable the agency to comply with its obligations under the 2012 Act. This means that the hirer must provide the agency with up to date information with terms and conditions of employment and the hirer must inform the employment agency of the correct rate of pay, annual leave entitlements and other payments arrangements or allowances that the agency worker is entitled to under the 2012 Act.

This does mean that significant amount of commercially sensitive information can be required to be provided.

What does pay mean

Pay is specifically defined in Section 2of the Act as basic pay and any pay in excess of basic pay such as shift work, peat work, overtime, unsocial hour's premium, Sunday premiums. Pay does not include importantly sick pay, payments under a pension scheme, financial participation schemes or Occupational Social Security Schemes.

Working out the rate of pay

The 2012 Act does not set out the rate of pay other than to require that the rate for agency workers be the same as if he / she were employed directly by the hirer to do the same or similar jobs. However, regard must be had to establish pay scales, collective agreements and terms and conditions of employment.

It is becoming clear that some hirers to avoid equal pay claims are effectively making sure that the agency workers will work separate and distinct from full time workers doing different work. Again, with proper planning it is relatively easy to circumvent the legislation. This is a defect in same which some employers can use quite legitimately.

Holidays / Annual Leave Entitlements

The Act of 2012 specifically provides that the agency worker will be entitled to the same holiday / annual leave entitlements.

Access to information and job vacancies

This is probably one of the most important provisions in the legislation. Section 11 of the 2012 Act provides that a hirer when informing his employees of any vacant positions must also inform any agency workers of the vacancy for the purposes of allowing the agency worker to apply for the position also. The guidance notes provides that the hirer can choose how they wish to publicise such vacancies but the agency worker should know when and where to access the relevant information.

If you are considering taking on agency workers or you are an agency then we strongly advise that appropriate advice be obtained.

Richard Grogan & Ruth Lynch in this firm are available to advise on the Act.

The importance of a Social Media Policy in the workplace

It now appears that some 46% of Irish employers do not have a Social Media Policy in place. This leaves the employer open to internal dispute and potential litigation where issues arise.

It is important for employers to have in place a Social Media Policy. This should be written in plain English. It should set out what is and is not acceptable.

It is important where social media is being used in the workplace that the employer knows the social media accounts which an employee is accessing particularly if this is to be accessed during working hours.

There also needs to be a clear and definitive policy in place setting out what may or may not be posted on social media. This would include for example comments about fellow employees, the employer themselves and work related contacts such as customers and suppliers. It is important that employers are aware that an employer may be held liable for acts of bullying, harassment or discrimination which is carried out by an employee on social media sites. This occurs even if matters complained of are carried out without the employers consent or knowledge. It is to an extent irrelevant that the activity of social media occurs outside of working hours or outside the workplace.

An employer may have a vicarious liability. It is therefore important that an employer has policy in place and that the employer can show that they took practical steps to prevent any of the acts complained of. It is important that

the policy sets out what is appropriate use of social media by employees and that failure to follow same can result in disciplinary action up to and including dismissal.

Many businesses see social media as a way of enhancing their reputation and their services. It is therefore important that employers need to set out clear guidance as to WHO may publish information relating to the business, WHAT can be communicated, and, WHO it can be communicated to.

It is extremely important that employers in any policy clearly set out that confidential information relating to the business is not communicated on social media.

A recent Employment Appeals Tribunal case recently found that a former employee of Marks and Spencer was unfairly dismissed. The Tribunal took into account the fact that the employee contributed to her own dismissal by participating in conversations regarding a manager on a social networking site and reduced the compensation awarded. The company could not provide any evidence of a disciplinary process and the Tribunal had to treat the case as an uncontested unfair dismissal. The Tribunal however accepted that the actions of the employee contributed to her dismissal calling it "careless misuse of social networking site". While the case highlights the importance of proper procedures it also highlights that the misuse of social media in the workplace is becoming an issue for employers. In the case in question the employer actually had a social networking policy. If the employer did not have a social networking policy then it may well have been that the employee could well have claimed that this was not a prohibited activity. It is important to remember that according to a salary.com survey in the US it found that employees waste at work up to an hour a day surfing the internet. The recent UK case of Adrian Smith –v- Trafford Housing Trust 2012 EWHC 3221 (CH) which was given in November 2012 is interesting. It sheds particular light on the issue of the use of social media and how it impacts the workplace.

The case involved an employee posting on facebook issues relating to gay marriage. A fellow employee complained about it and the employee was demoted. While the High Court ruled in favour of the employee it expressed real disquiet that he had been guilty of gross misconduct for which he deserved to be dismissed but due to the fact that rather than being dismissed he had been demoted that because of the terms of the employers Code of Conduct and the employees contract the demotion was not an appropriate option.

The case highlight the importance of having not only a proper Code of Conduct but also that the penalties that can be imposed are clearly set out.

Protection of Employment (Exceptional Collective Redundancies and Related Matters) Act 2007 (Duration of Part 2) Order 2013 S.I. No. 153/2013.

The purpose of the Order is to extend, by a further three years, until 7 May 2016, the period for which Part 2 of the 2007 Act shall have effect. This part of the Act allows for case referrals to the Redundancy Panel in cases where proposed redundancies are considered to constitute exceptional collective redundancies. This part of the Act also sets out the process of procedures to be followed in pursuing referrals to the panel.

Copies of the Statutory Instrument can be viewed on www.djei.ie

Taxation of Maternity Benefit Adoptive Benefit and Health & Safety Benefit

The Revenue e-Brief No. 19/13 issued on 17th May 2013.

Employers, Agents and Payroll Practitioners should note that Maternity Benefit, Adoptive Benefit, and, Health & Safety Benefit which is payable by the Department of Social Protection from 1 July 2013 will be taxable in full. USC and PRSI will not apply to these benefits.

The Revenue will receive payment details from the Department.

To administer taxation of these benefits, individuals who pay their tax through the PAYE system will where possible have their annual tax credits and cut-off point reduced by the amount of these payments.

Employers and pension providers will be advised of the adjusted tax credits and cut-off points on the Employer's Tax Credit Certificate (P2Cs). Further information on this can be found on the Revenues Employer's Guide to PAYE.

It is advisable that employers advise any employee who is in receipt of these benefits that these new procedures will apply. The practical effect of matters is that unless employees are advised it comes as a significant shock to them on their return to the workplace that they suddenly find that their net pay after they return to work is substantially reduced.

Illness Benefit

Since January illness benefit, paid to an employee, is subject to PAYE. It is not however subject to employers PRSI or to USC. Some employers are, by mistake, still deducting and paying employers PRSI and USC on such payments.

EU Gender Directive

For the first time the motor insurance survey by the National Consumer Agency has since the implementation of the Directive last December found that quotes for both male and female drivers across eight driver profiles were found to be equal.

The survey also showed the importance of seeking a number of quotes. The research found that significant savings of up to €1300 could be found across the profiles. For example a difference of up to €1335 was found on third party fire and theft cover and up to €1038 on fully comprehensive cover between the lowest and highest quote for a 20 year old student with a full licence and driving experience of less than one year. There was a difference of up to €595 and €625 respectively on quotes for a 25 year old teacher with a full licence for 3 years.

The survey has shown up that the fear that premiums for female drivers will rise once the Directive was implemented has not happened.

Capital Acquisitions Tax and Debt Forgiveness Arrangements.

Section 5 of the Capital Acquisitions Tax Consolidation Act 2003 provides that a person is deemed where, under or in consequence of any disposition, that person becomes beneficially entitled in possession otherwise than on debt, to any benefit otherwise and for full consideration in money or monies worth paid by such person.

By virtue of the Definition of "disposition" in section 2 (1) CATCA 2003 the release, forfeiture, surrender or abandonment of any debt or benefit or the failure to exercise a right may be subject to CAT in certain situations. The Revenue has confirmed that for Bona Fide commercial reasons, a financial institution enters into a debt restructuring, forgiveness or right off arrangement with a customer. The approach of the Revenue, subject to being satisfied that it is a Bona Fide arrangement is that the financial institution is not intent on making a gift of any sort to the debtor and accordingly it would not be subject to a CAT charge.

There were concerns that where there was a debt restructuring that this could be deemed to be a gift for CAT purposes. The Revenue in their e-briefing 12/13 which is available on the Revenue website has confirmed that this is not the position. This is a welcome clarification.

Workplace injury: An employee's perspective

Health and safety in the workplace is of paramount importance to any business. All employers are obliged to carry out risk assessments in the workplace and prepare a safety statement based on this assessment.

If you suffer an injury in the workplace it is important to take the following steps:

Notify your employer of the accident
Inform your employer/supervisor about the accident and make sure it is recorded. Immediately notify your employer of any health and safety risks identified. Make sure you follow any health and safety procedures your employer has in place.

You should report all injuries to your employer; minor injuries can develop into more serious conditions and it is important to have all details recorded, if at a future date you decide to take a claim.

If possible take a photograph of the accident location and any injuries you have suffered.

Seek medical attention
Obtain the necessary medical treatment immediately. Make sure that you inform your medical advisers how the accident happened and that it occurred in the workplace. It is important to be as accurate as possible as to the precise circumstances of the accident.
Keep a copy of all receipts and the dates of medical treatment.

Keep a note of the following information:

- The names and addresses of any witnesses to the accident
- Check your contract of employment for any terms and conditions relating to sick pay
- Do not complete any insurance forms without seeking legal advice
- Keep a record of any loss of earnings due to absence from work caused by the injury

Contact a solicitor
If you suffer an injury at work and you feel your employer is at fault you may be entitled to bring a personal injuries claim against your employer to the Injuries Board. The Injuries Board are an independent statutory body who provide independent assessments for compensation following an accident. If the matter cannot be agreed at this stage then it must proceed to Court by way of a civil claim for compensation.

Upcoming Cases

This firm is involved in a number of significant Point of Law cases before the High Court.

They fall into two categories.

The first relates to the issue of the entitlement to be paid during a lay-off.

The second group of cases relate to the level of compensation which should be awarded in Working Time cases applying what is commonly termed the Von Colson and Kamann principles.

We expect decisions in these cases later in the year.

New Supreme Court Judges

The Cabinet has approved plans to provide for two additional supreme Court Judges. This will hopefully assist in clearing some of the backlog in the Supreme Court.